

“Original Acts,” “Meager Offspring,” and Titles in a Bill’s Family Tree: A Legislative Drafter’s Perspective on *City of Fircrest v. Jensen*

Kristen L. Fraser[†]

I. INTRODUCTION

Many Americans research their ancestry to determine whether their pedigrees reveal titled forebears. After the state Supreme Court’s ruling in *City of Fircrest v. Jensen*,¹ lawyers in Washington may be undertaking a similar genealogical effort—combing through old session laws in the hope that a bill’s legislative ancestors might provide a title to legitimize an act disputed in the present day.

In *Fircrest*, a four-justice plurality of the state Supreme Court wrongly voted to revive the *St. Paul*² rule, under which the title of an “original act” may be used to determine whether a subsequent “amendatory act” complies with the subject-in-title³ requirement of Article II, section 19 of the state constitution.⁴ Although five justices voted to overrule *St. Paul*, the *Fircrest* plurality’s holding eliminates the requirement that an amendatory bill carry on its face a substantive statement of its

[†] Kristen L. Fraser holds degrees in law and political science from the University of Washington. She serves as Senior Counsel and Records & Litigation Coordinator for the Office of Program Research of the Washington House of Representatives and hence is one of “our state’s usually infallible legislative staff.” See 14 Op. Wash. State Att’y Gen. 18 (1981). The author would like to thank other attorneys on legislative staff, particularly Chris Cordes, Steve Jones, and Kyle Thiessen, for their comments on early drafts of this paper. The author’s opinions are her own, and nothing in this Article constitutes an official position of the House of Representatives, its members or administration, or the Office of Program Research.

1. 158 Wash. 2d 384, 390, 143 P.3d 776, 779–80 (2006).

2. *St. Paul & Tacoma Timber Co. v. State*, 40 Wash. 2d 347, 243 P.2d 474 (1952).

3. And, apparently, also the single-subject rule. Compare *Fircrest*, 158 Wash. 2d at 393, 143 P.3d at 782, with 158 Wash. 2d at 401, 407, 143 P.3d at 785, 788 (Owens, J., concurring) (*St. Paul* rule tests only the act’s title, not whether it meets the single-subject test) and 158 Wash. 2d at 410–12, 143 P.3d at 790–91 (Sanders, J., dissenting) (plurality uses *St. Paul* to conflate the separate tests). See *infra* notes 119, 129–131. This Article focuses on the subject-in-title analysis, but the plurality’s holding on the single-subject test is equally troubling.

4. 158 Wash. 2d at 390–91, 143 P.3d at 779–80.

subject matter, in disregard of judicial precedent, legislative practices, and the constitutional purposes of the subject-in-title rule.

This Article takes a closer look at the “dark and bloody ground”⁵ of *Fircrest* from the perspective of a legislative drafter, and discusses several flaws in the *Fircrest* plurality’s approach. First, by focusing on the title of an “original act,” the plurality’s resurrection of the *St. Paul* analysis conflicts with legislative use and implementation of Article II, section 19. Second, *Fircrest* and *St. Paul* thwart the purposes of the subject-in-title rule by undercutting the constitutional requirement of a subject matter declaration. Third, to compound the plurality’s error in resurrecting *St. Paul*, none of the court’s opinions fully understood the evolution of the statutes before the court—a review of the statutes’ legislative history demonstrates that the plurality relied on the title of an “original act” that was not, in fact, within the challenged act’s direct legislative “ancestry,” thus revealing the futility of the “original act” analysis.

Litigants who quarrel with a statute’s substance are increasingly likely to raise procedural challenges to the law-making actions through which the statute was enacted.⁶ Given this trend and the prominence of the *St. Paul* analysis in the lead *Fircrest* opinion,⁷ courts will undoubtedly encounter “original act” arguments in future litigation. To promote legislative intent, the purposes of the subject-in-title rule, and public understanding of the law, the court should reject the *St. Paul* reasoning used by the *Fircrest* plurality. The legislature is the branch of government that must interpret and apply the title-subject rule in performing its own constitutional duties. This Article argues, from the perspective of a drafter in the legislative branch, that the court should acknowledge legislative practices, expressly overrule *Fircrest* and *St. Paul*, and follow its more numerous decisions that consider exclusively the adequacy of the

5. *Batey v. Employment Sec. Dept.*, 137 Wash. App. 506, 511 n.3, 154 P.3d 266, 268 (2007), amended on reconsideration, 2007 Wash. App. LEXIS 1244, petition for review filed, June 15, 2007.

6. See Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges*, 38 HARV. J. ON LEGIS. 103, 106–07 (2001) (title/subject challenges are easy to make; each case is *sui generis* and offers one last chance for political opponents to attack legislation); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 818–20 (2006) (quantifying increase in single-subject litigation). See also Kristen L. Fraser, *Method, Procedure, Means & Manner: Washington’s Law of Law-Making*, 39 GONZ. L. REV. 447, 452–53 (2003–04) (recent invalidation of high-profile initiatives in Washington may have increased interest in procedural challenges); e.g., *Amalgamated Transit Union v. State*, 142 Wash. 2d 183, 217, 11 P.3d 762, 786 (2000) (invalidating I–695 on multiple grounds, including single-subject, subject-in-title, amendment without setting forth, and exceeding initiative power).

7. *Fircrest*, 158 Wash. 2d at 390–92, 143 P.3d at 779–81.

title actually placed before the legislature and the public in the legislation at issue.⁸

II. BACKGROUND

A. Article II, Section 19: The Washington State Constitution's Title/Subject Rule

1. Judicial Treatment of the Subject-in-Title Rule

Article II, section 19 of the Washington Constitution establishes subject and title requirements for legislation: “No bill shall embrace more than one subject, and that shall be expressed in the title.”⁹ The title/subject rule contains two separate but related procedural restrictions on the law-making power. The single-subject rule prohibits legislation from having more than one subject.¹⁰ The subject-in-title rule, on which this Article focuses, requires that a bill’s subject be expressed in its title.¹¹ According to a statehood-era commentator, taken together, these two aspects of the title/subject requirement have three purposes:

1. To prevent hodge-podge or logrolling legislation;
2. To prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and very carelessly and unintentionally adopted; and
3. To fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation, in

8. See *infra* notes 26, 100, 123 (*St. Paul* not used since 1971 and abandoned in the last 35 years).

9. WASH. CONST. art. II, § 19.

10. E.g., *Amalgamated Transit*, 142 Wash. 2d at 216–17, 11 P.3d at 785–86 (even with general title, initiative unconstitutionally contained multiple subjects because license fee caps lacked rational unity with voter approval requirement for tax increases); *State Legislature v. State*, 139 Wash. 2d 239, 985 P.2d 383 (1999) (“substantive law” in budget proviso is a second subject); *Barde v. State*, 90 Wash. 2d 470, 584 P.2d 390 (1978) (even where title “taking or withholding of property” encompassed both parts, bill contained multiple subjects because no rational unity between “dognapping” and civil replevin); *Power, Inc. v. Huntley*, 39 Wash. 2d 191, 198–99, 235 P.2d 173, 178 (1951) (corporate income tax could not be combined with appropriations legislation); see also *Harland v. Territory*, 3 Wash. Terr. 131, 145, 13 P. 453, 458 (1887) (citing THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 173 (5th ed. 1883)).

11. E.g., *Grange v. Locke*, 153 Wash. 2d 475, 497–98, 105 P.3d 9, 21–22 (2005); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wash. 2d 622, 638, 71 P.3d 644, 653 (2003); see *Fraser, supra* note 6, at 460, 466; Dustin Buehler, Comment, *Washington’s Title Match: The Single-subject and Subject-in-title Rules of Article II, section 19 of the Washington State Constitution*, 81 WASH. L. REV. 595, 604 (2006).

order that they may have opportunity of being heard thereon by petition or otherwise, if they so desire.¹²

The single-subject rule serves the first of these purposes,¹³ and the subject-in-title rule promotes the latter two objectives.¹⁴

Briefly, the subject-in-title rule requires that a bill's title contain a declaration of its subject matter.¹⁵ Unlike many other state constitutions,¹⁶ Washington's constitution does not include an express

12. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 173 (5th ed. 1883) (cited in *Harland v. Territory*, 3 Wash. Terr. 131, 145, 13 P. 453, 458 (1887)).

13. *Power, Inc. v. Huntley*, 39 Wash. 2d 191, 199, 235 P.2d 173, 178 (1951); *Harland*, 3 Wash. Terr. at 145, 13 P. 453 at 458 (pre-statehood ruling interpreting territorial organic act). In particular, the single-subject rule is intended to prevent the passage of separate subjects which on their own could not command a legislative majority. *Power, Inc.*, 39 Wash. 2d at 198 (neither the corporate income tax bill nor the appropriations bill could pass on its own). A related purpose is preventing the attachment of an unpopular provision onto a popular, unrelated subject in order to guarantee the former's passage. *Flanders v. Morris*, 88 Wash. 2d 183, 186, 558 P.2d 769, 772 (1977) (in addition to notice problems under subject-in-title, even if legislators had notice they would be wary of rejecting a single provision, because the budget bill must pass to fund state government, and under conference committee procedures it may not be amended). *Grange v. Locke*, 153 Wash. 2d 475, 491, 105 P.3d 9, 18 (2005). See also WASHINGTON STATUTE LAW COMMITTEE, BILL DRAFTING GUIDE 8 (2007) [hereinafter BILL DRAFTING GUIDE].

That said, the purpose of the single-subject rule must not be confused with the actual text of its proscription: although it is intended to *prevent* logrolling by barring multiple subjects, it does not *prohibit* logrolling, notwithstanding references in court opinions to "the constitutional prohibition against legislative vote swapping." *Pierce County v. State*, 150 Wash. 2d 422, 434, 78 P.3d 640, 647 (2003); *City of Fircrest v. Fircrest*, 158 Wash. 2d 384, 412, 143 P.3d 776, 790 (2006) (Sanders, J., dissenting) (separate, inconsistent pieces of legislation "cannot be logically reconciled other than to conclude that those voting for SHB 3055 voted for at least one provision they did not support to ensure passage of those they did. This is evidence of a textbook example of *logrolling in violation of our constitution*." (emphasis added)); see Fraser, *supra* note 6, at 461. Compare WASH. CONST. art. II, § 19 with U.S. Stats. 32d Cong. Sess. II, ch. 90 § 6 (1853) (Washington Territory's Organic Act) ("To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.").

14. "The purpose behind the subject-in-title rule is to guarantee that the members of the legislature and the public are given notice of the *subject matter* of a bill." *Grange v. Locke*, 153 Wash. 2d 475, 491, 105 P.3d 9, 18 (2005) (emphasis added) (citing *Pierce County v. State*, 150 Wash. 2d 422, 430, 78 P.3d 640, 647 (2003)); *Amalgamated Transit*, 142 Wash. 2d at 207, 11 P.3d at 781; see Buehler, *supra* note 11, 608–9.

15. Numerous judicial decisions and law review articles provide ample background information on article II, section 19 and its subject-in-title requirement. Because this Article focuses on the *Fircrest* plurality's use of an "original" act's title, this discussion will center on those aspects of the subject-in-title rule most relevant to the *Fircrest* case and legislative analysis. See generally Fraser, *supra* note 6, at 460–69; Buehler, *supra* note 11, 604–09 (citing cases); *Amalgamated Transit Union v. State*, 142 Wash. 2d 183, 217, 11 P.3d 762, 786 (2000) (citing numerous title examples and invalidating 1-695 on, among other things, subject-in-title violations); *Grange v. Locke*, 153 Wash. 2d 475, 497–98, 105 P.3d 9, 21 (2005); *Citizens for Responsible Wildlife Mgmt v. State*, 149 Wash. 2d 622, 638, 71 P.3d 644, 653 (2003).

16. See Dragich, *supra* note 6, at 116–17; compare ALA. CONST. art. IV § 45 ("clearly expressed in its title") with MO. CONST. art. III, § 23 ("No bill shall contain more than one subject which shall be clearly expressed in its title") and N.M. CONST. art. IV, § 16 (same).

“clear title” requirement. Instead, Article II, section 19 directs that a bill’s title give notice of the bill’s subject matter either by indicating the scope and purpose of the law to an inquiring mind or by giving enough notice to lead to an inquiry into the body of the act.¹⁷ All that is necessary are a “few well-chosen words, suggestive of the general subject stated.”¹⁸ An elaborate statement of the subject is not necessary¹⁹ so long as a legislator or member of the public, “by a mere glance at a few catchwords in the title, [would] be apprised of what the act treats, without further search.”²⁰ “A very meager expression will be sufficient, but some expression there must be.”²¹ In other words, the bill title must disclose the bill’s *subject* but need not detail the *contents*.²² For example,

An overly broad title is not, in itself, a violation of article II, section 19. A “title may be broader than the statute, and still be good as to the subject it fairly indicates.” *Howlett v. Cheetham*, 17 Wash. 626, 635, 50 P. 522, 525 (1897). See *St. Louis Health Care Network v. State*, 968 S.W. 2d 145, 147 (Mo. 1998) (en banc) (broad title “relating to certain incorporated and non-incorporated entities” failed to satisfy Missouri constitution’s “clearly expressed” requirement).

Notwithstanding Washington’s lack of a textual “clear title” requirement, language in some rulings appears to import such an obligation. *Patrice v. Murphy*, 136 Wash. 2d 845, 852, 966 P.2d 1271, 1274 (1998) (“This court has long interpreted article II, section 19 to require the titles of bills to give *clear* information as to their contents”) (emphasis added); *Charron v. Miyahara*, 90 Wash. App. 324, 326, 950 P.2d 531, 534 (1998) (referring to “title specificity” requirements of WASH. CONST. art. II, § 19); *Batey v. Employment Sec. Dept.*, 137 Wash. App. 506, 513, 154 P.3d 266, 270 (2007), *amended*, 2007 Wash. App. LEXIS 1244, *petition for review filed*, June 15, 2007; see *infra* note 22 (use of quasi-due process analysis in subject-in-title inquiry).

17. *Grange v. Locke*, 153 Wash. 2d 475, 491, 105 P.3d 9, 18 (2005); *Amalgamated Transit*, 142 Wash. 2d at 217, 11 P.3d at 786; *Washington Fed’n of State Employees v. State*, 127 Wash. 2d 544, 554, 901 P.2d 1028, 1033 (1995); *YMCA v. State*, 62 Wash. 2d 504, 506, 383 P.2d 497, 498–99 (1963).

18. *Amalgamated Transit*, 142 Wash. 2d at 209, 11 P.3d at 783; see *Fraser*, *supra* note 6, at 463, 466. Consistent with the purpose of giving notice, courts give words in a title their ordinary meaning, rather than any particular definition assigned to those terms within the bill. *Grange*, 153 Wash. 2d at 496–97, 105 P.3d at 21 (“qualifying primary” interpreted generically); *Amalgamated Transit*, 142 Wash. 2d at 227, 11 P.3d at 791 (“tax” carried its ordinary meaning, not the initiative’s broad definition); *Petroleum Lease Props. Inc. v. Huse*, 195 Wash. 254, 257–58, 80 P.2d 774, 778 (1938) (no indication that term “securities” in title included oil and gas leases).

19. *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 26, 200 P.2d 467, 474 (1948).

