

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

No. 78637-2

2005 NOV -1 PM 3:33 (Spokane) (Spokane County Superior Court No. 05-2-10166-9)

BY C. J. MERRITT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE FARM BUREAU FEDERATION,  
WASHINGTON STATE GRANGE, NATIONAL FEDERATION  
OF INDEPENDENT BUSINESS, BUILDING INDUSTRY ASSOCIATION  
OF WASHINGTON, EVERGREEN FREEDOM FOUNDATION,  
WASHINGTON ASSOCIATION OF REALTORS,  
and STEVE NEIGHBORS,

Respondents,

v.

CHRISTINE GREGOIRE, Governor of the State of Washington;  
STATE EXPENDITURE LIMIT COMMITTEE; an agency of the State of  
Washington; and STATE OF WASHINGTON,

Appellants.

---

**RESPONDENTS' REPLY BRIEF ON CROSS-APPEAL**

---

Richard M. Stephens, WSBA No. 21776  
Samuel A. Rodabough, WSBA No. 35347  
Brian D. Amsbary, WSBA No. 36566  
Attorneys for Respondents

GROEN STEPHENS & KLINGE LLP  
11100 NE 8th Street, Suite 750  
Bellevue, WA 98004  
Telephone: (425) 453-6206

**Table of Contents**

1

- I. THE STATE’S ARGUMENT THAT THE EXPENDITURE LIMIT FROM NOVEMBER 2005 DICTATES WHETHER TAXES ENACTED 6 MONTHS PRIOR ARE SUBJECT TO VOTER APPROVAL DEFIES LOGIC AND THE TPA..... 1
  - A. The TPA Grants Exclusive Authority to the ELC to Establish the State Expenditure Limit and to Calculate that Limit on an Annual Basis..... 1
  - B. The Respective Roles of the Legislature, Governor, and Treasurer All Require a Reliance on a Specific State Expenditure Limit—The Limit Is Not a Moving Target as Argued by the State.....4
  - C. The State’s Tortured Logic Does Not Even Support Its Conclusion that the Limit Set in November 2005 Should Determine Whether ESHB 2314, Enacted Months Prior, Is Subject to the Voter Approval Requirement ..... 8
- II. PART XI OF ESHB 2314 SHOULD BE APPROVED BY THE VOTERS..... 10
- III. THIS COURT SHOULD REVERSE THE TRIAL COURT’S DECISION TO CREATE LEGISLATIVE AND EXECUTIVE PRIVILEGES..... 10
  - A. This Issue Is Properly Before the Court ..... 11
  - B. The Washington Speech and Debate Clause Does Not Contain an Evidentiary Privilege ..... 12
  - C. The Separation of Powers Doctrine Does Not Mandate Judicial Creation of the Claimed Privileges..... 19
  - D. If This Court Does Create the Claimed Privileges, They Should be Strictly Limited ..... 21

## Table of Authorities

### Cases

<i>Allied Daily Newspapers of Washington v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	22
<i>Arizona Indep. Redistricting Comm'n v. Fields</i> , 75 P.3d 1088 (Ariz. 2003) .....	18
<i>Avara v. Baltimore New American Div.</i> , 440 A.2d 368, 371 (Md. 1982) .....	24
<i>Berndt v. Dep't of Labor and Indus.</i> , 44 Wn.2d 138, 265 P.2d 1037 (1954).....	20
<i>Citizens Coun. Against Crime v. Bjork</i> , 84 Wn.2d 891, 529 P.2d 1072 (1975).....	12
<i>Coffin v. Coffin</i> , 4 Mass. 1 (1808).....	16
<i>Cook v. King County</i> , 9 Wn. App. 50, 510 P.2d 659 (1973).....	11
<i>Hamilton v. Verdow</i> , 414 A.2d 914, 921 (Md. 1980) .....	24
<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978).....	24
<i>Kilbourn v. Thompson</i> , 103 U.S. 168 (1880) .....	16
<i>Malyon v. Pierce County</i> , 131 Wn.2d 779, 935 P.2d 1272 (1997).....	12, 18
<i>Manufactured Housing Cmty's of Washington v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	17
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803).....	20
<i>Medcalf v. Dep't of Licensing</i> , 133 Wn.2d 290, 944 P.2d 1014 (1997).....	6
<i>Schrom v. Bd. For Volunteer Fire Fighters</i> , 153 Wn.2d 19, 100 P.3d 814 (2004).....	12
<i>Seattle Sch. Dist. No. 1 v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978).....	20
<i>Snedigar v. Hodderson</i> , 114 Wn.2d 153, 786 P.2d 781 (1990).....	25
<i>Southcenter Joint Venture v. Nat'l Democratic Policy Comm.</i> , 113 Wn.2d 413, 780 P.2d 1282 (1989).....	19
<i>State v. Beno</i> , 341 N.W.2d 668, 677 (Wis. 1984).....	13, 18

<i>State v. Brayman</i> , 110 Wn.2d 183, 751 P.2d 294 (1998).....	12
<i>State v. Burden</i> , 120 Wn.2d 371, 841 P.2d 758 (1992).....	21, 22
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	11
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	25
<i>State v. Jones</i> , 96 Wn. App. 369, 979 P.2d 898 (1999).....	25
<i>State v. Maxon</i> , 110 Wn.2d 564, 756 P.2d 1297 (1988).....	11, 20
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005).....	6, 12, 14
<i>Trammel v. United States</i> , 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).....	21
<i>United States v. Johnson</i> , 383 U.S. 169, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966).....	16
<i>United States v. Nixon</i> , 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).....	20, 24
<i>Washington Water Jet Workers Ass'n v. Yarbrough</i> , 151 Wn.2d 470, 90 P.3d 42 (2004).....	17
<i>Yelle v. Bishop</i> , 55 Wn.2d 286, 347 P.2d 1081 (1959).....	13
<i>Zylstra v. Piva</i> , 85 Wn.2d 743, 539 P.2d 823 (1975).....	20

