

NOTE

Taxing Judicial Restraint: How Washington's Supreme Court Misinterpreted its Role and the Washington State Constitution

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In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution.¹

I. INTRODUCTION

In the realm of constitutional interpretation, the judicial department reigns supreme.² When a judge wields his or her interpretive power to “say what the law is,”³ nothing constrains the judge from concluding that the text means whatever the judge wants it to mean. In fact, when the textual language at issue fails to support the ultimate outcome, judges routinely look to sources other than the constitution’s text to justify a result.⁴ This behavior, however, corrupts the judge’s interpretive role.⁵

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1. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1 (1990).

2. *See, e.g.*, *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 83 (Wash. 1978) (“The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary.”).

3. *League of Educ. Voters v. State*, 295 P.3d 743,753 (Wash. 2013) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

4. *See, e.g., id.* at 749 (“Determining whether the constitution prohibits a particular legislative action requires the court to first examine the plain language of the constitutional provision at issue.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012) (“But to say that one *begins* with the words of the [text] is to suggest that one does not *end* there. Like the starting line of a boat race, the text is (on this view) thought to be a point of

Although the judge remains cloaked under the guise of interpreting the constitution's text, the judge is *constructing* it, which is not a proper function of the court.⁶

League of Education Voters v. State (League) exemplifies the judiciary's potential abuse of its interpretive role⁷: The Washington Supreme Court misinterpreted its judicial function because it ignored the text of Washington State's constitution and held a statute unconstitutional.⁸ The court, therefore, voided a statute because of judicial volition, not because Washington's constitution demanded that outcome.

This Note challenges the reasoning in *League* and makes a novel suggestion for Washington State constitutional analysis, an approach that may apply to other states.⁹ Washington courts must reinvigorate the beyond-a-reasonable-doubt doctrine, which declares that a statute is constitutional unless the challenger proves the statute unconstitutional beyond a reasonable doubt.¹⁰ Courts have been saying for over a century that this

departure for a much longer journey. So when you read qualified introductory bows to the text, brace yourself for a nontextual solution—maybe a far-fetched one.”) (emphasis in original).

5. See SCALIA & GARNER, *supra* note 4, at 3 (“In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge’s principal function is to give those texts their fair meaning.”); see also Pierre Schlag, *Framers’ Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 291–92 (1985) (discussing how resorting to history to discern the “framers intent” leads to arbitrary decisions because no concrete way of discerning this intent exists).

6. See SCALIA & GARNER, *supra* note 4, at 13–14. Scalia and Garner discuss the equivocal nature of the term “construction.” *Id.* The noun “construction” can mean “to construe”—meaning “to interpret”—and can also mean “to construct”—meaning “to build.” *Id.* The phrase statutory construction—in the sense of deriving meaning from the text—has long been used interchangeably with the phrase “statutory interpretation,” a proper function of courts. *Id.* But if you describe the judge’s role as constructing a text, which means the judge “builds the text,” you are mistakenly describing the role of the legislature rather than the judiciary. See *id.* at 13 n.41. A judge’s role, in an age of democratically prescribed texts, is interpreting—*construing* meaning from—the text, not constructing it. See *id.*

7. See *League*, 295 P.3d at 743.

8. See *id.*

9. The solution discussed *infra* Part IV suggests a new theoretical rationale for the beyond-a-reasonable-doubt doctrine. Courts in other states also apply this doctrine. See, e.g., *State v. Craig*, 826 N.W.2d 789, 791 (Minn. 2013) (“[We] uphold a statute unless the challenging party demonstrates that the statute is unconstitutional beyond a reasonable doubt.”); *Nichols v. R & D Const. Co.*, 60 A.3d 932, 938 (R.I. 2013) (stating a statute will not be declared unconstitutional unless found constitutionally defective beyond a reasonable doubt); *Alexander v. Bozeman Motors, Inc.*, 291 P.3d 1120, 1125 (Mont. 2012) (“[W]e note that legislative enactments are presumed constitutional, and the party challenging a statute bears the burden of proving the statute unconstitutional beyond a reasonable doubt.”); *State v. Catalano*, 104 So.3d 1069, 1075 (Fla. 2012) (“There is a strong presumption that a statute is constitutionally valid, and all reasonable doubts about the statute’s validity must be resolved in favor of constitutionality.”); *5K Farms, Inc. v. Miss. Dep’t of Revenue*, 94 So.3d 221, 227 (Miss. 2012) (“[T]he courts are without the right to substitute their judgment for that of the Legislature as to the wisdom and policy of the act and must enforce it, unless it appears beyond all reasonable doubt to violate the Constitution.”) (internal citation omitted).