20. *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 321, 68 P. 957, 959 (1902).

21. *Harland v. Territory*, 3 Wash. Terr. 131, 146, 13 P. 453, 458 (1887) (interpreting territorial organic act’s title/subject rule, “every law shall embrace but one object, and that shall be expressed in the title”).

22. The requirement that a title contain some substantive notice of a bill’s subject matter should not be confused with the more stringent notice requirement of a due process analysis, which applies to legislation’s contents and not its title. *E.g.*, *City of Spokane v. Neff*, 152 Wash. 2d 85, 90, 93 P.3d 158, 160 (2004) (in considering whether prostitution loitering ordinance was unconstitutionally vague, inquiry was whether a person of ordinary intelligence would have “fair notice” of what conduct the ordinance prohibited). Some subject-in-title rulings employ language evidently based on due process considerations, *e.g.*, “Article II, section 19’s prohibition requires a bill title to give notice to the general public and, *most especially*, to parties whose rights and liabilities are affected by the bill.” *Patrice v. Murphy*, 136 Wash. 2d 845, 854, 966 P.2d 1271, 1275 (emphasis added).

“AN ACT Relating to liquor sales” need not declare in its title whether it reimposes Prohibition or expands state liquor store hours to Sundays, so long as the bill relates to liquor sales and does not include provisions relating to, for example, toxic waste or farm animals.

In determining whether a bill’s title satisfies the constitutional requirements, Washington courts recognize two types of titles: general titles, which are liberally construed to embrace all provisions fairly within the subject matter statement,²³ and restrictive titles, which carve out a particular part or branch of a subject and for which provisions of the bill not fairly within the title will not be given force.²⁴ With the exception of *St. Paul* and its “meager offspring,”²⁵ courts do not draw other types of distinctions among titles, such as the contrast made by the *Fircrest* plurality between “original” and “amendatory” titles.²⁶

Likewise, in *Fray* the court rejected the title “technical corrections to ch. 35, laws of 1991” because it did “not give fair notice that . . . Plan II members no longer have the right to sue their employers.” *Fray v. Spokane County*, 134 Wash. 2d 637, 652, 952 P.2d 601, 608 (1998); *see also* *Batey v. Employment Sec. Dept.*, 137 Wash. App. 506, 513–14, 154 P.3d 266, 270 (2007), *amended* 2007 Wash. App. LEXIS 1244, *petition for review filed*, June 15, 2007.

These separate inquiries should not be conflated. As noted in *COOLEY*, *supra* note 12, the public notice purpose of the constitutional provision is to inform the public of legislation’s subject matter *during the legislative process*; this section does not require the title to give due process “fair notice” of the legislation’s actual mandates or proscriptions. In *Fray*, for example, the narrow title “technical corrections” simply did not indicate that substantive rights were affected, resulting in material outside the title’s scope, but the constitution would have been satisfied if the bill were broadly titled “AN ACT relating to the law enforcement officers’ and fire fighters’ retirement systems.” In that case, though such a title does not declare the contents, it embraces them, and alerts the citizen or legislator that further investigation is necessary. *Fray*, 134 Wash. 2d 637, 952 P.2d 601.

23. *In re Boot*, 130 Wash. 2d 553, 566, 925 P.2d 964, 971 (1996); *Gruen v. State Tax Comm’n*, 35 Wash. 2d 1, 22, 211 P.2d 651, 664, *overruled on other grounds by State ex rel.* Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963); *State ex rel. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 26, 200 P.2d 467, 474 (1948); *State v. Thomas*, 103 Wash. App. 800, 807–09, 14 P.3d 854, 857–60 (2000); *see Fraser*, *supra* note 6, at 463, 466.

24. *Batey*, 137 Wash. App. at 513, 154 P.3d at 270 (2007), *amended*, 2007 Wash. App. LEXIS 1244, *petition for review filed*, June 15, 2007; *Daviscourt v. Peistrup*, 40 Wash. App. 433, 437, 698 P.2d 1093, 1097 *review denied*, 104 Wash. 2d 1008 (1985); *Cory v. Nethery*, 19 Wash. 2d 326, 329–31, 142 P.2d 488, 490 (1943); *DeCano v. State*, 7 Wash. 2d 613, 623, 110 P.2d 627, 632 (1941).

25. *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 401, 143 P.3d 776, 785 (2006) (Owens, J., concurring).

26. *See infra* note 190 (*St. Paul* and the four cases that follow it); *Fircrest*, 158 Wash. 2d at 390–91, 143 P.3d at 789–90 (*St. Paul* is “absent” from more recent cases; most cases declined to follow *St. Paul* and analyzed the “amendatory title”); *Fircrest*, 158 Wash. 2d at 401–02, 405–07, 143 P.3d 785–86 (concurrence) (that *St. Paul* was an anomaly is demonstrated by its “meager offspring” and silent but clear overruling by the past 25 years [actually 35] of judicial decisions; “dozens” of cases “ignore” *St. Paul*); *Fircrest*, 158 Wash. 2d at 412 n.1, 143 P.3d at 790 (dissent) (“*St. Paul* was followed by this court on only four occasions, most recently 25 [actually 35] years ago, and with good reason: its holding has no basis in the constitution.”). The youngest of *St. Paul*’s “offspring” is *Belancsik v. Overlake Mem’l Hosp.*, 80 Wash. 2d 111, 114–15, 492 P.2d 219, 221–22 (1971), decided 35—not 25—years before *Fircrest*.

2. The Title/Subject Rule in the Legislature

The constitution assigns to the legislature the role of directly implementing Article II, section 19. Hence, the legislature alone may draft bill titles.²⁷ The judicial role in implementing Article II, section 19's application to bill titles arises through interpretation only, not through any original drafting power.²⁸ Limited solely by the constitution, the legislator who drafts a bill has complete control over the initial way in which the subject matter statement in the bill title is written²⁹ and any number of legislative policy, parliamentary, and political objectives may affect the way in which a legislator exercises this drafting power.³⁰

Throughout the legislative process, a bill's title consists of two parts: the substantive subject matter statement³¹ preceding the first semi-colon,³² and the optional "ministerial"³³ portion thereafter. For example, the complete title of Chapter 330, Laws of 2006 (Engrossed Senate Bill 6661) is:

AN ACT Relating to establishing the Washington beer commission; amending RCW 66.44.800, 15.04.200, 42.17.31907, 42.56.380, and 43.23.033; reenacting and amending RCW 66.28.010; adding a new section to chapter 66.12 RCW; adding a new chapter to Title 15 RCW; providing an effective date; and providing an expiration date.³⁴

27. For purposes of the discussion in this Article, ballot titles prepared for measures initiated by or referred to the voters must be distinguished from bill titles originally drafted by the legislature, though both types of titles are subject to judicial analysis under article II, section 19. *E.g.*, *Wash. Fed'n of State Employees v. State*, 127 Wash. 2d 544, 551, 901 P.2d 1028, 1032 (1995) (article II, section 19 applies to initiatives). Ballot titles are drafted by the Attorney General (or, rarely, by the legislature) through a prescribed statutory process, rather than through original legislative drafting. *See* WASH. REV. CODE § 29A.72.050 (2006); *Fraser*, *supra* note 6, at 460 & n.104. Ballot titles drafted under this process may be appealed to the Thurston County Superior Court, where the court may "render its decision and file with the secretary of state a certified copy of such ballot title or summary as [the court] determines will meet statutory requirements." WASH. REV. CODE § 29A.72.080.

28. Again, ballot measure titles are an exception. *Id.*

29. In the Senate, the title may be subject to parliamentary challenge. *See infra* notes 35–38 and accompanying text (parliamentary challenge).

30. *See infra* notes 142–45 and accompanying text (drafting objectives).

31. Also referred to as the "narrative description," *see Fircrest*, 158 Wash. 2d at 417, 143 P.3d at 793 (Sanders, J., dissenting) (citing *Thomas*, 103 Wn. App at 808); the "descriptive title," *Fircrest*, 158 Wash. 2d at 405, 143 P.3d at 787 (Owens, J. concurring); or the "legal title," BILL DRAFTING GUIDE, *supra* note 13, at 49.

32. *See* WASH. STATE. HOUSE RULE 11(G) (2007) (subject matter statement precedes the first semi-colon).

33. *See infra* notes 39–42 and accompanying text (ministerial title).

34. 2006 Wash. Sess. Laws ch. 330.

In this example, the subject matter statement is “establishing the Washington beer commission,” and the remainder of the title is deemed ministerial.

For parliamentary purposes, treatment of the substantive subject matter statement differs somewhat in the Senate and the House of Representatives. In the House, a bill’s subject matter statement is fixed once the bill is introduced—House rules expressly prohibit amendment of the subject matter statement in the title.³⁵ Senate rules authorize parliamentary challenges to a bill’s title and do not prohibit amendment of the title to better reflect the bill’s contents.³⁶ Permitting substantive title amendments promotes notice and disclosure of a bill’s subject at all stages in the legislative process, given that the precise issue addressed by a bill may change throughout the legislative process.³⁷ The enrolled bill doctrine, which prevents courts from scrutinizing the procedures by which a bill was passed if the act is fair on its face, prohibits judicial scrutiny of the legislature’s choice to amend a bill title’s subject matter statement.³⁸

35. WASH. STATE HOUSE RULE 11(G) (2007) (“The subject matter portion of a bill title shall not be amended in committee or on second reading. Changes in that part of the title after the subject matter statement shall either be presented with the text amendment or be incorporated by the chief clerk in the engrossing process.”). See BILL DRAFTING GUIDE, *supra* note 13, at 49 (“Changing the legal title of a bill (the material before the first semicolon) is rarely done in the senate and forbidden in the house. If a change in the legal title is desired, the requester should consult with senate or house of representatives leadership for approval.”).

36. WASH. STATE SENATE RULE 25 (2007) (reciting language of article II, section 19). *E.g.*, Senate Journal at 454–55 (Wash. 2006) (bill title did not fully express subject; Senate president invited sponsor to amend title); Senate Journal at 703 (Wash. 1997) (“If the amendment is within the scope and object of the bill, the Senate may amend the title if necessary.”); *cf.* Senate Journal (House Bill 1187, Wash. April 9, 2007) (Senate rules do not prohibit amending the title of a House bill, though the House may object when the bill is returned for concurrence); see Fraser, *supra* note 6, at 470, 475. Compare, *e.g.*, Senate Bill 5131 (Wash. 2005) (“AN ACT Relating to firearms”) with Substitute Senate Bill 5131 (Wash. 2005) (“AN ACT Relating to possession of firearms by persons found not guilty by reason of insanity”). In ruling on a parliamentary challenge to a bill title, the presiding officer must leave constitutional interpretation to the courts, but he or she must also interpret and implement the legislative rule. Fraser, *supra* note 6, at 475 & nn. 251–52. Parliamentary challenges are waived if not raised. *Id.* at 459.

37. Dragich, *supra* note 6, at 153. On the other hand, a prohibition on substantive title amendments ensures that a legislator may rely on a fixed title at all stages of the legislative process, such that an unobtrusive title amendment may not be used to expand or alter a bill’s purpose. Parliamentary scope and object rules limit this risk. See *infra* note 144 (discussing scope and object).

38. Schwarz v. State, 85 Wash. 2d 171, 175, 531 P.2d 1280, 1282 (1975); see Fraser, *supra* note 6, at 470, 474–75; *cf.* Grange v. Locke, 153 Wash. 2d 475, 481, 105 P.3d 9, 13 (2005) (referring to original bill title and amended bill title); see *infra* notes 176–83 and accompanying text (enrolled bill doctrine). The enrolled bill doctrine also prevents the court from speculating on whether legislators were misled by an amendment that changes the text but not the title of the bill. Brower v. State, 137 Wash. 2d 44, 70–71, 969 P.2d 42, 57–58 (1998).

The ministerial portion of the bill title is drafted according to legislative custom rather than constitutional requirements.³⁹ The portion of a bill title after the first semicolon typically contains “housekeeping” provisions that list certain components of the legislation.⁴⁰ This list identifies specific bill sections or contents, such as amended, repealed, or reenacted sections, emergency clauses, effective dates, appropriations, or expiration dates.⁴¹ These declarations are updated as the bill progresses through the legislature and sections are revised, added, and deleted during the amendment and engrossing process.⁴²

B. Sections and Statutes—a Brief Overview of Washington’s Law-Making and Codification Process

In Washington, laws enacted by the legislature must be drafted in the form of bills.⁴³ The component parts of bills are sections. The legislature has drafted bills in this fashion since statehood.⁴⁴ If enacted and

39. BILL DRAFTING GUIDE, *supra* note 13, at 8 (citing cases); *see also* State v. Thomas, 103 Wash. App. 800, 808–09, 14 P.3d 854, 859–60 (2000) (title is “narrative description” in phrase following “AN ACT Relating to” and preceding the first semicolon, not “ministerial” recitation of bill sections, which is “surplusage”); Patrice v. Murphy, 136 Wash. 2d 845, 853–55, 966 P.2d 1271, 1274–76 (1998) (analyzing phrase before first semicolon); Flanders v. Morris, 88 Wash. 2d 183, 188, 558 P.2d 769, 773 (1977) (title need not be an “index”); Washington Fed’n of State Employees v. State, 127 Wash. 2d 544, 557, 901 P.2d 1028, 1035 (1995) (title need not specifically express that repealers are included); Maxwell v. Lancaster, 81 Wash. 602, 607, 143 P.157, 159 (1914) (under a title relating to a general subject, the legislature may “repeal existing laws as well as create new ones”); Bennett v. State, 117 Wash. 2d 483, 488–90, 70 P.3d 147, 150–51 (2003) (analyzing phrase before first semicolon).

40. BILL DRAFTING GUIDE, *supra* note 13, at 8.

41. *Id.* at 8–9 (citing cases). For example, in an omnibus alcohol and controlled substances act, Chapter 271, Laws of 1989, which was the subject of title/subject challenges in both State v. Jenkins, 68 Wash. App. 897, 900–01, 847 P.2d 488, 489–90 (1993), *review denied*, 121 Wash. 2d 1032, and Acevedo v. State, 78 Wash. App. 886, 899 P.2d 31 (1995), the ministerial items listed included: amended sections, sections added to various chapters, new sections, new chapters, reenacted sections, penalties, effective dates, expiration dates, appropriations, and declaration of an emergency.

42. BILL DRAFTING GUIDE, *supra* note 13, at 49; WASH. STATE HOUSE RULE 11(G) (2007). An engrossed bill is a bill for which amendments adopted in the house of origin are physically incorporated into the bill. BILL DRAFTING GUIDE, *supra* note 13, at 50; ED SEEBERGER, SINE DIE: A GUIDE TO THE WASHINGTON STATE LEGISLATIVE PROCESS 230 (University of Washington 1997).

43. “[N]o laws shall be enacted except by bill.” WASH. CONST. art. II, § 18. Ballot measures authorized by Amendment 7 are exceptions to this otherwise applicable requirement that laws be in the form of bills passed by both houses and either signed by the governor or repassed over her veto. WASH. CONST. art. II, § 1 (amendment 7); art. III, § 12. Amendment 7 permits voters to enact legislation (initiatives to the voters), propose legislation to the legislature (initiatives to the legislature); to reject legislation enacted by the legislature (referendum measures), and to approve or reject legislation referred by the legislature to the voters (referendum bills).