**Statutes**

RCW 5.60.060.....	25
RCW 42.56.280.....	24
RCW 43.135.010.....	4
RCW 43.135.025.....	1, 3
RCW 43.135.035.....	1, 4, 8, 10
RCW 43.88.030.....	5
RCW 43.88.300.....	7

**Other Authorities**

8 WIGMORE ON EVIDENCE (3d ed. 1940).....20

BLACK’S LAW DICTIONARY (1891) ..... 14

Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE  
(Goodrich ed., 1862)..... 14

Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*,  
45 WM. & MARY L. REV. 221 (2003). ..... 16, 18, 19

**Constitutional Provisions**

MD. CONST. art. III, § 18.....23

U.S. CONST. art. I, § 6 ..... 17

WASH. CONST. art. III, § 1.....22

I.

**THE STATE’S ARGUMENT THAT THE EXPENDITURE LIMIT  
FROM NOVEMBER 2005 DICTATES WHETHER TAXES  
ENACTED 6 MONTHS PRIOR ARE SUBJECT TO VOTER  
APPROVAL DEFIES LOGIC AND THE TPA**

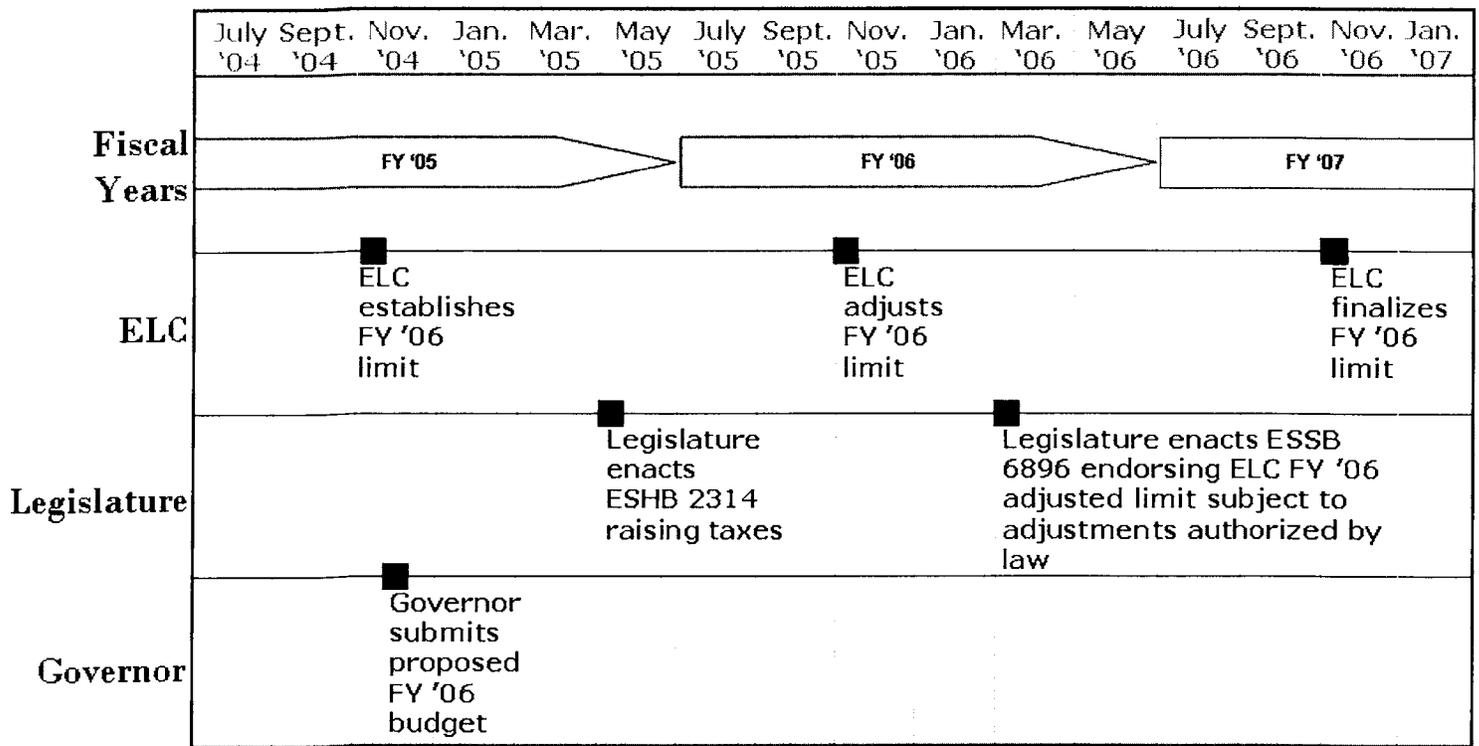
In its retort to Respondents’ claim on cross-appeal that the trial court applied the wrong expenditure limit for the purpose of deciding whether ESHB 2314 required voter approval under RCW 43.135.035(2)(a), the State tellingly divorces its analysis from both the plain language of the TPA and its legislative purpose. However, Respondents need not run from the plain language of the TPA. Both the TPA and its clear legislative purpose support Respondents’ position.