10. *League*, 295 P.3d at 749.

doctrine emerged out of judicial deference to the legislature, a coequal branch, as if “deference” prevents courts from striking down otherwise unconstitutional statutes.¹¹ This Note proposes a new rationale and purpose for the doctrine: The beyond-a-reasonable-doubt doctrine should exist to prevent judges from striking down otherwise constitutional laws.¹²

In this Note, Part II discusses the background of *League of Education Voters v. State* and constitutional interpretation in Washington. Part III examines the *League* court’s reasoning. Part IV details a new analytical framework for constitutional analysis through the reformed beyond-a-reasonable-doubt doctrine and applies that framework to the Supermajority issue addressed in *League*. Part V concludes the discussion.

II. THE SUPERMAJORITY’S HISTORY AND WASHINGTON CONSTITUTIONAL ANALYSIS

A. Brief History of the Supermajority Requirement

In 1993, voters approved initiative I-601, later codified into statute as RCW 43.135.034.¹³ This initiative imposed a voting restriction on bills that increased taxes.¹⁴ Before a new tax measure could become law,

11. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 218 (Boston, Little, Brown, & Co. 1883). The Washington Supreme Court, in many of its decisions, respected Cooley’s treatise as an authority for interpreting and for understanding Washington’s constitution. See, e.g., *Nathan v. Spokane Cnty.*, 76 P. 521, 522–25 (Wash. 1904); see also *Petroleum Lease Properties Co. v. Huse*, 80 P.2d 774, 776 (Wash. 1938) (“The object of this constitutional provision is stated by Judge Cooley, in a passage often quoted by this and other courts”); *Ransom v. City of S. Bend*, 136 P. 365, 366 (Wash. 1913) (“Judge Cooley says, in his work on Constitutional Limitations (5th Ed.) p. 201: ‘The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.’”).

12. See discussion *infra* Part IV.

13. *League*, 295 P.3d at 746. In 1993, voters passed I-601 by 51.21%—774,342 voted in favor and 737,735 opposed. *Id.* at 762. After 1993, voters passed initiatives that re-imposed the Supermajority requirement: In 2007, voters passed I-960 by 51.24%—816,792 voted in favor and 777,125 opposed. *Id.* In 2010, voters passed I-1053 by 63.75%—1,575,655 voted in favor and 895,833 opposed. *Id.* Most recently, in 2012, voters passed I-1185 by 63.91%—1,892,969 voted in favor and 1,069,083 opposed. *Id.* Voters re-imposed the Supermajority after the legislature suspended I-601 in 2005, and voters passed subsequent initiatives to prevent the legislature from suspending the Supermajority again. *Id.* at 746. An initiative restricts the legislature because the legislature may not modify or repeal an initiative for two years after its enactment unless the legislature can amass two-thirds—a supermajority—of elected members in both houses. See WASH. CONST. art. II, § 1(c).

14. *League*, 295 P.3d at 746; WASH. REV. CODE § 43.135.034 (2010)—the Supermajority statute challenged in *League*—defined tax measures as “any action or combination of actions by the state legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.” WASH. REV. CODE § 43.135.034(b).

it needed approval from two-thirds of the legislative members in both houses¹⁵ (the Supermajority).¹⁶ Washington's constitution, however, only requires a simple majority vote of members—more than half—before a bill may become law.¹⁷ The goal of the Supermajority requirement was to erect a hurdle against the ordinary simple-majority passage of new taxes by requiring an increased consensus, effectively preventing the legislature from increasing taxes in Washington.¹⁸