44. *E.g.*, 1889 Wash. Sess. Laws ch. 2 (“to fund state debt”). The way in which the legislature chooses to divide a bill into sections affects the governor’s veto power, which generally extends only to entire *sections* of legislation. WASH. CONST. art. III, § 12 (Amendment 62); Legislature v. Lowry, 131 Wash. 2d 309, 320–21, 931 P.2d 885, 891–92 (1997), *modifying* Washington State Motorcycle Dealers’ Assn. v. State, 111 Wash. 2d 667, 763 P.2d 442 (1988); *see* Fraser, *supra* note 6, at 489–91.

signed by the governor, the bills become session laws (also referred to as chapter laws⁴⁵) and the sections are known by section references to those chapters, e.g., Laws of 1899, chapter 2, section 3. Sections of session laws may also be incorporated into Washington's codified laws, the Revised Code of Washington (RCW).⁴⁶

Bills may consist of different types of sections. First, sections may be new or amendatory. A new section is a new statement of law.⁴⁷ An amendatory section is a section of a bill or act that amends a pre-existing statutory section.⁴⁸ Whether a section of a bill is drafted as a new section or as an amendatory section is determined by the bill's structure and content, the organization of the RCW, and the legislator's objectives, subject to the constitutional and parliamentary prohibitions on amendment without setting forth in full, which require that the entire text of amended sections be set forth in the bill.⁴⁹

Second, sections may be codified or uncoded. Statutory sections of a "general and permanent nature" are codified by the Code Reviser⁵⁰ into numbered sections of the Revised Code of Washington (RCW).⁵¹ Sections that are temporary in nature (such as appropriations), sections that are technical or ministerial (such as effective dates, codification directions, or caption disclaimers), and sections for which the legislature does not otherwise direct codification (such as most intent sections) are not assigned code section numbers.⁵² Instead, these sections are

45. SEEGER, *supra* note 42, at 227.

46. WASH. REV. CODE ch. 1.04; BILL DRAFTING GUIDE, *supra* note 13, at 6; SEEGER, *supra* note 42, at 237.

47. BILL DRAFTING GUIDE, *supra* note 13, at 6.

48. See generally BILL DRAFTING GUIDE, *supra* note 13, at 3–4. *Amendatory sections* should be distinguished from *amendments*, which are proposed changes to a bill and may involve new or existing sections. See SEEGER, *supra* note 42, at 225; BILL DRAFTING GUIDE, *supra* note 13, at 44–47.

49. WASH. CONST. art. II, § 37 ("No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."); WASH. STATE SENATE RULE 26 (2007) (setting forth text of article II, § 37); WASH. STATE HOUSE RULE 11(F) (2007) ("No act shall ever be revised or amended without being set forth at full length."); WASH. STATE LEGIS. JOINT RULES 12–13 (2007) (requiring section number and specific formatting for amendatory changes); see *infra* note 70 and accompanying text (regarding "jingles" for amendatory sections); BILL DRAFTING GUIDE, *supra* note 13, at 5–6 (formatting to indicate amendatory changes).

50. The Code Reviser is an attorney appointed by the Statute Law Committee to codify into the appropriate sections of the Revised Code of Washington measures enacted into law. The Code Reviser also prepares all official bill drafts. See WASH. REV. CODE ch. 1.08; SEEGER, *supra* note 42, at 228.

51. WASH. REV. CODE § 1.04.010; WASH. REV. CODE § 1.08.015(1); see WASH. REV. CODE ch. 1.08; SEEGER, *supra* note 42, at 18, 228.

52. WASH. REV. CODE § 1.08.017; BILL DRAFTING GUIDE, *supra* note 13, at 6–7.

referenced by their session law chapter and section numbers and may be included in the code as notes to codified sections.

Depending on the subject matter and the extent of preexisting statutory law on the subject, a bill may consist of any combination of new and amendatory sections. The same sections of law are often amended over and over again, under different bill titles, for different purposes. For example, Laws of 2006, Chapter 277 (HB 2704) established new crimes relating to organized retail theft.⁵³ The bill set forth the elements of the new crimes in new sections added to Chapter 9A.56, Theft and Robbery.⁵⁴ However, to determine the way in which criminal penalties are calculated for these new crimes, HB 2704 had to amend title 9, chapter 94A, section 510 of the Revised Code of Washington (RCW) to place the new crimes on the felony seriousness level table.⁵⁵ This particular section of the RCW has been repeatedly amended over the years—more than 70 times since it was enacted in 1983 in “AN ACT Related to the sentencing of criminal offenders.”⁵⁶ Each of these acts in turn contained a myriad of new and amendatory sections, depending on the particular subject addressed by each separate bill.⁵⁷

After both houses of the legislature have voted favorably upon a bill, the bill is known as an “enrolled bill” and is filed with the Secretary of State.⁵⁸ At this stage, the bill may also be referred to as an “act,” though it has not yet been enacted into law.⁵⁹ When the governor signs the bill,⁶⁰ the Secretary of State assigns the act a session law number based on the order in which the governor signs the bills.⁶¹

After a bill becomes law, the Code Reviser assigns code section numbers to new codified sections and incorporates the amendments made by amendatory sections into the appropriate numbered sections of the RCW.⁶² The RCW is organized into three levels: Titles,⁶³ chapters,

53. 2006 Wash. Sess. Laws ch. 277.

54. *Id.* §§ 1–3.

55. *Id.* § 6.

56. 1983 Wash. Sess. Laws ch. 115 § 3.

57. See *infra* note 229 and accompanying text (examples of titles under which WASH. REV. CODE § 9.94A.510 has been amended).

58. WASH. CONST. art. III, § 12 (every act that passes the legislature must be delivered to the governor); WASH. CONST. art. III, § 17 (directing Secretary of State to keep a record of the official acts of the legislature); WASH. REV. CODE § 44.20.010 (the house of the legislature that transmits an enrolled bill to the governor must also deliver a copy to the Secretary of State); SEEBERGER, *supra* note 42, at 230. See *infra* notes 176–183 and accompanying text (enrolled bill doctrine).

59. WASH. CONST. art. III, § 12; SEEBERGER, *supra* note 42, at 225.

60. Or, if the governor fails to veto the bill within the constitutionally prescribed period, it likewise becomes law. WASH. CONST. art. III, § 12. Washington does not have a “pocket veto.” Fraser, *supra* note 6, at 490.

61. SEEBERGER, *supra* note 42, at 227.

62. WASH. REV. CODE §§ 1.08.015–.020; SEEBERGER, *supra* note 42, at 227.

and sections.⁶⁴ Titles are the broadest subdivision of the thousands of sections of law that form the Revised Code of Washington. Many RCW Titles were created as part of the massive recodification effort that began in 1951 with the creation of the modern Statute Law Committee and Office of the Code Reviser.⁶⁵ During the 1950s and 1960s, the legislature passed many such comprehensive recodification acts to revise and consolidate the various privately published codes⁶⁶ into a consistently denominated statutory code.⁶⁷

The ninety-five Titles of the RCW cover topics ranging from the very broad, *e.g.*, Title 9A, the criminal code, or Title 28A, common school provisions, to the fairly narrow, *e.g.*, Title 17, weeds, rodents and pests. Each title is divided into chapters—for example, Title 9A is Washington’s criminal code and consists of chapters such as chapter 9A.32, homicide, and chapter 9A.44, sex offenses. Within each chapter are codified the individual sections of law—for example, RCW 9A.32.040 defines the crime of murder in the first degree and RCW 9A.32.050 defines the crime of murder in the second degree. As of January 2007, the ninety-five Titles of the RCW comprised 2970 chapters and nearly 45,000 sections.⁶⁸

A section of the RCW is the descendant of all the session laws that created it, as modified by the most recent session law. Each section of the RCW contains a history note listing that section’s statutory predecessors.⁶⁹ When a bill amends a codified section, the “jingle” describing the legislative action declares that the bill amends both that section of code and the most recent version of the session laws that constitute that codified section.⁷⁰ If the code section has been previously subject to a “double amendment” in the session laws in which the legislature amends the same section twice (or more) in the same session without reference to the

63. For purposes of the discussion in this Article, “Title” as a division of the RCW will be capitalized to distinguish such divisions from *bill* titles.

64. See WASH. REV. CODE §§ 1.04.014–.016, 1.08.015(3).

65. See WASH. REV. CODE ch. 1.04 (establishing Revised Code of Washington); ch. 1.08 (establishing Statute Law Committee and Code Reviser).

66. See generally Kelly Kunsch, *Statutory Compilations of Washington*, 12 U. PUGET SOUND L. REV. 285 (1989); Joe V. Panesko, History of Washington State Codification (June 8, 2006) (unpublished presentation to Statute Law Committee on file with author); Joe V. Panesko, *Breaking the Codes—A History of Washington State Codification 6–10* (2004) (unpublished paper on file with the author).

67. *E.g.*, 1959 Wash. Sess. Laws ch. 28 (reenactment of Title 72, public institutions); 1959 Wash. Sess. Laws ch. 26 (reenactment of Title 74, public assistance). See generally Kunsch, *supra* note 66, at 305 (between 1951 and 1963, all titles of the RCW had been restored by the Statute Law Committee or reenacted by the legislature).

68. Information provided by the Office of the Code Reviser.

69. BILL DRAFTING GUIDE, *supra* note 13, at 4.

70. *Id.*

other amendment, the legislature may subsequently “reenact” the separate session laws to incorporate the separate session laws back into the same section of code.⁷¹

Sections of law remain “on the books” until they are repealed or decodified by the legislature.⁷² To repeal a statute, the repealing legislation must identify every session law that amended the statute.⁷³ If a statute is challenged in court, the court may have the power to declare invalid all or a portion of the section of law and thereby render it unenforceable, but the court lacks the power to repeal or decodify sections; only the legislature may undertake the statutory lawmaking actions of repeal and decodification.⁷⁴ In other words, a judicially invalidated section or portion thereof does not “disappear” from the code.⁷⁵ Instead, the section

71. *Id.* at 5, 17; WASH. REV. CODE § 1.12.025 (construction of double amendments). If the legislature further amends that section at the same time as the reenactment, the section’s “jingle” in the bill declares this purpose. BILL DRAFTING GUIDE, *supra* note 13, at 5, 17.

72. The legislature has delegated to the Code Reviser, in consultation with the Statute Law Committee, a limited authority to remove “manifestly obsolete” provisions from the code. WASH. REV. CODE § 1.08.015(2)(m). Generally, use of this authority is limited to ministerial sections such as severability clauses, effective dates, etc. BILL DRAFTING GUIDE, *supra* note 13, at 13, or other sections that have manifestly expired on their own terms.

73. BILL DRAFTING GUIDE, *supra* note 13, at 11–12. The legislature has delegated to the Code Reviser, in consultation with the Statute Law Committee, a limited authority to decodify a section that has been repealed without reference to an amendment to the section. WASH. REV. CODE § 1.12.025; see BILL DRAFTING GUIDE, *supra* note 13, at 13. Such decodification may occur only if the Statute Law Committee determines that the decodification does not conflict with the purposes of the amendment. BILL DRAFTING GUIDE, *supra* note 13, at 13.

74. A number of statutes invalidated by the courts have remained codified in the RCW, even though those judicial rulings render them unenforceable. Compare, e.g., WASH. REV. CODE § 44.04.015 (establishing term limits for state legislators) with *Gerberding v. Munro*, 134 Wash. 2d 188, 205, 949 P.2d 1366, 1374 (1998) (state constitution establishes exclusive qualifications for state officers and term limit statutes therefore invalid); WASH. REV. CODE § 4.56.250 (limiting noneconomic damages) with *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 652–53, 771 P.2d 711, 719–20 (1989) (invalidating statutory cap on noneconomic damages as infringement on right to jury trial).

75. The distinction between a judicial declaration of invalidity and repeal or decodification implicates both separation of powers and the drafting requirements of article II, section 37, which dictates that an amended section must be set forth in full. Apparently under the impression that judicial invalidation of a section of session law rendered the section decodified (as opposed to being unenforceable), a King County Superior Court judge struck down Initiative 747 (2002 Wash. Sess. Laws ch. 1 § 2) on the basis that a section amended by the initiative had previously been judicially invalidated. *Washington Citizens Action v. State*, No. 05–2–02052–1 SEA slip op. at 4 (King County Superior Court, June 13, 2006), review granted. The court therefore concluded that I-747 violated article II, section 37 by failing to set forth in full the law that was operative as a result of the prior court ruling, as opposed to the most recent session law enacted through the statutory lawmaking process. *Id.* The superior court relied upon *Boeing Co. v. State*, which declared that “an invalid statute is a nullity. It is as inoperative as if it had never passed.” 74 Wash. 2d 82, 88–89, 442 P.2d 970, 973–74 (1968) (emphasis added). This statement is correct as far as it goes, but such a ruling does not smite the section into statutory oblivion, notwithstanding *Boeing’s* comparison of a judicial declaration of unconstitutionality to a gubernatorial veto, 74 Wash. 2d at 89, 442 P.2d at 974, an analogy at odds with the constitution. The veto is the governor’s legislative power, and it is

remains part of the state's statutory law and may serve as the basis⁷⁶ for a subsequent legislative correction to the section.⁷⁷

C. Substitute House Bill 3055 and City of Fircrest v. Jensen

When Fircrest police officer R.J. LaTour contacted young motorist Theo Jensen in the wee hours of a fall morning, little did the officer know that his encounter with the motorist would set in motion a study in separation of powers and an interbranch disagreement over the complex relationship between the state constitution's title/subject rule and the processes of statutory evolution.

On October 23, 2004, Officer LaTour pulled over a speeding vehicle in the City of Fircrest.⁷⁸ Inside, the officer found Mr. Jensen and an

distinctly a *statutory* law-making power. WASH. CONST. art. III, § 12; *Legislature v. Lowry*, 131 Wash. 2d 309, 330, 931 P.2d 885, 896 (1997); *Hallin v. Trent*, 94 Wash. 2d 671, 678, 619 P.2d 357, 361 (1980), *overruled on other grounds by* Wash. Fed. Of State Employees v. State, 101 Wash. 2d 536, 547, 682 P.2d 869, 875 (1984). A valid veto excises material from an act *before* it becomes law as surely as if the legislature had never written it in the first place, 94 Wash. 2d at 671, 619 P.2d at 360, but judicial invalidation merely renders *inoperative* a section that already had been signed into law.

The superior court ruling confuses the court's power of constitutional interpretation with the legislature's power to enact, repeal, and amend statutes. In addition, such reasoning will stymie legislative drafting—if the legislature uses the predecessor session law rather than the invalidated section as the basis for future amendment, it is equally vulnerable to the argument that it has violated article II, section 37 by failing to set forth in full the most recent legislatively enacted session law. Furthermore, dozens of challenges to statutes may be pending at any particular time, and the legislature cannot be required to predict which of these would be successful (much less upheld on appeal) and thereby trigger an obligation to amend the predecessor session law rather than the current version.

76. "The use of outdated versions of the Revised Code of Washington as a basis for preparing amendatory or repealing legislation results in the inadvertent deletion of current language, the reenactment of obsolete language, and other serious consequences." BILL DRAFTING GUIDE, *supra* note 13, at 4.