**A. The TPA Grants Exclusive Authority to the ELC to Establish the State Expenditure Limit and to Calculate that Limit on an Annual Basis**

Respondents previously observed in their Opening Brief on Cross-Appeal that, under RCW 43.135.025(5), the ELC is given the exclusive authority to “determin[e] and adjust[.]” the state expenditure limit. *See, e.g.*, Resp’t Br. at 9, 22 (citing RCW 43.135.025(5)). Because this fact is simply indisputable, the State’s Response brief makes no attempt to rebut it, opting instead to implicitly urge this Court to ignore the plain language of the statute. Rather, the State argues in its reply brief, without citation, that the Legislature may essentially establish its own spending limit without amending the statute. *See App. Rep. Br.* at 20-21. The State cannot cite to

any portion of the TPA for this proposition, and its position is directly contrary thereto.

The TPA directs that the ELC exercise its exclusive authority by calculating the spending limit on an annual basis. Each November, the ELC calculates three state expenditure limits. *See* RCW 43.135.025(6) (“Each November, the state expenditure limit committee shall adjust the expenditure limit for the preceding fiscal year...and then project an expenditure limit for the next two fiscal years.”). Thus, the ELC calculates a state expenditure limit for each given fiscal year three times over a span of three years. Relevant to the present case, for example, in November 2004, the ELC established the limit for FY 2006, which began on July 1, 2005. In November 2005, approximately half way through FY 2006, the ELC adopted an adjusted limit for FY 2006. Finally, in November 2006, after the close of FY 2006 (which occurs on June 30, 2006), the ELC sets a final limit for FY 2006. This is illustrated as follows:



The State incorrectly argues that “Respondents’ argument fails to recognize a fundamental characteristic of the state expenditure limit—the limit is not static.” App. Rep. Br. at 20. Respondents do recognize that the state expenditure limit is not static. As indicated above, the TPA requires an annual calculation of the state expenditure limit, which occurs three times for each given fiscal year. Contrary to the State’s assertion, these three calculations do “take[] into account events that...require an adjustment to the spending limit.” *Id.* at 20. However, Respondents reject the State’s argument that the state expenditure limit is so malleable that it can be adjusted more frequently than on an annual basis. The State’s argument defies the plain language of the TPA which contemplates an **annual** calculation of the limit. Moreover, the Legislature may not set its own state expenditure limit as long as the TPA gives exclusive authority to

the ELC to set that limit. *See* RCW 43.135.025(5). A spending limit that changes more frequently than the annual scheme in the TPA also fails to provide the stability required by all involved in the budget process.

**B. The Respective Roles of the Legislature, Governor, and Treasurer All Require a Reliance on a Specific State Expenditure Limit—The Limit Is Not a Moving Target as Argued by the State**

The state expenditure limit is intended to provide certainty and stability for all actors involved in the budgeting process. Specifically, the plain language of the TPA indicates that the state expenditure limit is the measuring stick by which the Legislature, Governor, and Treasurer gauge their respective duties in the budgeting process.

First, the state expenditure limit directs the Legislature’s budgeting efforts by “establish[ing] a limit on state expenditures” within which it may enact a budget. *See* RCW 43.135.010(4)(a). In order to ensure that the fox is not guarding the hen house, the state expenditure limit is set by an independent state agency, the ELC, and not the Legislature itself. Thus, in calculating the spending limit, the ELC alerts the Legislature as to when it is necessary to seek voter approval for bills that raise revenue in excess of the state expenditure limit. *See* RCW 43.135.035(2)(a). However, the Legislature is not the only state actor that relies upon the state expenditure limit to gauge its activities.

As previously indicated, the Governor uses the state expenditure limit as the basis of his or her budgeting activities as well:

The budget document submitted by the governor to the legislature under RCW 43.88.030 shall reflect the state expenditure limit **established** under chapter 43.135 RCW and **shall not propose expenditures in excess of that limit.**

RCW 43.88.033 (emphasis added). Notwithstanding the fact that this statute unequivocally refers to the state expenditure limit in the present tense, the State unabashedly argues that “it does not require the governor to propose a budget that falls within a projected spending limit.”

Unfortunately for the State, the projected spending limit is the only limit in effect when the governor proposes a budget. *See* Diagram on pg. 3. It is the only limit which has been “established” as the statute requires.

Tellingly, the State never explains, or even bothers to respond for that matter, to Respondents’ argument that all prior proposed budgets by our governors have complied with the existing expenditure limit. *See* Resp’t Br. at 24 n.6 (citing CP 83, 836). Apparently, the State expects this Court to believe that all prior proposed budgets by our various governors have merely voluntarily complied with the expenditure limit set by the ELC a month prior. By implication, the State must believe that all of these budgets could have been substantially higher if the respective governors were willing to look into a crystal ball and predict exactly what actions would

occur in the future that would require an adjustment to the state expenditure limit. The State's argument is absurd. *See State v. Roggenkamp*, 153 Wn.2d 614, 636, 106 P.3d 196 (2005) (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) for proposition that courts must avoid absurd results when interpreting statutes).

Finally, in a desperate attempt to avoid addressing this plain language, the State argues that the requirement that the governor submit a budget within the spending limit under RCW 43.88.033 'is irrelevant to this case.' App. Rep. Br. at 22 n.5. It is stupefying that the State argues the irrelevance of this statute when it is both part of the TPA (albeit codified elsewhere) and employs the same language in referring to the state expenditure limit as used elsewhere in the TPA. "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 Wn.2d 290, 300-01, 944 P.2d 1014 (1997). The State's irrelevance argument is not surprising inasmuch as the plain language of the TPA supports the conclusion that the limit established prior to the legislative action is the limit which applies to the enactment of legislation.