77. For example, certain sections in 1995 Wash. Sess. Laws ch. 285, "AN ACT Relating to insurance fraud," were invalidated on both single-subject and subject-in-title grounds in *State v. Thomas*, 103 Wash. App. 800, 14 P.3d 854 (2000), *see infra* note 184. To correct these deficiencies, the legislature reenacted, under proper titles and without further amendment, certain sections of the invalidated 1995 legislation. *E.g.*, 2001 Wash. Sess. Laws ch. 310; *see also* 2001 Wash. Sess. Laws ch. 222. Likewise, in *McGowan v. State*, 148 Wash. 2d 278, 296–97, 60 P.3d 67, 76–77 (2002), the court invalidated subsection 2(1)(d) of Initiative 732 on substantive constitutional grounds, and it severed this provision from the remainder of the law. 2001 Wash. Sess. Laws ch. 4 § 2(1)(d). This action did not excise the subsection from the code and session laws; instead, the legislature amended WASH. REV. CODE § 28A.400.205 to delete the offending subsection 2003. Wash. Sess. Laws 1st Sp. Sess. ch. 20 § 1. In a different and apparently unique approach, to address the judicial invalidation of 1982 2d Sp. Sess. ch. 9, the legislature, through the amendment process, *restored* the changes wrought by the 1982 law, with the declared purpose of "correcting the relevant RCW sections to read as though the legislature had not enacted "chapter 9, Laws of 1982, 2d ex. sess., and thereby make clear the effect of the subsequent amendments in Part II of this act." *Compare* 1989 Wash. Sess. Laws ch. 302 §§ 1, 101–103; *with* Wash. Sess. Laws 1982 2d Ex. Sess. ch. 9 §§ 1–3. In Part II of the same act the legislature then made further changes to those sections. 1989 Wash. Sess. Laws ch. 302 §§ 201, 203, 206 (amending §§ 101–103).

odor of intoxicants.⁷⁹ Officer LaTour conducted field sobriety tests and arrested Mr. Jensen, whose BAC⁸⁰ results at the police station were 0.043 and 0.042, below the statutory level of intoxication,⁸¹ but above the 0.02 limit for persons under age 21.⁸² The City consequently charged Mr. Jensen with being a driver under age 21 consuming alcohol.⁸³

In the spring of 2004, a few months before Mr. Jensen's arrest, the 58th Washington Legislature amended statutes relating to certain vehicular offenses in a bill entitled "AN ACT Relating to admissibility of DUI tests."⁸⁴ Substitute House Bill (SHB) 3055 consisted of a new, uncodified intent section (section 1) and three amendatory sections. Section 2 amended RCW 46.20.308 to address search warrants for breath or blood, implied consent warnings, and breath test machines in medical facilities.⁸⁵ Sections 2 and 3 amended RCW 46.20.308 and RCW 46.20.3101 respectively to revise references to the BAC threshold for persons under twenty-one years for the offenses of driving under the influence, physical control of a vehicle under the influence, and driver under twenty-one consuming alcohol.⁸⁶ Section 4 amended RCW 46.61.506 to address persons authorized to draw blood for blood tests and to address admissibility of breath tests and independent tests.⁸⁷ Significantly, the provisions of section 4 regarding admissibility of breath tests applied not only to offenses governed by the DUI statute,⁸⁸ but also to other offenses relating to vehicles and intoxicants, such as the driver under twenty-one consuming alcohol statute under which Mr. Jensen was charged.⁸⁹

78. *Fircrest*, 158 Wash. 2d at 389, 143 P.3d at 779.

79. *Id.*

80. BAC may stand for either "blood alcohol content" or "breath alcohol concentration." WASH. REV. CODE § 46.61.506. Mr. Jensen's breath was tested. *Fircrest*, 158 Wash. 2d at 389, 143 P.3d at 779.

81. WASH. REV. CODE § 46.61.502.

82. *Id.* § 46.61.503.

83. *Id.*

84. 2004 Wash. Sess. Laws ch. 68.

85. *Id.* § 2.

86. *Id.* §§ 2–3. Section 2 also reenacted this section of code to address prior double amendments. See *supra* note 71 and accompanying text (double amendments). Section 2 was originally enacted in 1969 as part of Initiative 242. 1969 Wash. Sess. Laws ch. 1 § 1. Before its amendment in SHB 3055, this section of law had been amended twenty times. See WASH. REV. CODE § 46.20.308 (history note).

87. 2004 Wash. Sess. Laws ch. 68 § 4. As with section 2, section 4 was originally enacted in 1969 as part of Initiative 242. 1969 Wash. Sess. Laws ch. 1 § 3. Before its amendment in SHB 3055, this section of law had been amended seven times. See *infra* note 196 (titles for these amendatory acts).

88. WASH. REV. CODE § 46.61.502.

89. *Id.* § 46.61.503. *Fircrest*, 158 Wash. 2d at 389, 143 P.3d at 779.

In *City of Fircrest v. Jensen*,⁹⁰ Mr. Jensen challenged the City's use of his breath test under the new provisions of SHB 3055. He based one of his arguments⁹¹ on the subject-in-title rule, contending that section 4 of SHB 3055 violated Article II, section 19 by including subject matter beyond its title because it amended breath test admissibility for his non-DUI offense under the title "AN ACT Relating to admissibility of DUI tests."⁹² Because the legislature gave SHB 3055 the restrictive title "DUI tests" rather than, for example, the general title "BAC tests," he contended that the amendments in SHB 3055 applied only to DUI cases and not to other crimes affected by a breath test.⁹³

III. THE *FIRCREST* RULING: A DIVIDED STATE SUPREME COURT UPHOLDS SHB 3055

At the state Supreme Court, a four-justice plurality and a three-justice concurrence voted to uphold SHB 3055 against the subject-in-title challenge, with two justices dissenting. Significantly, the plurality and concurrence employed very different reasoning.

A. Plurality: Title of the "Original Act" *Embraces the Subject Matter of SHB 3055*

Justice Charles Johnson, writing for the plurality, declared that the court's first inquiry in a title/subject challenge is the relevant title of the act.⁹⁴ Ordinarily, this question arises only when legislation has both a bill title and a ballot title, as do referendum measures or initiatives to the legislature,⁹⁵ but the *Fircrest* plurality concluded that a bill which includes amendatory sections may likewise have more than one title: the title assigned by the legislature to the "amendatory act," and the title of the "original act," the act that originally created the sections amended in the subsequent legislation.⁹⁶ The plurality concluded under the *St. Paul* line of cases that "when an act purports to amend a prior act, the relevant

90. 158 Wash. 2d 384, 143 P.2d 776 (2006).

91. In addition to his contentions based on the subject-in-title rule, Jensen also argued that the bill contained multiple subjects, violated the separation of powers doctrine, and unconstitutionally created a mandatory rebuttable presumption. *Fircrest*, 158 Wash. 2d at 395–400, 143 P.3d at 782–84; Brief for Appellant at 19–31, *City of Fircrest v. Jensen*, 158 Wash. 2d 384 (2006); 158 Wash. 2d 384, 390, 143 P.3d 776, 779–80 (2006).

92. Brief of Appellant, at 14, *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 143 P.2d 776 (2006).

93. *Id.* at 11–12.

94. *Fircrest*, 158 Wash. 2d at 390, 143 P.3d at 779–80.

95. See Fraser, *supra* note 6, at 461–62.

96. *Fircrest*, 158 Wash. 2d at 390–92, 143 P.3d at 779–80.

title to be examined under Article II, section 19 is the title of the *original act*.⁹⁷

Specifically, the plurality held that

[a]ny original act passed by the legislature is subject to traditional Article II, section 19 challenges. . . . When amending an original act, it is unnecessary to examine the amendatory title for strict compliance with Article II, section 19, because the underlying act has already passed such scrutiny.⁹⁸ In these cases, we need only inquire if the amendatory act explicitly identifies what sections of the original act it is purporting to amend and that the amendments proposed could have been included in the original act [T]he title of an amendatory act is sufficient if the title identifies and purports to amend the original act and the subject matter of the amendatory act is within the purview of the original act.⁹⁹

Although the plurality acknowledged that *St. Paul* had “been called into question by its absence from more recent Article II, section 19 challenges regarding amendatory acts,”¹⁰⁰ it adhered to *St. Paul*, rejecting arguments that the *St. Paul* line had been superseded by other analyses and was “incorrect and harmful.” Further, the plurality declared that *St. Paul* relied upon a “1908 treatise” and thus reflected the common understanding of Article II, section 19 at statehood.¹⁰¹

For these reasons, the plurality determined that the “original act” was the 1961 legislation that created Title 46 of the Revised Code of Washington (RCW), and therefore the relevant title was:

AN ACT Relating to vehicles; providing for the regulation and licensing thereof and of persons in relation thereto; providing for the collection and disposition of moneys; enacting a vehicle code to be known as Title 46 of the Revised Code of Washington-“Motor Vehicles”; providing penalties; repealing certain acts and parts of acts; and declaring an emergency.¹⁰²

Because the ministerial portion of SHB 3055’s title identified by RCW number the sections of code being amended, *i.e.*, sections in Title 46, the plurality reasoned that the act met the first prong of the *St. Paul* test by “explicitly identifying and announcing its amendment of the original act,”¹⁰³ meaning the 1961 act “Relating to vehicles” that created Title 46.

97. *Id.* at 390, 143 P.3d at 779 (emphasis added).

98. This statement is puzzling. See *infra* notes 159–162 and accompanying text.

99. *Fircrest*, 158 Wash. 2d at 391, 143 P.3d at 780.

100. *Id.* at 390–91, 143 P.3d at 779–80.

101. *Id.* at 392, n.3, 143 P.3d at 780, n.3.

102. *Id.* at 393, 143 P.3d at 781 (citing 1961 Wash. Laws ch. 12).

103. *Id.* at 393, 143 P.3d at 781.

According to the plurality, SHB 3055 met the second prong because provisions relating to blood and breath tests fit within the 1961 title “vehicles.”¹⁰⁴ In other words, the plurality concluded that by declaring an intent to amend a prior act, the reference to the code number of a statutory section in the ministerial portion of a bill title did indeed declare a subject. For these reasons, the plurality upheld SHB 3055 against both the subject-in-title challenge and the single-subject challenge in the same sentence.¹⁰⁵

The *Fircrest* plurality was mistaken in concluding both that *St. Paul* reflected the framers’ view at statehood, and that the framers’ view permitted reference to a section number to state a subject. First, contrary to the statement in the plurality opinion, *St. Paul* did not rely on a statehood-era source: *St. Paul* did not cite a “1908 treatise.”¹⁰⁶ *St. Paul* cited “SUTHERLAND, STATUTORY CONSTRUCTION (3rd Ed.) § 1908,”¹⁰⁷ without stating a year of publication for the 1943 third edition that it quoted. In fact, an edition of Sutherland more contemporaneous with statehood supports the opposite conclusion:

The constitutional requirement . . . is satisfied generally if the amendatory or supplemental act identifies the original act by its title, and declares the *purpose* to amend or supplement it *It is not enough to refer to the original act merely by the number of the chapter of the published laws which includes it. The true and actual subject or object must be expressed in the title and not by way of reference to something else to show it.*¹⁰⁸

Further, the plurality’s claim that *St. Paul* reflected the prevailing view at statehood is undercut by *Harland v. Territory*, one of Washington’s earliest title-subject cases, where the court held that the “clear weight of authority” was against the position “that a reference to a section in the title of an amendatory act, without more, is in any case sufficient” to satisfy the clear-title requirement.¹⁰⁹ Soon after statehood the

104. *Id.*

105. *Id.* In addition, the plurality rejected Mr. Jensen’s separation of powers and due process arguments. *Id.* at 398–400, 143 P.3d at 783–84.

106. *Fircrest*, 158 Wash. 2d at 392, n.3, 143 P.3d at 780, n.3.

107. 40 Wash. 2d at 355, 243 P.2d at 478–79 (emphasis added).

108. J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 101 (1891) (emphasis added). *But see* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 137 (J. Lewis, ed., 2d ed. 1904) (title of amendatory act need not specify or indicate the nature of the amendment).

109. 3 Wash. Terr. 131, 151, 13 P. 453, 461 (1887). At that time, the Organic Act required that “every law shall embrace one subject, and that shall be expressed in the title.” U.S. Stats. 32d Cong. Sess. II, ch. 90 § 6 (1853). *Harland* went on to add that

[t]he expression of a purpose to amend a particular section of the Code gives it to be understood that the law is to be changed; but what the law that is to be changed, and in what respect it is to be changed, is a matter left entirely in the dark.

court reaffirmed *Harland*, stating “that a mere reference to a section in the title of an act does not state a subject. . . . [T]he title of an amending act must contain some words which indicate the *theme or proposition* of which the act sought to be amended treats.”¹¹⁰ In other words, notwithstanding *St. Paul* and its “meager offspring,” Article II, section 19 requires a substantive subject matter statement; the ministerial title’s recitation of sections amended by the bill does not declare such a constitutionally sufficient “theme” or “proposition.”¹¹¹

*B. Concurrence’s and Dissent’s Article II, Section 19 Analysis:
Reject St. Paul and “Original Acts”*

Three justices signed a concurring opinion and two a dissent, both of which opinions would have overruled *St. Paul*.¹¹² Although Justice Owens’ concurrence would have upheld SHB 3055 both on single-subject and subject-in-title grounds,¹¹³ Justice Sanders’ dissent would have rejected SHB 3055 as failing each of these tests.¹¹⁴ Both opinions agreed that *St. Paul* is contrary to the constitution’s plain language: “Clearly, the plain text of our Constitution does not differentiate between ‘original’ and ‘amendatory’ bills. There is no principled reason, and the [plurality] offers none, to forego Article II, section 19 analysis simply because one bill purports to amend another.”¹¹⁵

Justice Owens’ Article II, section 19 analysis would have overruled *St. Paul* for a number of reasons. First, the 1952 *St. Paul* decision was inconsistent with the text of Article II, section 19: “By its plain language, Article II, section 19 requires that *any* bill, whether original or amenda-

3 Wash. Terr. at 146.

110. *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 325–26, 68 P. 957, 960–61 (1902) (emphasis supplied), cited in *Fircrest*, 158 Wash. 2d at 404, 143 P.3d at 786 (Owens, J., concurring); *Fray v. Spokane County*, 134 Wash. 2d 637, 654–55, 952 P.2d 601, 609–10 (“mere reference to a section in the title of an act does not state a subject”).

111. *Seattle Elec. Co.*, 28 Wash. at 325–26, 68 P. at 960; see *Patrice v. Murphy*, 136 Wash. 2d 845, 853–55, 966 P.2d 1271, 1274–75 (“bare numerical reference” does not alert readers to content); *Fray*, 134 Wash. 2d at 654–55, 952 P.2d at 609–10 (1998) (in act titled “technical corrections to ch. 35, laws of 1991,” reference to section number in title does not state a subject); Cf. *Bennett v. State*, 117 Wash. App. 483, 488, 70 P.3d 147, 150 (2003) (distinguishing *Fray*; title “implementing the federal personal responsibility and work opportunity reconciliation act of 1996” was not a mere reference to a numbered code section, but rather indicated its purpose of implementing a federal law).