Finally, the Treasurer also relies upon the State expenditure limit to determine when state funds must be placed in the emergency reserve

account. The ‘state treasurer shall not issue or redeem any check, warrant, or voucher that will result in a state general fund expenditure for any fiscal year in excess of the state expenditure limit.’ RCW 43.135.025 (2). If the state expenditure limit changes more frequently than the annual calculation by the ELC, the Treasurer simply cannot perform his obligations.

According to the State’s theory, the Treasurer authorizes expenditures up until the close of the fiscal year on June 30, but would not know for sure whether he had complied with the TPA until 5 months later when the ELC convenes in November. Thus, the Treasurer would merely shoot into the dark, notwithstanding the fact that he could be personally liable if he failed to correctly anticipate the acts of the ELC. *Id.* (“A violation of this subsection...shall subject the state treasurer to the penalties provided in RCW 43.88.300”).

The State’s argument regarding the ability of the Legislature to anticipate future changes in the limit openly contradicts the very framework of the TPA. The State argues that the Legislature may take into account events that may require an adjustment to the state expenditure limit and thus anticipate the ELC’s calculation of the limit. If the Legislature is wrong, however, the State argues that the remedy is a ‘challenge [similar to the instant] case.’ App. Rep. Br. at 23. Yet, such a challenge would simply be too late to cure any of the problems sought to be remedied by I-601. For

example, revenue would have already been collected for numerous months before any determination could be made as to whether a bill should have been approved by the voters in the first instance under RCW 43.135.035(2)(a).

**C. The State's Tortured Logic Does Not Even Support Its Conclusion that the Limit Set in November 2005 Should Determine Whether ESHB 2314, Enacted Months Prior, Is Subject to the Voter Approval Requirement**

From the very inception of the instant lawsuit, the State has been placed in a difficult position of trying to justify, *post facto*, why the taxes enacted in ESHB 2314 were not approved by the voters. Because ESHB 2314 raised revenue in excess of the only expenditure limit in existence at the time, the State was constrained to argue that the spending limit by which the validity of ESHB 2314 is gauged for purposes of the voter approval requirement of RCW 43.135.035(2)(a) is the limit established the following November (*i.e.*, the adjusted limit). However, the State simply cannot offer any principled reason for choosing the subsequently adjusted spending limit as that gauge.

For example, the State's Reply Brief boldly proclaims that the Legislature did not breach the spending limit because "[n]ot until the fiscal year ends is the spending limit for that year finally determined." App. Rep. Br. at 20-21. What the State conveniently omits is that FY 2006 is not concluded until June 30, 2006. *See* Diagram on pg. 3. Accordingly, the

final state expenditure limit for FY 2006 will not be finalized until the ELC convenes in late November 2006. Thus, the State's own logic regarding finalization of the limit is wholly inconsistent with its conclusion that the adjusted limit controls whether voter approval of tax increases is necessary. The sole reason for the State's tortured logic is simple. The State's reasoning is nothing more than a post hoc attempt to rationalize the Legislature's conduct, and the State has now painted itself in a corner because its position is not supported by the plain language of the TPA.

Finally, Respondents hope that arguments regarding statutory construction and the intricacies of the state expenditure limit do not overshadow how simple this issue truly is. The TPA was unquestionably designed to limit state expenditures. As Respondents have previously observed, the TPA seeks to apply to government the same age-tested financial advice given to our citizens—create a budget, stick to that budget, and save for a rainy day. If a family creates a budget, that budget can be effective only if it is established before the spending occurs. If the family engages in a spending spree that exceeds the budget, adding up the amount of the receipts and declaring that the budget has been increased proportionately defeats the entire purpose of establishing a budget in the first instance. The State's logic contravenes the plain language of the TPA, legislative intent of the TPA, and common sense.

## II.

### **PART XI OF ESHB 2314 SHOULD BE APPROVED BY THE VOTERS**

In response to Respondents' argument that Part XI of ESHB 2314 is ineffective until approved by the voters, the State essentially argues that applying the voter approval requirement of RCW 43.135.035(2)(a) to a revenue-neutral portion of a tax bill would be inconsistent with the TPA's limitation on seeking voter approval for those actions that "will result in expenditures in excess of the state expenditure limit." App. Rep. Br. at 29 (quoting RCW 43.135.035(2)(a)).

While the State's **argument** is that this portion of ESSB 2314 is revenue neutral in regard to the general fund, the **evidence** does not make that clear. Nevertheless, an undisputed **increase in tax rates** for taxes being placed in the general fund supposedly to offset an anticipated decline in the taxed sales (a decline due to **new taxes**) falls within the requirement for voter approval of bills which raise taxes whenever the limit is exceeded.

## III.

### **THIS COURT SHOULD REVERSE THE TRIAL COURT'S DECISION TO CREATE LEGISLATIVE AND EXECUTIVE PRIVILEGES**

The State would have this Court engage in raw policy making dressed up in the guise of constitutional adjudication. Time and again, the State erroneously conflates elected officials' long-standing constitutional

immunity from suit for actions taken within the scope of their official duties with an evidentiary privilege shielding vast reaches of the executive and legislative branches from the judicial process. Large sections of the State's reply are spent extolling the policies served by such privileges; not once, however, does the State cite a Washington statute or judicial opinion that actually recognizes the existence of either privilege. Instead, the State – relying primarily on selectively chosen, often inapposite case law from other jurisdictions – is reduced to baldly asserting that such privileges “long ha[ve] been constitutionally established.” App. Rep. Br. at 45.