112. *Fircrest*, 158 Wash. 2d at 409, 143 P.3d at 787 (Owens, J., concurring); *id.* at 412 n.1, 143 P.3d at 790 n.1 (Sanders, J., dissenting). In addition, both of these opinions objected to the plurality’s single-subject ruling. 158 Wash. 2d at 401, 406–07, 143 P.3d at 785, 788 (Owens, J., concurring); 158 Wash. 2d at 411–13, n.1, 143 P.3d at 790–91, n.1 (Sanders, J., dissenting).

113. *Id.* at 409, 143 P.3d at 789 (Owens, J., concurring).

114. *Id.* at 410–11, 143 P.3d at 790 (Sanders, J., dissenting).

115. *Id.* at 412 n.1, 143 P.3d at 790 n.1 (Sanders, J., dissenting); *id.* at 403, 143 P.3d at 786 (Owens, J., concurring) (citing dissent).

tory, must embrace a single subject that is expressed in *that bill's* title."¹¹⁶ For this reason, *St. Paul* was in conflict with the framers' views at statehood and incorrect when decided.¹¹⁷ Further, *St. Paul* conflicted with both prior and subsequent interpretations of Article II, section 19.¹¹⁸ After reviewing *St. Paul's* "meager offspring," the concurring justices pointed out that *St. Paul* did not adequately explain how its own rule was to be applied, as seen in the conflation of the single-subject and subject-in-title tests in both the *St. Paul* progeny and the *Fircrest* plurality.¹¹⁹

Notwithstanding the concurrence's dispute with the plurality on *St. Paul*, the concurring justices agreed with the outcome of the title/subject challenge. Justice Owens reasoned that the title "AN ACT Relating to DUI tests" was general: "Although 'DUI' does refer to a specific statute, the average citizen would interpret the acronym more broadly as a reference to alcohol-related driving offenses."¹²⁰ For this reason, the title encompassed and gave notice that the bill addressed "admissibility of tests administered pursuant to alcohol-related driving offenses." Likewise, because the component parts of SHB 3055 were related to the general title and to each other though their direction toward uniform standards for BAC tests, the bill met the single-subject test according to the concurrence.¹²¹

Writing for the dissent, Justice Sanders would have rejected SHB 3055 in its entirety under Article II, section 19.¹²² Although the dissent would have overruled *St. Paul* as inconsistent with both the text of Article II, section 19 and subsequent precedent,¹²³ the dissent's subject-

116. *Id.* at 403, 143 P.3d at 786 (Owens, J., concurring) (emphasis in original).

117. *Id.* at 403–05, 407–08, 143 P.3d at 786–87 (Owens, J., concurring).

118. *Id.* at 403–05, 407–08, 143 P.3d at 786–87 (Owens, J., concurring) (citing *Price v. Evergreen Cemetery Co.*, 57 Wash. 2d 352, 359, 357 P.2d 702, 705–06 (1960) (Finley, J., dissenting) (criticizing majority for failure to follow *St. Paul* rule)).

119. *Id.* at 406–07, 143 P.3d at 787–88 (Owens, J., concurring). The concurrence explained that the subject of a bill should be measured by its content—the title must express the subject, but the title is not its test. *Id.* at 408 n.4, 143 P.3d at 789 n.4 (Owens, J., concurring).

120. Although Justice Owens did not directly cite *Grange v. Locke* for this proposition, her conclusion is bolstered by that and similar cases in which the court interpreted titles under ordinary understanding of the words and not as terms of art. *Grange v. Locke*, 153 Wash. 2d 474, 496–97, 105 P.3d 9, 20–21 (2005) ("qualifying primary" interpreted generically); *Amalgamated Transit Union v. State*, 142 Wash. 2d 183, 217, 11 P.3d 762, 786 ("tax" carried its ordinary meaning, not the initiative's broad definition); *Petroleum Lease Props. Inc. v. Huse*, 195 Wash. 254, 257–58, 80 P.2d 774, 775–76 (1938) (no indication that term "securities" in title included oil and gas leases).

121. *Fircrest*, 158 Wash. 2d at 408–09, 143 P.3d at 789 (Owens, J., concurring). The concurrence accepted the plurality's reasoning on the separation of powers and due process claims. *Id.* at 400, 143 P.3d at 784.

122. *Id.* at 410, 143 P.3d at 789 (Sanders, J., dissenting). The dissent also would have invalidated SHB 3055 as a legislative invasion of judicial powers. *Id.* at 417–21, 143 P.3d at 793–95 (Sanders, J., dissenting).

123. *Id.* at 411–13, n.1, 143 P.3d at 790–91, n.1 (Sanders, J., dissenting).

in-title analysis distinguished *St. Paul* and concluded that *St. Paul* did not prohibit inquiry into the constitutionality of SHB 3055's title.¹²⁴ This was because the title of SHB 3055 did not actually meet *St. Paul*'s requirement that the bill "identify and purport to amend a prior act,"¹²⁵ as SHB 3055's title "clearly" did not identify such an intent: "The majority attempts to shoehorn SHB 3055 into the *St. Paul* framework by including the recitation of the statutory provisions affected as part of its title, but doing so runs afoul of the rule that constitutional inquiries focus solely on the *narrative description* of the act."¹²⁶ Since the *St. Paul* analysis did not apply, the dissent went on to conclude that the narrative statement "DUI tests" did not provide "an indication of the scope and purpose of the law," because it failed to mention search warrants, breath test equipment, implied consent warnings, or license sanctions.¹²⁷ For this reason, the dissent would have found the bill in violation of Article II, section 19's subject-in-title rule.¹²⁸

As with the concurrence, the dissent found no basis in the text of the constitution for the plurality's use of *St. Paul* in a single-subject challenge, noting that

the Washington State Constitution does not provide, and we have never held, a bill which impermissibly embraces more than one subject is nonetheless constitutional because its title, or the title of the bill it purports to amend, somehow rectifies the violation.¹²⁹

Moreover, notwithstanding the holdings of its progeny, *St. Paul* itself did not purport to apply to a single-subject analysis.¹³⁰ Using a rational unity analysis, the dissent would have invalidated the bill under the single-subject rule.¹³¹

IV. A LEGISLATIVE DRAFTER'S PERSPECTIVE ON *FIRCREST*

On first reading, legislative drafters might be tempted to minimize the significance of *Fircrest*, given that a *de facto* majority of five justices voted against resurrecting *St. Paul*. Yet there is good reason for concern on the part of the legislature if the courts and future litigants fail to realize that the plurality's reasoning is flawed both in its understanding of

124. *Id.* at 417, 143 P.3d at 793 (Sanders, J., dissenting).

125. *Id.* at 416–17, 143 P.3d at 793 (Sanders, J., dissenting) (citing *St. Paul*, 40 Wash. 2d 347, 355, 243 P.2d 474, 479 (1952)).

126. *Id.* at 417, 143 P.3d at 793 (Sanders, J., dissenting) (emphasis applied).

127. *Id.* at 416–17, 143 P.3d at 793 (Sanders, J., dissenting).

128. *Id.*

129. *Id.* at 412, 143 P.3d at 790 (Sanders, J., dissenting).

130. *Id.* at 413, 143 P.3d at 791 (Sanders, J., dissenting).

131. 158 Wash. 2d at 411–12, 143 P.3d at 790 (Sanders, J., dissenting).

the legislative and judicial precedent and the purposes of the subject-in-title rule and in its use of statutory evolution.

This Article brings a specifically legislative perspective to the discussion. In a long line of cases, the court declares that it—not the legislature, nor the governor—is the final arbiter of constitutional language and interpretation, even when its view may be contrary to the view of the constitution taken by the legislative or executive branches.¹³² Yet at the same time the constitution assigns to the legislative branch the task of fulfilling the subject-in-title requirement; the legislature *must* write bill titles, and *only* the legislature may do so.¹³³ *Fircrest* conflicts not only with prior case law¹³⁴ and the purposes of the subject-in-title rule, but also with legislative implementation of Article II, section 19. This Article argues that this conflict arises not from disagreements naturally arising among the branches regarding constitutional roles and interpretation¹³⁵ but instead through judicial misunderstanding of statutory evolution and the legislative process.

A. Legislative Use of Bill Titles Promotes the Constitution's Purposes

In fulfilling its own constitutional responsibilities, the legislature at all stages of the law-making process uses the subject matter statement in the bill before the body as the relevant title for legal, parliamentary, and policy analysis. This practice promotes the constitutional purpose of informing legislators and the public of the subject placed before them by the bill in question.¹³⁶

First, in legislative practice, the substantive title of the bill before the body, not of a previous act, is the operative title. Unlike the plurality opinion in *Fircrest*, the state constitution and cases interpreting it do not distinguish between “original” and “amendatory” titles or acts. Neither do legislative rules and practices.¹³⁷ Notwithstanding some parliamen-

132. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 503–07, 585 P.2d 71, 86–89 (1978) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)).

133. See *supra* note 27 (ballot measure titles are exceptions).

134. See *supra* note 26 (judicial abandonment of *St. Paul*); *supra* notes 39–42 and accompanying text (ministerial portion of title is not constitutionally substantive); *supra* notes 109–111 and accompanying text (mere reference to section number in ministerial portion does not state a subject).

135. *E.g.*, *Legislature v. Lowry*, 131 Wash. 2d 309, 320, 931 P.2d 885, 891 (1997) (court is reluctant to be drawn into legislative–executive disputes about veto power, but will not “abandon our constitutional responsibility to referee disputes between the branches.”); *In re Juvenile Dir.*, 87 Wash. 2d 232, 241, 552 P.2d 163, 168–69 (1976) (court claims power to order appropriations if legislative branch fails to provide enough for its support).

136. See *infra* notes 163–68; *supra* notes 12, 14 (constitutional purposes).

137. Each body adopts rules that govern its own practices. WASH. CONST. art. II, § 9; House Resolution 4607 (Wash. 2007) (House rules); Engrossed Senate Resolution 8601 (Wash. 2007)

tary differences¹³⁸ between the House and Senate, both legislative bodies focus on the subject matter statement in the title of the bill before the body, not the title of any previous legislation.

Nothing in legislative rules or practices recognizes the concept of an “amendatory title.”¹³⁹ The legislature distinguishes between amendatory bills and bills consisting of new sections only as needed to comply with Article II, section 37’s requirement that amended sections be set forth in full.¹⁴⁰ Amendatory sections must refer to the affected code or session law section number and set forth amendatory changes in a specific format, but the rules do not establish any separate requirements for titles of amendatory acts.¹⁴¹ The legislature makes no further distinctions between bills that create new sections and bills that make the first, the second, or the twentieth revision to an existing section.

In addition to serving constitutional purposes, bill titles reflect legislators’ policy and parliamentary objectives and may be drawn accordingly.¹⁴² Legislators may draft a narrow title to accomplish a targeted purpose¹⁴³ or to fend off unfriendly amendments,¹⁴⁴ or they may draft a

(Senate rules). *See generally* Fraser, *supra* note 6, at 459–60. In addition, the House and the Senate together adopt joint rules. House Concurrent Resolution 8400 (Wash. 2007) (joint rules).

138. *See supra* notes 35–37 and accompanying text (House and Senate rules and practices on title amendments).

139. 158 Wash. 2d at 391, 143 P.3d at 780 (“amendatory title”).

140. WASH. STATE SENATE RULE 26 (2007) (setting forth text of art. II, § 37); WASH. STATE HOUSE RULE 11(F) (“No act shall ever be revised or amended without being set forth at full length.”) (2007).

A further parliamentary distinction regarding amendatory sections may be required, if applicable, to determine whether a bill is an amendment to a ballot measure so as to require a two-thirds vote under article II, section 1’s restrictions. *See* Senate Journal at 377 (Wash. 2005) (parliamentary ruling that section revised by Initiative 872 requires two-thirds vote to amend); Senate Journal at 1550 (Wash. 2003) (parliamentary ruling that incidental amendment to section amended by initiative did not require two-thirds vote). *See generally* Fraser, *supra* note 6, at 456, 471–74.

141. WASH. STATE LEGIS. JOINT RULES 12–13 (2007) (requiring section number and specific formatting for amendatory changes); WASH. STATE SENATE RULE 26 (2007); WASH. STATE HOUSE RULE 11(F) (2007). *See supra* note 70 and accompanying text (regarding “jingles” for amendatory sections).

142. Often there are many options available for titles to a particular measure, and the President is mindful that there are legal, policy, and political reasons for preferring one set of language to another. The President will give great deference to the title chosen by a member or the body for a bill. Senate Journal 455 (Wash. 2006) (ruling on subject-in-title challenge under Senate Rule 25) (“[T]he legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division The generality of a title is no objection to it, so long as it is not made a cover to legislation incongruous in itself and which by no fair intendment can be considered as having a necessary or proper connection.”). *Marston v. Humes*, 3 Wash. 267, 276, 28 P. 520, 523 (1891) (citations and internal quotations omitted) (citing THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 144 (5th ed. 1883)).

143. Examples of extraordinarily narrow titles are found in 2006 Wash. Sess. Laws ch. 122 (26-line title) and in 2007 Wash. Sess. Laws ch. 483 (ESSB 6157) (60-line title).

broad title to address diverse but connected and complementary issues in omnibus legislation.¹⁴⁵ Regardless of the title's scope, the legislature's implementation of Article II, section 19 ensures that the title contains a substantive statement of the bill's subject. If the bill as enacted satisfies constitutional requirements, the enrolled bill doctrine prevents the court from second-guessing the legislature's choice of title; it is not the role of the court to re-draft a title by enlarging what the legislature has seen fit to limit¹⁴⁶ nor by narrowing a title drafted broadly by the legislature.¹⁴⁷ For this reason, *Fircrest* incorrectly considered the title of legislation enacted more than forty years previously rather than the title of SHB 3055 as enacted by the fifty-eighth legislature.

Second, in legislative practice the portions of a bill title beyond the statement of subject matter are "ministerial" only and never state a substantive subject. The legislature is free to include these "housekeeping"

144. See *supra* notes 28–31 and accompanying text. "Restrictive titles are generally avoided, unless a sponsor's strategy is to avoid amendments." BILL DRAFTING GUIDE, *supra* note 17, at 8. Scope and object rules limit the amendments that legislators may offer to a bill. WASH. STATE SENATE RULE 66 and WASH. STATE HOUSE RULE 11(E). Such rules prohibit amendments that "change the scope and object of the bill." These rules echo article II, section 38 of the state constitution, which states that "[n]o amendment shall be allowed which shall change the scope and object of the bill." *Id.* Although this requirement is an independent constitutional provision, the scope and object requirement also implements both the single-subject rule (by preventing addition of subjects) and the subject-in-title rule (by requiring amendments to be germane). See *Fed'n of State Employees v. State*, 127 Wash. 2d 544, 570 n.5, 901 P.2d 1028, 1041 (Talmadge, J., concurring and dissenting) (describing prevention of logrolling); see also SEEBERGER, *supra* note 42, at 20 (title/subject and scope and object rules overlap, but "the scope and object provision generally applies more to the amendatory process").