This Court should not fall prey to such sophistry. “[T]he granting of testimonial privilege is a recognized function of legislative power,” *Cook v. King County*, 9 Wn. App. 50, 52, 510 P.2d 659 (1973), and is a quintessential question of policy. This Court should adhere to its longstanding reticence to create evidentiary privileges by judicial fiat, *see State v. Maxon*, 110 Wn.2d 564, 566, 756 P.2d 1297 (1988), and leave the decision to create the claimed privileges to the legislature, the body to whom such policy choices are constitutionally assigned. *See, e.g., State v. Costich*, 152 Wn.2d 463, 479, 98 P.3d 795 (2004); Resp't Br. at 58-59.

**A. This Issue Is Properly Before the Court**

The State notes that the subjective motivations of individual legislators are irrelevant to statutory interpretation. *See* App. Rep. Br. at 32

(quoting *State v. Brayman*, 110 Wn.2d 183, 204, 751 P.2d 294 (1998)).

Respondents agree, and seek no information as to the motive of any individual legislator in voting for any bill. What Respondents seek is information regarding the legislative intent underlying certain bills.

Determination of legislative intent is the primary goal of statutory interpretation. *Schrom v. Bd. For Volunteer Fire Fighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). The search for such intent begins, of course, with the text of the statute, and ends where the text is unambiguous.

*Roggenkamp*, 153 Wn.2d at 621. As the State implicitly concedes, however, where the text is ambiguous, the facts and circumstances underlying the enactment of a statute are relevant in its interpretation. *See* App. Rep. Br. at 32-33 (quoting *Citizens Coun. Against Crime v. Bjork*, 84 Wn.2d 891, 897 n.1, 529 P.2d 1072 (1975)). That is the situation here.

**B. The Washington Speech and Debate Clause Does Not Contain an Evidentiary Privilege**

As noted by the State, this Court's objective in construing and applying constitutional provisions 'is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.'" App. Rep. Br. at 33-34 (quoting *Malyon v. Pierce County*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997)). The State also accurately notes that "[i]n determining the meaning of a constitutional provision, the intent of the

framers, and the history of events and proceedings contemporaneous with its adoption may properly be considered.” App. Rep. Br. at 34 (quoting *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959)). The State fails to recognize, however, that nothing in the original understanding or history of this state’s Speech and Debate Clause supports the assertion that the clause contains a legislative evidentiary privilege.

The Speech and Debate Clause provides “No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.” WASH. CONST. art. II, § 17. The State proffers three major arguments to support its assertion that this clause contains an evidentiary privilege. *First*, it quotes a Wisconsin Supreme Court opinion that cherry picks the word “answerable” out of a nineteenth century definition of the word “liable” and thus concludes that no legislator may be made to answer a request for evidence. *See* App. Rep. Br. at 35 (citing *State v. Beno*, 341 N.W.2d 668, 677 (Wis. 1984)). Therein, the State contends, lies proof that this state’s Speech and Debate Clause contains an evidentiary privilege.

Beyond the problems inherent in relying on a Wisconsin opinion issued in 1984 to illuminate the meaning of the Washington Constitution promulgated ninety-five years earlier, *see infra* at 17-18, the rule of *noscitur a sociis* belies the State’s conclusion. This rule provides that a single word

in a provision “should not be read in isolation, and that the meaning of words may be indicated or controlled by those with which they are associated.” *Roggenkamp*, 153 Wn.2d at 623. As indicated in Respondents’ opening brief, the word “answerable” regularly appears in nineteenth century definitions of “liable.” *See Resp’t Br.* at 61 -62. While “answerable” may be susceptible to a range of meanings, when read in the context of these definitions, it is apparent that “liable” does not carry the meaning urged by the State.<sup>1</sup>

The historical context within which the Washington Constitution was enacted also supports a narrow reading of the Speech and Debate Clause. As Justice Utter has noted

The period during which the Washington Constitution was adopted was one of great skepticism regarding state legislatures. The era was one in which the “wholesale corruption of state legislatures was laughed at by honest men throughout America.” (*Tacoma Daily Ledger*, July 19, 1889). Accordingly, the subject to which constitution makers turned most naturally was that of reforming the legislature. Many provisions of Article II were adopted with

---

<sup>1</sup> For example, Webster’s Dictionary defined “liable” to mean “[b]ound; obliged in law or equity; responsible; answerable. The surety is *liable* for the debt of his principal. The parent is not *liable* for debts contracted by a son who is a minor, except for necessaries.” Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 661 (Goodrich ed., 1862) (emphasis in original). Read in this context, “answerable” does not denote a verbal or written response, but instead denotes “[o]bliged or liable to pay, indemnify, or make good; as, to be *answerable* for a debt or for damages.” *Id.* at 52 (defining “answerable”) (emphasis in original). Similarly, Black’s Law Dictionary defined “liable” to mean “[b]ound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution.” BLACK’S LAW DICTIONARY 713 (1891). Again, read in this context, “answerable” does not denote a verbal or written response, but instead “denotes an assumption of liability, as to ‘answer’ for the debt or default of another.” *Id.* at 75 (defining “answer”).

the indent [sic] of limiting and channeling the Legislature's power.

Robert F. Utter & Hugh D. Spitzer, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 51 (2002) (internal citation and quotations omitted); *see also* Resp't Br. at 66 -68.