The two legislative bodies appear to use bill titles differently in a scope and object analysis, presumably because the Senate may amend the substance of a title and the House may not. See *supra* notes 35–38 and accompanying text (rules and practices on title amendments). Compare Senate Journal 529 (Wash. 1999) (body of act, rather than title, determines scope and object) and Senate Journal 703 (Wash. 1997) (if amendments are within scope and object of bill, title may be amended) with House Journal 357–58 (Wash. 1995) (title considered in scope and object analysis). The enrolled bill doctrine may bar judicial enforcement of article II, section 38. *Power, Inc., v. Huntley*, 39 Wash. 2d 191, 204, 235 P.2d 173, 180–81 (1951); see *Fraser*, *supra* note 6, at 475 & n.253 (title considered in scope and object analysis; relationship with enrolled bill doctrine).

145. *E.g.*, *In re Boot*, 130 Wash. 2d 555, 566, 925 P.2d 964, 966 (1996) (upholding title of omnibus act relating to "violence prevention"); *State v. Jenkins*, 68 Wash. App. 897, 900–01, 847 P.2d 488, 489–90 (1993), *review denied*, 121 Wash. 2d 1032 (upholding title of omnibus act relating to "alcohol and controlled substances abuse").

146. In making a parliamentary ruling on the sufficiency of a title, the "challenge for the [presiding officer] is to adequately recognize the title protection afforded by Rule 25 [Senate title/subject rule] while refraining from simply substituting his judgment for that of the drafters." Senate Journal 455 (Wash. 2006); see *Gruen v. Tax Comm'n*, 35 Wash. 2d 1, 23, 211 P.2d 651, 644 (1949) (legislature has ability to limit breadth of title); cf. *Grange v. Locke*, 153 Wash. 2d 475, 491, 496–97 105 P.3d 9, 18, 20–21 (2005) (court interprets words in title per ordinary definition, not as terms of art).

147. Cf. *Batey v. Employment Sec. Div.*, 137 Wash. App. 506, 513, 154 P.3d 266, 270 *amended, reconsideration granted petition for review filed*, June 15, 2007, (phrase in title "to enhance benefit and tax equity" deemed restrictive).

lists, to revise them, or omit them entirely, because these technical declarations appear as a legislative custom, not as a constitutional mandate.¹⁴⁸ The relevant title for a constitutional inquiry is the subject matter statement before the first semicolon, and other material in the title is “surplusage” that is not constitutionally required.¹⁴⁹ Supporting the legislative practice of treating this material as ministerial only is a substantial body of case law declaring, contrary to *Fircrest*, that mere incidental reference to a section number in a bill title can never, in itself, state a subject.¹⁵⁰ The *Fircrest* plurality reasoned that the references to the code numbers of individual sections in the ministerial portion of the title declared a purpose to amend Title 46,¹⁵¹ but the *Fircrest* plurality is incorrect in assuming that reference to a section number in the technical part of a bill title in itself may state a substantive subject.

In addition to conflicting with the purposes of the title-subject rule and legislative practices, *Fircrest* and *St. Paul* will frustrate legal analysis of bill titles during the legislative process. The legislature must interpret and apply the subject-in-title requirement in conducting its ordinary constitutional duties. This requirement influences the drafting of every bill, along with every proposed amendment and substitute bill, and many such proposals require specific legal or parliamentary analysis under its

148. BILL DRAFTING GUIDE, *supra* note 13, at 8; *see supra* notes 39–42 and accompanying text (ministerial title drafted through legislative custom, not constitutional requirement).

149. *See State v. Thomas*, 103 Wash. App. 800, 808–09, 14 P.3d 854, 859–60 (2000) (title is “narrative description” in phrase following “AN ACT Relating to” and preceding the first semicolon, not “ministerial” recitation of bill sections, which is “surplusage”); *Patrice v. Murphy*, 136 Wash. 2d 845, 853–55, 966 P.2d 1271, 1274–75 (1998) (analyzing phrase before first semicolon); *Flanders v. Morris*, 88 Wash. 2d 183, 188, 558 P.2d 769, 773 (1977) (title need not be an “index”); *Wash. Fed’n of State Employees v. State*, 127 Wash. 2d 544, 557, 901 P.2d 1028, 1035 (1995) (title need not specifically express that repealers are included); *Maxwell v. Lancaster*, 81 Wash. 602, 607, 143 P. 157, 158 (1914) (under a title relating to a general subject, the legislature may repeal existing laws as well as create new ones); *Bennett v. State*, 117 Wash. 2d 483, 488–90, 70 P.3d 147, 150–51 (2003) (analyzing phrase before first semicolon); *see also* BILL DRAFTING GUIDE, *supra* note 13, at 8 (citing cases).

150. *Patrice v. Murphy*, 136 Wash. 2d 845, 853–55, 966 P.2d 1271, 1274–75 (1998) (“bare numerical reference” does not alert readers to content); *Fray v. Spokane County*, 134 Wash. 2d 637, 654–55, 952 P.2d 601, 609–10 (1998) (in AART “technical corrections to ch. 35, laws of 1991,” reference to section number in title does not state a subject); *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 325–26, 68 P. 957, 960–61 (1902) (mere reference to a section number does not state a subject); *Harland v. Territory*, 3 Wash. Terr. 131, 146, 13 P. 453 (1887) (“The expression of a purpose to amend a particular section of the Code gives it to be understood that the law is to be changed; but what the law that is to be changed, and in what respect it is to be changed, is a matter left entirely in the dark”); *cf. Bennett v. State*, 117 Wash. App. 483, 488, 70 P.3d 147, 150 (2003) (distinguishing *Fray*; title “implementing the federal personal responsibility and work opportunity reconciliation act of 1996” was not a mere reference to a numbered code section, but rather indicated its purpose of implementing a federal law).

151. *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 393, 143 P.3d 776, 781 (2006).

terms.¹⁵² The House and the Senate must constantly balance the need to comply with constitutional drafting constraints, as interpreted in judicial and parliamentary rulings, with legislators' policy and political objectives in offering legislation.¹⁵³ As previously noted, the courts are facing increasing numbers of challenges under the title/subject rule of Article II, section 19, triggering more analyses at the judicial level.¹⁵⁴ Yet for every such challenge that reaches a courtroom, legislators and legislative attorneys will have engaged in hundreds of formal and informal subject-in-title analyses while the bills are still at the Capitol.¹⁵⁵ For example, if a bill is entitled "AN ACT Relating to liquor sales" and a legislator would like to offer an amendment relating to salaries of state liquor store employees, the presiding officer or committee chair may be asked for a parliamentary ruling on whether it is in order for the body or the committee to consider the amendment. The amendment's sponsor may ask a staff attorney for advice on the likely outcome of such a parliamentary inquiry or on whether the bill if amended would be upheld in court, and an opponent may ask for an opinion on whether those particular topics may be included in a single bill regardless of the bill's title. The title/subject rule informs every such analysis and decision.

In conducting these analyses, legislators, parliamentarians, and legislative drafters rely on the subject matter statement in the title of the individual bill in question. During a litigated dispute, the parties and the court may be able to research exhaustively the history of a specific section, but if legislators were required to investigate the titles of prior acts to determine whether an amendment or substitute bill introduced a subject beyond the bill's title, floor action would grind to a halt as staff attorneys reviewed the historical antecedents of each amendatory section in the bill, any one of which could have dozens of legislative "ancestors."¹⁵⁶ Instead, the legislature uses the much simpler approach of relying on the subject matter statement in the title of the bill itself. This straightforward analysis is necessitated by the myriad demands of the legislative session. For example, in the 2005 and 2006 sessions, the 59th Legislature drafted 12,728 bills, memorials, and resolutions, considered a total of 4671 measures and thousands of amendments thereto, and en-

152. See *infra* note 192 and accompanying text (number of bill drafts); Fraser, *supra* note 6, at 459 & n.94 (relationship between parliamentary analysis and subsequent judicial review).

153. See *supra* note 146 (presiding officer's goal in parliamentary rulings); notes 29, 30, 141–143 and accompanying text. (objectives).

154. See *supra* note 6 and accompanying text.

155. This statement is based on this author's experience.

156. See *supra* note 56 and *infra* notes 191–93 and accompanying text (sections may be amended multiple times, under multiple titles, for multiple purposes).

acted 891 acts in a total of 164 legislative days.¹⁵⁷ As *Harland* asked before statehood, if legislators are too busy to read the full text of every law they must vote upon, is it not even more futile to expect them to read previous legislation in order to determine whether to vote on the legislation currently before them?¹⁵⁸ Under *Fircrest*, it would be nigh impossible for a legislator to determine a bill's true title for purposes of the subject-in-title rule in ordinary legislative work.

The *Fircrest* plurality also misunderstands the legislative process in its puzzling statement that when amending "an original act, it is unnecessary to examine the amendatory title for strict compliance with Article II, section 19, *because the underlying act has already passed such scrutiny.*"¹⁵⁹ While all legislation is entitled to a presumption of constitutionality,¹⁶⁰ and in the Senate a bill that allegedly violates the constitutional title/subject rule is subject to parliamentary challenge,¹⁶¹ the *absence* of a parliamentary or legal challenge is not constitutional "scrutiny."¹⁶² It is emphatically not the case that each "original act" will have survived judicial review before that act's "progeny" are subject to challenge. Again, the demands of the legislative session mean that legislative analysis of a title/subject question must not require legislators and their legal staff to research the entire legislative history of every section of every bill in order to determine whether prior acts were or were not the focus of a judicial title/subject ruling.

157. Information provided by the Office of the Code Reviser.

158. *Harland v. Territory*, 3 Wash. Terr. 131, 147, 13 P. 453, 459 (1887).

If legislators are too busy or too negligent to have read in full or to read laws on which they must vote, how vain to expect them to read laws which the laws they are to vote are to affect, with the sole purpose of determining therefrom whether it is worthwhile to read the laws on which they are to vote?

Id. at 147, 13 P. at 459; see Senate Journal 455 (Wash. 2006) (sheer number of bills causes readers to rely on bill titles); Philip A. Talmadge, *A New Approach to Statutory Construction in Washington*, 25 SEATTLE U. L. REV. 179, 186–87 n.37 (discussing "Busy Congress" model and need for legislators to rely on the expertise of colleagues: "It is a common and acceptable practice to vote based on the advice of others rather than personal knowledge about the contents of bills Voting based on advice rather than personal knowledge is a common and perfectly appropriate way of managing massive decision making responsibilities.").

159. *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 391, 143 P.3d 776, 780 (emphasis added). In *Belancsik v. Overlake Mem'l Hosp.*, 80 Wash. 2d 111, 114–15, 492 P.2d 219, 220–21 (1971), one of the *St. Paul* progeny, the "original act" had indeed been judicially upheld against an article II, section 19 challenge. *In re Estate of Wiltermood*, 78 Wash. 2d 238, 472 P.2d 536 (1970).

160. *E.g.*, *Island County v. State*, 135 Wash. 2d 141, 146–47, 955 P.2d 377, 379–80 (1998).

161. WASH. STATE SENATE RULE 25, see *supra* note 36 (Senate parliamentary rulings).

162. Even if a bill's title had been challenged on title/subject grounds and upheld in a parliamentary ruling, that ruling does not prevent a court from reaching a different conclusion in its constitutional analysis. Compare Senate Journal, 32d Leg. Ex. Session 68 (Wash. 1951) (Senate president rejected a bill in a parliamentary ruling under the Senate's title subject rule; this ruling was overridden by the Senate and the bill passed), *with* *Power, Inc. v. Huntley*, 39 Wash. 2d 191, 198–99, 235 P.2d 173, 178 (1951) (invalidating same legislation on article II, section 19 grounds).

*B. Fircrest and St. Paul Thwart the Legislative Purposes
of the Subject-in-Title Rule*

In addition to frustrating legislative implementation of the subject-in-title rule, the “original act” analysis used by *Fircrest* and *St. Paul* runs contrary to the rule’s purposes of protecting legislators against undisclosed subjects and informing legislators and the public of the legislation’s subject matter.¹⁶³

1. *Fircrest* Conflicts with the Purposes
of the Subject-in-Title Rule

In a legislative setting, the importance of a title in providing effective notice cannot be underestimated. As *Harland* noted just before statehood, busy legislators rely on bill titles for notice of a bill’s subject matter:

In theory, legislators inform themselves carefully and laboriously of the effect of the laws on which they vote. In practice, they do not. Laws are often passed by their titles alone. They are very rarely referred to in publications, official or otherwise, prior to their passage, except by their titles. Knowing this fact and accepting it, and with the design of making the best of it, our constitution makers gave their mandate, intending to obviate as far as possible the evils resulting from this lax way of doing business.¹⁶⁴

Little has changed. As previously noted, each legislature considers thousands of bills and amendments.¹⁶⁵ This sheer volume of legislative work and the constitutionally compressed¹⁶⁶ time frame in which it must be accomplished demand that legislators be able to rely on the title of a bill itself for notice of its subject matter.¹⁶⁷

163. *E.g.*, *State ex rel. Toll Bridge Auth. v. Yelle*, 32 Wash. 2d 13, 24, 200 P.2d 467, 472–73 (1948); see *Harland v. Territory*, 3 Wash. Terr. 131, 145, 13 P. 453, 458 (1887) (citing *COOLEY*, *supra* note 12).

164. *Harland*, 3 Wash. Terr. at 147, 13 P. at 459.

165. See *infra* note 157 and accompanying text.

166. Regular sessions are limited to 105 days in odd-numbered years and 60 days in even-numbered years. WASH. CONST. art. II, § 12.

167. In *Grange v. Locke*, the governor argued that the purposes of the subject-in-title requirement apply only during the actual legislative process to provide notice to legislators and members of the public of “what is contained in *proposed* new laws.” Brief of Respondent at 33–34, *Grange v. Locke*, 153 Wash. 2d 474, 105 P.3d 9 (2005) (emphasis in original). Hence, such purposes are fulfilled once both houses of the legislature have passed the bill, and the act is delivered to the governor for approval or veto. For this reason, argued Governor Locke, the rule cannot be applied to a veto. *Id.* The *Grange* court did not reach the issue. *Id.* at 498–99, 105 P.3d at 22. An older case indicates that the subject-in-title rule does indeed bind the governor in the use of the veto power. *Spokane Grain & Fuel v. Lyttaker*, 59 Wash. 76, 85–86, 109 P. 316, 320 (1910) (“In the exercise of the veto power, the executive can have no greater power than the executive and the legislature combined, yet

According to a parliamentary ruling of the Lieutenant Governor, who serves as the President of the Senate, a bill's title must provide notice of its subject matter:

[T]he purpose of the title requirement [is] to provide some form of notice to the members and the public of the subject matter of each bill. The volume of legislation introduced each Session is significant, and the sheer number of bills makes it challenging for anyone to read each measure in full. The title provides a shorthand method for a reader to quickly discern the issues and law being affected by a bill to determine if the measure concerns policy of interest to the reader. In this way, someone interested in liquor licenses, for example, could be assured that a measure entitled, "AN ACT relating to vehicle licensing subagents" does not modify alcohol statutes. It is important, therefore, that the title be accurate as well as concise. It does not require that the title be perfectly precise, but it should adequately describe the scope and purpose of the law being changed so as to cause a reader following a particular issue to determine if further inquiry into the text of the bill is necessary.¹⁶⁸

Allowing the title of an "original act" to serve as the title of a subsequent "amendatory" act frustrates the constitutional purposes of notice and disclosure. A bill that complies with the rule by disclosing its subject on its face either lets a legislator or citizen know the bill's subject at first glance or informs the reader that further investigation is required.¹⁶⁹ By relying on the title of earlier legislation, the *Fircrest* plurality eliminated the requirement that an amendatory bill's title contain a substantive disclosure of the bill's subject matter. This use of an "original title" would validate hidden subjects and render irrelevant the title of the bill being voted upon.¹⁷⁰

if the Legislature had enacted the law in question, in the form in which it left the executive office, there could be no question as to its invalidity [under the subject-in-title rule]."); see *Fraser*, *supra* note 6, at 459–60.