The State would have this Court ignore these well-established historical facts because nothing expressly links them to the enactment of the Speech and Debate Clause. *See* App. Rep. Br. at 47-48. However, as Justice Utter has explained, "[a]n understanding of the history and social forces that shaped Washington's Constitution is a critical factor in judicial interpretation of that document." Utter & Spitzer at 12; *see also* *Bishop*, 55 Wn.2d at 291. While the passage above obviously does not speak directly to the Speech and Debate Clause, the historical circumstances it describes are far more consistent with a narrow interpretation of the clause than with reading into the clause an evidentiary privilege then-unrecognized anywhere in American jurisprudence.

Indeed, the historical record utterly contradicts the State's *second* major argument: that a constitutionally-grounded legislative evidentiary privilege was "well established" by the time of Washington's statehood in 1889. *See* App. Rep. Br. at 36. This is simply not so. As the Supreme Court has explained, the ancient English protections for parliamentary speech and debate were enacted to prevent criminal prosecution of the

Crown's parliamentary enemies, *United States v. Johnson*, 383 U.S. 169, 180-82, 86 S. Ct. 749, 15 L. Ed. 2d 681 (1966), not to cloak parliamentary communications in evidentiary privilege.

Likewise, nothing in *Kilbourn v. Thompson*, 103 U.S. 168 (1880) – the only case in which the Supreme Court construed the federal Speech and Debate Clause prior to 1889 – indicates recognition of an evidentiary privilege rooted in the federal Speech and Debate Clause. Instead, *Kilbourn* simply held that congressmen were immune from suit for actions taken within the scope of their official duties, and in so doing declared that the federal clause should be construed liberally. *Id.* at 203-04 (quoting *Coffin v. Coffin*, 4 Mass. 1 (1808)). It was not until 1966 that the Supreme Court construed the federal Speech and Debate Clause to contain an evidentiary privilege. *See Johnson*, 383 U.S. at 173-76, 184-85; Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 249-50 (2003).

Thus, to the extent this state's Speech and Debate Clause is similar to the federal clause, the State is correct in its assertion that "[n]othing demonstrates that . . . Washington's framers intended to create a unique legislative privilege, one sharply divergent from the federal speech or debate clause or similar provisions then existing." App. Rep. Br. at 37; *but*

*see* Utter & Spitzer at 3.<sup>2</sup> No evidentiary privilege had been recognized at that time. To the extent that this state’s Speech and Debate Clause differs from the federal clause, it is plainly narrower<sup>3</sup> and must be construed accordingly. Indeed, the implication that these differences are merely stylistic and without substance, *see* App. Rep. Br. at 40 n.11, violates fundamental principles of constitutional interpretation and consequently must be rejected.<sup>4</sup>

*Third*, the State cites a selection of cherry picked case law from other jurisdictions in support of its assertions. While it is certainly true that this Court will often turn to other states with similar constitutional provisions for guidance in interpreting our own constitution, *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 493, 90 P.3d 42 (2004), this reliance has some logical limits. In particular, it defies reason to claim that judicial decisions issued in other jurisdictions **decades, or**

---

<sup>2</sup> “It is extremely unlikely that the Washington framers, in light of their central purpose in drafting out state constitution and the then current view of states’ rights, intended that the federal Constitution and courts should have any significant role in interpreting or setting limits on the interpretation of Washington’s Constitution.”

<sup>3</sup> Compare U.S. CONST. Art. I, § 6 (“[F]or any Speech or Debate in either House, [Senators and Representatives] *shall not be questioned* in any other Place.” (emphasis added)), with WASH. CONST. art. II, § 17 (“No member of the legislature *shall be liable* in any civil action or criminal prosecution whatever, for words spoken in debate.” (emphasis added)).

<sup>4</sup> *See Manufactured Housing Cmty’s of Washington v. State*, 142 Wn.2d 347, 358, 13 P.3d 183 (2000) (“[O]rdinary rules of textual and constitutional interpretation, as well as the logic of federalism, require that meaning be given to the differences in language between the Washington and United States Constitutions . . . .”); accord Utter & Spitzer at 10.

even a century,<sup>5</sup> after promulgation of the Washington Constitution can somehow inform its meaning. *Cf.* Utter & Spitzer at 2-3.<sup>6</sup> As noted above, and as conceded by the State, *see* App. Rep. Br. at 33-34, this Court's objective in construing and applying constitutional provisions "is to define the constitutional principle in accordance with the **original understanding of the ratifying public** so as to faithfully apply the principle to each situation which might thereafter arise." *Malyon*, 131 Wn.2d at 799 (emphasis added). No document published decades after the constitution's ratification could reflect or inform that understanding.

To the extent that the experiences of other states are relevant here, they weigh heavily against creation of an evidentiary privilege. Notably, fewer than half the states have recognized a legislative evidentiary privilege comparable to that recognized under the federal Speech and Debate Clause. *See* Huefner at 259-65. Moreover, of the forty-three states that possess constitutional speech and debate clauses, Washington's is among the most narrowly drawn. *See id.* at 236-39. Many states follow the federal model providing that legislators "shall not be questioned" regarding speech and debate, *id.* at 236 n.49; while others declare that speech and debate cannot

---

<sup>5</sup> *See, e.g.*, App. Rep. Br. at 34-35, 38-39 (citing *Beno*, 341 N.W.2d 668 (Wis. 1984)), 40 (citing *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088 (Ariz. 2003)).

<sup>6</sup> "It would be illogical to assume that a state constitution written before the U.S. Constitution, or a declaration of rights from such a state constitution when the federal Bill of Rights did not apply to the states, was meant to be interpreted with reference to federal courts' interpretations of the federal Constitution."

“be the foundation of any accusation or prosecution, action or complaint,” *id.* at 236 n.51; and still others hold that legislators may not be “held to answer” or “liable to answer” for their speech and debate, *id.* at 236 n.53.