Washington courts have yet to address whether the governor may use the veto to bring an act into compliance with either the single-subject or subject-in-title, if the act was in violation when it was passed by the legislature. *Cf.* 2007 Wash. Sess. Laws ch. 338 (in veto message, the governor noted that the title did not encompass the vetoed section.); 2007 Wash. Sess. Laws ch. 340 (same).

168. Senate Journal 455 (Wash. 2006) (presiding officer's ruling on subject-in-title challenge under Senate Rule 25).

169. *E.g.*, *Grange v. Locke*, 153 Wash. 2d 475, 498, 105 P.3d 9, 21–22 (2005) ("voter or legislator reading the title . . . for the first time"); *YMCA v. State*, 62 Wash. 2d 504, 506, 383 P.2d 497, 498–99 (1963) ("lead to an inquiry . . . or indicate to an inquiring mind").

170. *See City of Fircrest v. Jensen*, 158 Wash. 2d 384, 405, 143 P.3d 776, 787 (2006) (Owens, J., concurring) (The *Fircrest* plurality reduces descriptive title in an amendatory act to "surplusage."). Further, the plurality's apparent reliance on *St. Paul* to resolve the single-subject challenge could lead drafters to believe a broad title—whether an "original" or "amendatory" title—could cure a single-subject error, when in reality a bill's subject must be judged by whether its sub-

For example, under the plurality's reasoning, the legislature could include in "AN ACT Relating to murder" amendatory sections relating to both murder and theft, but argue that the subject-in-title rule is satisfied because the code sections dealing with theft and murder were "originally" enacted in a 1975 law titled "AN ACT Relating to crimes and criminal procedure."¹⁷¹ Similarly, in the Lieutenant Governor's example of a bill entitled "AN ACT Relating to vehicle licensing subagents," if the bill also contained provisions relating to liquor licenses on the theory that an "original act" contained provisions relating to all types of licensing, then published legislative agendas would not inform a citizen concerned about proximity of taverns to schools that "further investigation" is required.¹⁷² In turn, she would neither be alerted to testify at a legislative hearing nor to lobby committee members or her own district legislators. A legislator who relied on the bill title to vote for the bill would not know that he was potentially affecting the budget for the Liquor Control Board, liquor licensing fees paid by his local businesses, or his neighborhood entrepreneur's ability to open a new restaurant. These results would defeat the constitution's purpose of disclosing a bill's subject matter to legislators and the public.

2. Could *Fircrest* be Used "Offensively" to Invalidate Legislation?

Another question is whether the *Fircrest* reasoning could be used "offensively" in attempts to invalidate legislation. The plurality used an original act's broad title to uphold subsequent legislation with a narrower title. But would the reverse be true? If the sections in SSB 3055 ("AN ACT Relating to admissibility of DUI tests")¹⁷³ were subsequently amended by "AN ACT Relating to motor vehicle offenses," and the latter act addressed not only offenses involving vehicles and intoxicants, but also other vehicular crimes or infractions, could the earlier act's narrower title invalidate the broader contents of the amendatory act? Sections may be repeatedly amended under multiple titles,¹⁷⁴ and if a broad amendatory title happens to follow a narrow amendatory title, the *Fircrest* plu-

parts bear it and each other a "rational unity," not whether the title is drafted so broadly that it encompasses all of them. See *supra* note 119 (title must express subject, but title is not its test).

171. Laws of 1975, 1st Ex. Sess. ch. 260. This outcome also encourages logrolling and violations of the single-subject rule, because undisclosed subjects could well be second subjects.

172. *E.g.*, *Grange v. Locke*, 153 Wash. 2d 475, 498, 105 P.3d 9, 21–22 (2005) ("voter or legislator reading the title . . . for the first time"); *YMCA v. State*, 62 Wash. 2d 504, 506, 383 P.2d 497, 498–99 (1963) ("lead to an inquiry . . . or indicate to an inquiring mind").

173. 2004 Wash. Sess. Laws ch. 68.

174. See *supra* note 56 and *infra* notes 191–94 and accompanying text (regarding subsequent amendatory titles).

rality opinion, along with some of the *St. Paul* progeny, would seem to support this “offensive” use of its holding to invalidate subsequent amendatory legislation.¹⁷⁵

3. *Fircrest* Extends Subject-in-Title Analysis Beyond the Text of the Bill

In addition to conflicting with the purposes of Article II, section 19, the *Fircrest* plurality opinion also invades the legislative process by focusing on history and procedure rather than the ultimately enacted legislation. Judicial use of legislative history in a constitutional analysis under Article II, section 19 flouts both the enrolled bill doctrine and the constitutional purposes of the subject-in-title rule.

From the legislative perspective, the enrolled bill doctrine is a pillar of separation of powers principles, one that supports those principles by preventing judicial incursions into the legislative process.¹⁷⁶ Under this doctrine, an enrolled bill on file in the office of the secretary of state, signed by the officers of both houses as required by Article II, section 32 of the constitution and otherwise fair on its face, is conclusive evidence of the regularity of all proceedings necessary for its enactment in accordance with the constitution’s procedural requirements.¹⁷⁷ Unless an enrolled bill “carries its death warrant in its hand,”¹⁷⁸ an “investigation of the antecedent history of the passage of a bill will not be made except as may be necessary in case of ambiguity in the bill when the legislative intent must be determined.”¹⁷⁹ In other words, the enrolled bill doctrine permits the court to review legislative history, such as floor debate¹⁸⁰ or

175. *Goodnoe Hills Sch. Dist. v. Forry*, 52 Wash. 2d 868, 873–74, 329 P.2d 1083, 1085–86 (1958) (powers granted in the 1955 law could have been granted in the 1953 law); *Keeting v. PUD No. 1*, 49 Wash. 2d 761, 763–64, 306 P.2d 762, 762 (1957) (general title of 1953 law was sufficient to include the annexation feature found in the 1955 law). Even some language in *Harland*, which generally rejects the reasoning used in *Fircrest*, would seem to support this result:

Scattered throughout the reports and text-books are many cases holding that the incorporation in the title of the amendatory or repealing act of the title of the act to be amended or repealed is a sufficient compliance with the constitutional requirement. This is undoubtedly true, and it is true because *the subject of an amendatory act is required in all cases to be germane and congruous to the general object of the original act which it affects*, and to recite the title of the original act in the title of the amendatory act is to express the subject of the amendment in the amendatory act.

Harland, 3 Wash. Terr. at 460 (emphasis added).

176. *Citizens Council v. Bjork*, 84 Wash. 2d 891, 897 n.1, 529 P.2d 1072, 1076 (1975); see *Op. Atty. Gen. No. 10* (1965–66); *Fraser*, *supra* note 6, at 456–58.

177. *Citizens Council*, 84 Wash. 2d at 897 n.1, 529 P.2d at 1076.

178. *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 433, 249 P. 996 (1926).

179. *Citizens Council*, 84 Wash. 2d at 897 n.1, 529 P.2d at 1076.

180. *Fed’n of State Employees v. State*, 98 Wash. 2d 677, 685, 658 P.2d 634, 638 (1983); cf. *CLEAN v. State*, 130 Wash. 2d 782, 810, 928 P.3d 1054, 1067–68 (1996) (using floor debate to uphold declaration in emergency clause).

sequential drafts,¹⁸¹ when the court must discern legislative intent in order to interpret an ambiguous statute,¹⁸² but the court is otherwise prohibited from considering the legislative processes that led to enactment of the law.¹⁸³

Notwithstanding the enrolled bill doctrine, judicial use of legislative history has crept into constitutional subject-in-title analyses.¹⁸⁴ These opinions' recitation of legislative history¹⁸⁵ reveals judicial distrust of legislative procedures and parliamentary maneuvering: "A court's description of the legislative procedure leading to passage of the bill at is-

181. *E.g.*, *Howlett v. Cheetham*, 17 Wash. 626, 632, 50 P.522, 524 (1897); *Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wash. 2d 748, 753, 675 P.2d 593, 596 (1984); *cf.* *Hama Hama v. Shorelines Hearings Bd.*, 85 Wash. 2d 441, 450, 536 P.2d 157, 162-63 (1975) (when sequential drafts should not be used).

182. Where a statute is unambiguous, its meaning must be derived from its text only, and the court need not resort to an investigation of legislative history. *E.g.*, *Marquis v. City of Spokane*, 130 Wash. 2d 97, 107, 922 P.2d 43, 49 (1996). Ambiguity exists if a statute is open to more than one reasonable interpretation. *E.g.*, *Vashon Island Comm. for Self-Government v. Wash. State Boundary Review Bd.*, 127 Wash. 2d 759, 771, 903 P.2d 953 (1995).

183. "The court may resort to [legislative history] to ascertain legislative intent where a statute is ambiguous or its meaning is doubtful or obscure, but we will not go behind an enrolled document to determine the method, the procedure, the means or the manner by which it was passed in both houses of the legislature." *State ex rel. Bugge v. Martin*, 28 Wash. 2d 834, 840-41, 232 P.2d 833, 836-37 (1951).

184. In *Patrice*, the court noted that the material rejected as outside the title resulted from the grafting of a second bill onto court cost legislation as an eleventh-hour amendment. *Patrice v. Murphy*, 136 Wash. 2d 845, 966 P.2d 1271 (1998). Likewise, in *Batey*, the court explained that the provisions outside the title resulted from a striking amendment that stripped all substantive provisions from another bill, even though the title was drafted broadly ("making adjustments in the unemployment insurance system to enhance benefit and tax equity"). *Batey v. Employment Sec. Dept.*, 137 Wash. App. 506, 511-12, 154 P.3d 266, 268-69 (2007), *amended*, 2007 Wash. App. LEXIS 1244, Laws of 2006, ch. 2, *petition for review filed*, June 15, 2007. A striking amendment, as its name indicates, strikes all material from the bill after the title and the enacting clause and replaces it with provisions that are entirely new to the bill. *See* SEEBERGER, *supra* note 42, at 67, 239. Striking amendments are subject to challenge under parliamentary rules pertaining to scope and object, *see supra* note 144, but so long as the text and title of the bill as enacted satisfies the title-subject rule, the procedural use of a striking amendment is irrelevant to the title/subject constitutional analysis. For example, if a bill entitled "AN ACT Relating to liquor" were amended to strike provisions that restricted access to liquor and insert provisions allowing greater access to liquor, no violation of the subject-in-title rule results. Such an amendment might be vulnerable to a parliamentary scope and objection, but not a legal challenge under article II, section 19.

Conversely, in *Thomas* the court relied on the *absence* of legislative history describing additions to a bill to find that those portions of the bill fell outside of its title. *State v. Thomas*, 103 Wash. App. 810, 14 P.3d 854 (2000) (in "AN ACT Relating to insurance fraud," bill reports, committee discussions, and final legislative reports did not discuss the bill's effect on criminal profiteering statutes).

185. *Patrice*, 136 Wash. 2d at 849-51, 855, 966 P.2d, 175-76; *Batey v. State*, 137 Wash. App. 506, 511-13, 154 P.3d 266, 268-69 (2007); *Thomas*, 103 Wash. App. at 806, 810, 14 P.3d at 860.

sue sometimes indicates that the court's willingness to overturn the law is based on the suspicion that the process was tainted."¹⁸⁶

Such judicial speculation has no place in a constitutional analysis. Under the enrolled bill doctrine, the court's sole focus in an Article II, section 19 inquiry must be found within the four corners of the enrolled bill itself. Again, Article II, section 19 requires that "No bill shall embrace more than one subject, and that shall be expressed in its title." The text of this section does not invite the court to speculate on whether a late-breaking amendment added material outside the bill's title, or whether a striking amendment with different content relating to a bill's subject matter belatedly hijacked¹⁸⁷ a conveniently broad bill title. Instead, the court must focus on the text of the constitutional requirement: does the bill contain material not embraced by the title's subject matter statement, regardless of whether the material was added by last-minute amendment or was present from the first draft of the bill? Article II, section 19 places this focus on the bill's text and title, not on the bill's procedural history or legislative antecedents.¹⁸⁸ The enrolled bill doctrine correctly forces the court to scrutinize the final legislative product without speculating on the prior legislation, the politics, or the processes that led to the end result.

In its use of an "original act" in a constitutional analysis, *Fircrest* represents such a judicial breach of the enrolled bill doctrine. The "original act" relied upon by *Fircrest*'s plurality is not within the four corners of SHB 3055.¹⁸⁹ *Fircrest* looked to SHB 3055's legislative ancestors not to determine the meaning of SHB 3055's statutory provisions (a use of legislative history permitted by the enrolled bill doctrine if the statute is

186. Dragich, *supra* note 6, at 108–09. In addition to using legislative history in a subject-in-title analysis, courts have also improperly used a bill's background in constitutional analysis under the single-subject rule. *State Legislature v. State*, 139 Wash. 2d 129, 147, 985 P.2d 353, 363 (using legislative history as a criterion for determining whether budget bill violated single-subject rule by impermissibly including "substantive law"); *Flanders v. Morris*, 88 Wash. 2d 183, 186, 558 P.2d 769, 772 (1977) (same; "Tracing the history of the above quoted provision, we find that it epitomizes the very type of legislation that the two cited constitutional provisions [article II, section 19 and article II, section 37] were designed to protect against"). See also Fraser, *supra* note 6, at 468–69.

187. BILL DRAFTING GUIDE, *supra* note 13, at 50–51; SEEGER, *supra* note 42, at 67, 239 (striking amendments). This practice was formerly known as "scalping" a bill. See *supra* note 144 (parliamentary and constitutional scope and object requirements limit amendments, including striking amendments).

188. In contrast, other Washington constitutional provisions expressly require the legislature and the courts to consider new legislation against the background of prior laws, and scrutiny of this background does not violate the enrolled bill doctrine. Article II, section 37 requires amended sections to be set forth in full, and article II, sections 1 and 41 restrict amendment of ballot measures within two years of their enactment.

189. Again, references to section numbers in the ministerial portion of the bill title do not declare a substantive subject. See *supra* notes 110–111.

ambiguous) but to salvage its constitutionality in a manner not contemplated by the text of the constitutional provision. When considering SHB 3055 as enacted by the 58th Legislature, the court should have analyzed that act individually under the subject-in-title rule, without regard to titles selected by previous legislatures for prior, separate legislation. The *Fircrest* plurality's examination of prior legislative acts diverts judicial attention away from the bill at issue in a manner that conflicts with the text and thwarts the purposes of Article II, section 19.