The framers and ratifiers of this state’s constitution rejected all of these formulations. Instead, this state’s Speech and Debate Clause merely provides that “No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.” WASH. CONST. art. II, § 17. The differences between this clause and those above are significant and we must presume intentional. *See Utter & Spitzer* at 10.<sup>7</sup> Again, fundamental principles of constitutional interpretation mandate that these differences be given meaning. The fact that other courts in other states failed in this duty, or have no comparable duty in their own jurisprudence, does not excuse this Court to do the same.

**C. The Separation of Powers Doctrine Does Not Mandate Judicial Creation of the Claimed Privileges**

As Respondents noted in their opening brief, *see* Resp’t Br. at 68, the separation of powers doctrine is an important principle in our system of government. *See Southcenter Joint Venture v. Nat’l Democratic Policy Comm.*, 113 Wn.2d 413, 425, 780 P.2d 1282 (1989). In this case, however, the State would have this Court exalt the separation of powers doctrine

---

<sup>7</sup> It is reasonable to assume that the men who drafted the Washington Constitution, many of whom were lawyers, were well aware of these linguistic differences and their likely effect on the future legal interpretation of their work, and that they therefore intended to

beyond its legitimate scope and to the exclusion of the judiciary's fundamental purpose: the ascertainment of truth. The Court should decline this invitation.

Separation of powers is not an absolute principle. *See Zylstra v. Piva*, 85 Wn.2d 743, 750, 539 P.2d 823 (1975). Where the political branches of this state have acted in contravention of the law, the judiciary traditionally has not hesitated to call them to account. *See, e.g., Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496-97, 585 P.2d 71 (1978) (citing among others *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L. Ed. 60 (1803)). In this pursuit, the judiciary's fundamental goal is the ascertainment of truth. *See Berndt v. Dep't of Labor and Indus.*, 44 Wn.2d 138, 149, 265 P.2d 1037 (1954). Evidentiary privileges, "[w]hatever their origins . . . [lie] in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); *accord Maxon*, 110 Wn.2d at 569; 8 WIGMORE ON EVIDENCE § 2192 (3d ed. 1940). Given this, judicial creation of the claimed privileges would ultimately serve to undermine the separation of powers: exalting the political branches at the expense of the judiciary, thereby undermining the effectiveness of our system of justice which depends upon full development of all relevant facts. *See Nixon*, 418 U.S. at 709.

---

create such differences."

**D. If This Court Does Create the Claimed Privileges, They Should Be Strictly Limited**

In the event this Court agrees with the trial court and creates the claimed privileges, it should also ensure that these privileges are strictly and narrowly defined. Such a course would be consistent with the rule that evidentiary privileges are to be construed narrowly, so as to exclude as little relevant evidence as possible. *See State v. Burden*, 120 Wn.2d 371, 376, 841 P.2d 758 (1992); *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980).

The State disagrees. Not only does the State argue for judicial creation of the claimed privileges, it asserts that these privileges ought to be almost boundless in scope. According to the State, the claimed privileges cover not only elected officials, nor even elected officials and their personal aides. Under the State's theory, elected officials, personal aides, committee staff, caucus, and agency staff are all entitled to constitutionally-grounded evidentiary privileges. *See App. Rep. Br.* at 43-44, 49-51. Moreover, according to the State, the claimed privileges should be absolute, subject to little if any judicial review. *Id.* at 44-45, 50-51.

The State's position is untenable for several reasons. First and most obviously, adopting the State's position wholesale would require this Court to broaden the ruling of the trial court by eliminating some of the restrictions that the trial court placed on the privileges. No party assigned

error to these restrictions, however. Respondents merely assigned error to the decision to create the privileges in the first place, *see* Resp't Br. at 3, and argued in the alternative that the privileges should be narrowed. The State failed to assign error to any aspect of the trial court's ruling pertaining to privilege. "A ruling of the trial court to which no error has been assigned is not subject to review." *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 214, 848 P.2d 1258 (1993). Thus, the only task for this Court is to decide whether the privileges exist at all, and, if they do, whether their scope should be narrowed.

Second, the State's position falls afoul of the rule that evidentiary privileges are to be construed narrowly. *See Burden*, 120 Wn.2d at 376. It is difficult to conceive of a legislative or executive employee who would not fall within the sweep of the State's posited privilege. But, as noted in Respondents' opening brief, the Speech and Debate Clause does not speak of aides or staff, it speaks of "member[s] of the legislature." Resp't Br. at 76. Similarly, the executive branch is composed of a small group of elected officials, *see* WASH. CONST. art. III, § 1 (defining the executive branch); the Constitution says nothing about their aides.

Moreover, it is one thing to extend the privilege to communications between a privileged elected official and that official's personal aide, or to communications between the aide (acting on his superior's behalf) and

another privileged official or personal aide. It is quite another, however, to extend the privilege to committee, caucus, or agency staff. Any confidentiality that the privilege purports to protect is inherently destroyed by such an extension. Indeed, while it may be plausible to characterize elected officials' personal aides as their "alter egos," it is not plausible to characterize committee, caucus, or agency staff as any one person's "alter ego." Personal aides serve individual officials; committee, caucus, and agency staff serve governmental entities as a whole. Indeed, it is difficult to determine who would be empowered to invoke or waive such an expansive privilege. If one legislator wished to withhold a committee document, what if another legislator wished to produce it? Whose wishes would prevail? And on what grounds? It is nearly impossible to apply an expansive privilege in a principled manner.

Third, neither the language of the Speech and Debate Clause nor the responsibilities of the governor's office support creation of an absolute privilege. Indeed, given the foregoing, any privilege created under the Speech and Debate Clause should be drawn as narrowly as possible. For example, Maryland – a state whose speech and debate clause closely mirrors ours, *see* MD. CONST. art. III, § 18 – has held that the legislative privilege is inapplicable in declaratory judgment actions, reasoning that because no person is held liable in such a proceeding, the clause is

inapplicable by its own terms. *See Avara v. Baltimore New American Div.*, 440 A.2d 368, 371 (Md. 1982). In addition, our Public Records Act reflects a policy of disclosure subsequent to finalization of the relevant governmental action, such as enactment of a bill. *See Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 133, 580 P.2d 246 (1978); RCW 42.56.280. It would be both sensible and consistent with the public policy of this state to limit any legislative or executive privilege accordingly.

Conversely, the State's assertion that this Court should extend an absolute legislative privilege to the governor is utterly nonsensical. *See App. Rep. Br.* at 49-51. Not even the president of the United States enjoys such an absolute privilege. *Nixon*, 418 U.S. at 713. Yet the president regularly handles information – highly-sensitive military and diplomatic secrets – of a nature unlike anything handled by the governor of this or any other state. To the extent that the offices of president and governor truly are analogous, *see App. Rep. Br.* at 53 (citing *Hamilton v. Verdow*, 414 A.2d 914, 921 (Md. 1980)) – an assertion that is tenuous at best – the governor is not entitled to an absolute privilege.

Fourth, the State's conduct in this very case belies its assertion that robust *in camera* review of materials withheld pursuant to a claim of legislative or executive privilege is inappropriate. The State withheld several documents that fell outside the scope of any reasonable assertion of

legislative or executive privilege. Where citizens are challenging the awesome power of the state, *in camera* review constitutes a fair, ‘relatively costless, and eminently worthwhile method to insure that the balance between [one party’s] claims of . . . privilege and [the other’s] asserted need for the documents is correctly struck.’ *Snedigar v. Hodderson*, 114 Wn.2d 153, 167, 786 P.2d 781 (1990). Indeed, under the only governmental information privilege recognized in this state – RCW 5.60.060(5)’s protection of confidential communications to police officers and other similar officials, *see, e.g., State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) – any claim of privilege is subject to **mandatory** *in camera* review. *See State v. Jones*, 96 Wn. App. 369, 375-77, 979 P.2d 898 (1999).

Discovery is a proper tool in the judiciary’s unique role in the ascertainment of truth. The Legislature should not be immune from factfinding inquiries applicable to everyone else, including executive branch agencies. Accordingly, Respondents request that this Court reverse the decision of the trial court to create legislative and executive privileges.

RESPECTFULLY submitted this 1<sup>st</sup> day of November, 2006.

GROEN STEPHENS & KLINGE LLP

By: Richard M. Stephens  
Richard M. Stephens, WSBA #21776  
Samuel A. Rodabough, WSBA #35347  
Brian D. Amsbary, WSBA #36566  
Attorneys for Respondents-Cross-Appellants

FILED AS ATTACHMENT  
TO E-MAIL

**DECLARATION OF SERVICE**

I, Linda Hall, declare:

I am not a party in this action.

I reside in the State of Washington and am employed by Groen  
Stephens & Klinge LLP in Bellevue, Washington.

On November 1, 2006, a true and correct copy of Respondents  
Reply Brief on Cross-Appeal was transmitted via e-mail and placed in an  
envelope, which envelope with postage thereon fully prepaid was then  
sealed and deposited in a mailbox regularly maintained by the United States  
Postal Service in Bellevue, Washington, addressed to the following persons:

**Attorneys for Appellants**

Maureen A. Hart  
Jeffrey T. Even  
Attorney General of the State of Washington.  
1125 Washington St. S.E.  
P. O. Box 40100  
Olympia, WA 98504-0100

I declare under penalty of perjury that the foregoing is true and  
correct and that this declaration was executed this 1<sup>st</sup> day of November,  
2006 at Bellevue, Washington.

Linda Hall  
Linda Hall

FILED AS ATTACHMENT  
TO E-MAIL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2006 NOV -1 P 14:55

BY C.J. MCGRITT

CLERK

Rec. 11-01-06

-----Original Message-----

**From:** Linda Hall [mailto:lhall@GSKlegal.pro]  
**Sent:** Wednesday, November 01, 2006 4:59 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Subject:** Filing for Washington State Farm Bureau et al. v. Gregoire et al., No. 78637-2

-----Original Message-----

**From:** Linda Hall [mailto:lhall@GSKlegal.pro]  
**Sent:** Wednesday, November 01, 2006 4:24 PM  
**To:** Supreme@courts.wa.gov  
**Cc:** marnieh@atg.wa.gov; beckyw@atg.wa.gov; jeffe@atg.wa.gov; sam@gsklegal.pro  
**Subject:** Filing for Washington State Farm Bureau et al. v. Gregoire et al., No. 78637-2

To the Clerk of Court:

In the matter of Washington State Farm Bureau et al. v. Gregoire, et al., No. 78637-2, attached for filing with the Court please see Respondents' Reply Brief on Cross-Appeal.

My name is Linda Hall, legal Secretary to Richard M. Stephens, WSBA# 21776, attorney for Respondent, Washington State Farm Bureau. If you have any questions, please call us at (425) 453-6206.

Linda Hall, Legal Secretary to  
Richard M. Stephens, WSBA #21776  
Groen Stephens & Klinge LLP  
11100 N.E. 8th Street, Suite 750  
Bellevue, WA 98004  
(425) 453-6206