*C. Identifying the "Original Act" in the Legislative
Family Tree may be Impossible*

In following *St. Paul* and its "meager offspring," the *Fircrest* plurality did not fully understand the difficulty, if not the outright futility, of identifying the "original act" in question. The plurality failed to grasp how statutory evolution through the legislative amendment process makes it difficult to identify an "original act" for a statutory section with any history of amendment. Repeated amendments of the same sections of law, under different titles, for different purposes, make it futile to trace the "title" pedigree of any particular section. In its efforts to uphold SHB 3055 by trying to trace the bill's sections to their "original act," the *Fircrest* plurality instead broadened bill titles—broadened them not only beyond *St. Paul*'s precedent but even further in a manner not adequately understood by the plurality.

1. *Fircrest* Expands *St. Paul*'s "Original Act" Precedent
to Sections with Numerous Statutory "Ancestors"

First, by applying *St. Paul* to statutory sections with lengthy legislative histories, *Fircrest* vastly broadens *St. Paul*. Although *St. Paul* and its progeny employed poor reasoning, the legislative history of the sections at issue in those cases was fairly simple, with the sections' antecedents easily ascertained. The four cases that followed *St. Paul* each involved acts amended in legislative sessions closely following their original enactment, with no intervening amendments, so there was no difficulty identifying the original act; the "original acts" were the direct "parents" of the subsequent amendatory acts.¹⁹⁰

190. In *Belancsik v. Overlake Mem'l Hosp.*, 80 Wash. 2d 111, 114–15, 492 P.2d 219, 221 (1971), plaintiffs challenged a nonclaim statute, arguing that it violated the subject-in-title rule; plaintiffs did not claim a single-subject violation. The challenged section was in Laws of 1967 Extraordinary Session, ch. 106, entitled "probate law and procedure; prescribing changes in probate procedure[.]" In *Belancsik*, the "original act" was the 1965 act that created title 11 and the entire probate code. Laws of 1965, ch. 145. See *supra* notes 68–69 and accompanying text (recodification process). The 1965 act had previously been upheld against a subject-in-title challenge in *In re Estate*

In many other instances, however, a statute may have myriad legislative ancestors, ancestors too numerous or remote to trace up the “family tree” for purposes of identifying an “original act.” The “original title” envisioned in *Fircrest* could, perhaps, be identified if sections of an act were always amended together for the same purpose in subsequent legislation, without intervening amendments, as generally happened in the *St. Paul* “offspring.” But more frequently, sections of an “original act” will subsequently be amended in different combinations, under different titles, and for different purposes. To use a previously cited example, RCW 9.94A.510, establishing felony seriousness levels, has been amended over 70 times since it was enacted in 1983 in “AN ACT Related to the sentencing of criminal offenders.”¹⁹¹ “Amendatory acts” containing this section include scores of both new sections and other amendatory sections.¹⁹² “Amendatory titles” for these bills are both broad and narrow, and include “sentence enhancement for sex crimes

of *Wiltermood*, 78 Wash. 2d 238, 472 P.2d 536 (1970). None of the sections in the “original act” were amended in the 1965 special session that intervened between the “original act” and its 1967 descendant. In *Water Dist. No. 105 v. State*, 79 Wash. 2d 337, 340–41, 485 P.2d 66, 68–69 (1971), plaintiffs claimed both subject-in-title and single-subject violations. In that case, ch. 135, Laws of 1967 Extraordinary Session amended Laws of 1963, ch. 111 under the title “water districts, authorizing the leasing out of real property[.]” None of the sections created in the 1963 act had been amended before the 1967 amendatory act. The court resolved the subject-in-title argument by reasoning that the issue was not “whether the title of the act gives notice of the subject contained therein” but “whether the title identifies the original act, and whether the matter in the body of the amendatory act is germane to the subject expressed in the title of the original act.” *Id.* at 340–41, 485 P.2d at 69. The court resolved the single-subject challenge separately, under the ordinary general title/rational unity analysis. *Id.* at 341–42, 485 P.2d at 69. In *Goodnoe Hills Sch. Dist. v. Forry*, 52 Wash. 2d 868, 873–74, 329 P.2d 1083, 1085–86 (1958), 1955 legislation amended new sections created in 1953 under the title “providing for participation by non-high school districts in providing capital funds for financing the cost of high school facilities.” Again, there were no intervening amendments to these sections. Because the title of the 1953 act was general, it was sufficient to include the annexation feature found in the 1955 law. *Id.* at 874. In *Keeting v. PUD No. 1*, 49 Wash. 2d 761, 763–64, 306 P.2d 762, 762 (1957), plaintiff raised both subject-in-title and single-subject challenges to a 1955 act entitled “state government and providing for the conservation and development of electric power resources.” The 1955 act amended several sections and repealed one section of the 1953 act, and added new sections to the chapter created by the 1953 act. There had been no intervening amendments to the 1953 act. The court ruled that the 1955 law was amendatory of ch. 281, laws of 1953, and cited *St. Paul* and the 1943 3d edition of Sutherland. *Id.* at 763; see *supra* notes 106–107. The court reasoned that the powers granted in the 1955 law could have been granted in the 1953 law, meeting the subject-in-title test under *St. Paul*. *Keeting*, 49 Wash. 2d at 764, 306 P.2d at 762. The court also appeared to use *St. Paul* to resolve the single-subject test: “When the two titles are considered together, the purposes announced by the [single-subject] cases are accomplished.” *Id.* at 765, 306 P.2d at 765.

¹⁹¹ 1983 Wash. Sess. Laws ch. 115 § 3.

¹⁹² See WASH. REV. CODE § 9.94A.510 (listing acts that amended 1983 Wash. Sess. Laws ch. 115 § 3).

against minors,” “increasing penalties for armed crimes,” “violence prevention,” and “criminal offenders.”¹⁹³

The statutes at issue in *Fircrest*, sections 2 and 4 of SHB 3055, likewise had a long history of amendment. Both were enacted as part of Initiative 242 in 1969.¹⁹⁴ Before SHB 3055, Section 2, the implied consent statute, had been amended twenty times under a variety of titles.¹⁹⁵ Section 4, the evidence and BAC testing statute at the heart of Mr. Jensen’s subject-in-title challenge, had been amended seven times under a variety of titles.¹⁹⁶ There is simply no rational way for a court to identify which act in this varied series of amendments is the “original act” against which to weigh the validity of subsequent amendments to any of those sections.

2. *Fircrest*: The “Original Act” is the Act that Created the Entire RCW Title

The *Fircrest* plurality found a way to avoid the challenge of identifying an “original act” for these repeatedly amended sections: it relied upon the act that created the entire RCW Title in which the amended sections were codified.¹⁹⁷ By allowing the bill title of this “founder” legislation to embrace subsequent amendments and additions to a particular title of the RCW, *Fircrest* potentially broadens any bill title vastly beyond the scope contemplated by the legislature and permitted by Article II, section 19.

193. 2004 Wash. Sess. Laws ch. 176; 1995 Wash. Sess. Laws ch. 129 (“Hard Time for Armed Crime initiative to legislature); 1994 Wash. Sess. Laws Sp. Sess., ch. 7 (omnibus act, *see In re Boot*, 130 Wn.3d 553, 566, 925 P.2d 964, 966 (1996)); 1990 Wash. Sess. Laws ch. 3 (omnibus act relating to sex crimes, including civil commitment for sex offenders).

194. 1969 Wash. Sess. Laws ch. 1 § 1, 3.

195. WASH. REV. CODE § 46.20.308 (listing acts that amended 1969 Wash. Sess. Laws ch. 1 § 1).

196. WASH. REV. CODE § 46.61.506 (listing acts that amended 1969 Wash. Sess. Laws ch. 1 § 3). The titles of these acts are as follows: 1969 Wash. Sess. Laws ch. 1 (I-242) (creating WASH. REV. CODE § 46.61.506 as a new section in ch. 46.61), “providing that any person operating a motor vehicle on the public highways shall be deemed to have consented to a breath test (if unconscious a blood test) to determine intoxication, when arrested for any offense, provided the arresting officer has reasonable grounds to believe such operator was driving or in control of a vehicle while intoxicated; directing a six-month revocation of driving privileges for a person refusing such test after having been advised of his rights and consequences of refusal; providing hearing and appeal procedures; and reducing the blood alcohol percentage necessary to raise a presumption of intoxication”; 1975 Wash. Sess. Laws 1st Ex. Sess. ch. 287 § 1, “motor vehicles”; 1979 Wash. Sess. Laws Ex. Sess. ch. 176 § 5, “motor vehicle offenses involving alcohol or drugs”; 1986 Wash. Sess. Laws Ex. Sess. ch. 153 § 4, “alcohol breath testing”; 1987 Wash. Sess. Laws ch. 373 § 4, “blood alcohol content”; 1994 Wash. Sess. Laws ch. 275 § 26, “crimes involving alcohol, drugs, or mental problems”; 1995 Wash. Sess. Laws ch. 332 § 18, “offenses involving alcohol or drugs”; 1998 Wash. Sess. Laws ch. 213 § 6, “blood and breath alcohol standards for intoxication.”

197. *City of Fircrest v. Jensen*, 158 Wash. 2d 384, 393, 143 P.3d 776, 781 (2006).

Fircrest concluded that the “original act” for SHB 3055 was Chapter 12, Laws of 1961.¹⁹⁸ Enacted as one of the many comprehensive recodifications of the 1950s and 1960s,¹⁹⁹ Chapter 12 created the entire modern motor vehicle code, Title 46, by recodifying into that single RCW Title diverse motor vehicle laws with numerous ancestors.²⁰⁰ New Title 46 encompassed all preexisting and new sections of law relating to motor vehicles.²⁰¹ By the time SHB 3055 was enacted in 2004, the 1961 “original act” had been subject to 43 years of legislative natural selection, with the hundreds of sections in this Title individually amended, reenacted, and repealed many times under many titles for many reasons. For *Fircrest* and *St. Paul*’s purposes, the family tree of the “original act” relating to “vehicles” thus embraced hundreds, if not thousands, of Darwinian descendants. Yet *Fircrest* found this astonishingly broad “original act” provided a family name for all of its progeny:

The title of the *original act* reads, “AN ACT Relating to vehicles” The scope of the *original act* includes the creation of Title 46 of the Revised Code of Washington and deals specifically with motor vehicles . . . the title of SHB 3055 adequately announces it is amending the Motor Vehicle Act.²⁰²

Under this analysis, by looking back to the title of the act that created the entire motor vehicle code, an amendatory act “[r]elating to intermediate drivers’ licenses” could also embrace amendments to “admissibility of DUI tests,” so long as the ministerial portions of the bill title indicated amendments to Title 46, because both bills descend from the same great-grandparent “original act” entitled “AN ACT Relating to vehicles.”

By looking back to the title of the “original act” that created an entire title of the RCW, the *Fircrest* plurality judicially broadens the title of *any* bill, no matter how specifically the legislature might have chosen to write the title of a particular piece of legislation. *Fircrest*’s use of the recodification act as the “original act” moves beyond *St. Paul* and that case’s progeny by abandoning the need for any substantive link between the “original act” and the “amendatory act” other than shared codification in the broadest existing statutory classification (i.e., Title 46, Motor Vehicles; e.g., Title 9A, Criminal Code, Title 29A, Elections). Taken to its logical conclusion, *Fircrest* permits a bill that amends a particular section in a RCW Title to encompass any other amendment to any other section in that Title, so long as both sections were part of the original

198. *Id.* at 393, 143 P.3d at 781.

199. See *supra* notes 66–67.

200. 1961 Wash. Sess. Laws ch. 12. See Explanatory Note, 1961 Wash. Sess. Laws ch. 12.

201. *Id.* It contained hundreds of sections.

202. *Fircrest*, 158 Wash. 2d at 393, 143 P.3d at 781 (emphasis added).

recodification act forty to fifty years ago. After *Fircrest*, legislators, litigants, and members of the public may no longer be certain whether a bill's subject truly remains limited to the subject matter statement in the bill title chosen by the legislature.

3. The "Original Act" Wasn't Even a Direct "Ancestor" of SHB 3055

In relying on Chapter 12, Laws of 1961 as "the original act" whose title could be used to embrace subsequent amendments,²⁰³ the *Fircrest* plurality made a further error: None of the three *Fircrest* opinions recognized that Chapter 12 was not the true "original act" for the sections in question. Sections 2 and 4 of SHB 3055 were originally enacted as new sections by Initiative 242 in 1969²⁰⁴ and were merely codified in Title 46, which had been created by the 1961 act. These sections were grafted onto the Title 46 family tree, but were not in the line of descent from the 1961 "original act." The "original act" was neither a "parent" of the 2004 "amendatory act" nor even a more remote ancestor.

By failing to recognize that the sections at issue were not part of the "original act," the plurality applied a Lamarckian²⁰⁵ analysis to legislation, under which an act's progeny may inherit the acquired characteristics of an "ancestor." The "original" 1961 act relating to motor vehicles acquired characteristics in the form of new "original" sections added to Title 46 in a 1969 initiative. These 1969 sections, in turn, produced offspring of their own, in the form of multiple subsequent amendments. Yet according to the plurality, all such progeny were embraced by the title of the original act "Relating to vehicles,"²⁰⁶ the "step-grandparent" not in the direct ancestral line. Mere codification in a single RCW title thus turns that title into an "original act" whose initial bill title becomes a family name that legitimizes all amendments to all "original" sections subsequently codified within it. For purposes of a constitutional subject-in-title analysis the *Fircrest* plurality has reduced the entire state code to

203. *Id.* at 393, 143 P.3d at 781.

204. 1969 Wash. Sess. Laws ch. 1.

205. JEAN-BAPTISTE DE LAMARCK, ZOOLOGICAL PHILOSOPHY: EXPOSITION WITH REGARD TO THE NATURAL HISTORY OF ANIMALS 113 (Hugh Elliot trans., Macmillan, London 1914) (reprinted University of Chicago Press 1984) (1809).

All the acquisitions or losses wrought by nature on individuals, through the influence of the environment in which their race has long been placed, and hence through the influence of the predominant use or permanent disuse of any organ; all these are preserved by reproduction to the new individuals which arise, provided that the acquired modifications are common to both sexes, or at least to the individuals which produce the young.

Id.

206. *Fircrest*, 158 Wash. 2d at 393, 143 P.3d at 781.

a few key acts—genetic “founders”—created during the recodification process forty to fifty years ago.²⁰⁷

V. CONCLUSION

By eliminating the requirement that an amendatory bill’s title contain a substantive statement of the bill’s subject matter, the *Fircrest* plurality opinion conflicts with legislative implementation of the title/subject rule and frustrates the constitutional purposes of notice and disclosure. Further, the plurality’s misplaced reliance on an “original act” and its progeny’s genealogy conflicts with the realities of statutory evolution.

While *Fircrest* may have upheld the legislature’s purpose by affirming the legislation at issue, the plurality’s use of *St. Paul* and the resulting confusion about legislative titles will confound legislators, judges, practitioners, and the public alike. Fortunately, there was not a majority on the court to uphold continued use of the *St. Paul* reasoning. If future litigants raise Article II, section 19 arguments based on the *Fircrest* plurality, courts must recognize why a bill title’s subject matter statement is the constitutional title for both legislative and judicial purposes. *Fircrest* and *St. Paul* are “incorrect and harmful” offshoots that should be pruned from the jurisprudential family tree.

207. See *supra* notes 66–67 (recodification process).