Political opponents of the Supermajority voiced their opposition before the 1993 election, abhorring the consequences of requiring more than a simple majority vote for new taxes: “The requirement for two-thirds agreement in the legislature . . . could very well put control of the state's future in the hands of a small group of legislators with extreme views. Majority rule protects everyone.”¹⁹ Nineteen years later in 2012, Supermajority opponents continued this battle cry, arguing that the Supermajority achieved its purpose of limiting taxes but at great consequence.²⁰ They argued that a Supermajority requirement made new tax measures practically impossible to pass.²¹ As a consequence, the Supermajority prevented the legislature from raising necessary revenue to fund desirable programs such as education.²²

Preceding its ultimate fate of unconstitutionality, the Supermajority endured a litigious history for twenty years.²³ Before initiative I-601 went into effect, challengers to the Supermajority brought a writ of mandamus action to the Washington Supreme Court, claiming that the Supermajority provision violated Washington's constitution.²⁴ The court dismissed the mandamus action as a nonjusticiable controversy because the initiative had not entirely gone into effect and because ambiguity existed regarding how the law would function.²⁵ In 2009, after the senate president refused to forward a bill to the house of representatives because

15. The legislature consists of two bodies: the house of representatives and the senate. WASH. CONST. art. II, § 1.

16. *League*, 295 P.3d at 746.

17. See WASH. CONST. art. II, § 22.

18. See *1993 Washington Voters Pamphlet*, WASH. SECRETARY OF STATE, 6 (Nov. 2, 1993), https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/documents/1993%20general%20election.pdf; see also *Initiative Measure I-1053*, WASH. SECRETARY OF STATE (Jan. 5, 2010), <http://www.sos.wa.gov/elections/initiatives/text/i1053.pdf>.

19. *1993 Washington Voters Pamphlet*, *supra* note 18, at 7.

20. See Opening Brief of Plaintiff-Respondent at 5–7, *League of Educ. Voters v. State*, 295 P.3d 745 (Wash. 2013) (No. 87425-5), 2012 WL 3600413 [hereinafter LEV's Opening Brief].

21. *Id.* at 7.

22. *Id.*

23. I-960 passed in 1993. *League*, 295 P.3d at 746. In 2013, the Washington Supreme Court found the Supermajority unconstitutional. *Id.* at 753.

24. *Walker v. Munro*, 879 P.2d 920, 922 (Wash. 1994).

25. *Id.* at 924–25.

it received only a simple majority vote, not the Supermajority, a frustrated senator turned to the Washington Supreme Court for help.²⁶ The senator demanded a writ of mandamus that would compel the senate president to forward the bill. The senator also demanded a declaratory judgment that the Supermajority violated Washington's constitution.²⁷ The Washington Supreme Court refused to address the Supermajority's constitutionality and dismissed the case, holding the mandamus action presented a nonjusticiable political controversy.²⁸

The Washington Supreme Court's continued refusal to address the constitutional issue, however, did not deter Supermajority opponents. The following facts provided justification for the Washington Supreme Court to ultimately find a justiciable controversy and decide the constitutional challenge.²⁹ In 2011, Substitute House Bill 2078 (SHB 2078) purported to narrow a tax deduction³⁰ for large banks and other financial institutions and to direct the projected revenue toward funding classroom-size reductions in kindergarten through third grade.³¹ SHB 2078 gained simple-majority approval in the house of representatives, not the statutorily imposed Supermajority for new tax measures, and therefore died swiftly in the house without reaching the senate or the governor's pen.³²

As a result of SHB 2078's failed passage, the League of Education Voters, the Washington Education Association, twelve Washington State legislators, and individual taxpayers (collectively, LEV), filed a complaint against the State of Washington in King County Superior Court.³³ The plaintiffs sought a declaratory judgment that the Supermajority requirement—RCW 43.135.034—violated article II, section 22 of Washington State's constitution.³⁴ Pursuant to statute, the Washington

26. See *Brown v. Owen*, 206 P.3d 310, 313 (Wash. 2009).

27. *Id.*

28. *Id.* at 321.

29. See *League of Educ. Voters v. State*, 295 P.3d 743, 747–48 (Wash. 2013).

30. Because eliminating tax deductions would raise revenue, the tax deduction fell under the definition of "raising taxes." See former WASH. REV. CODE § 43.135.034 (2012).

31. *League*, 295 P.3d at 747. These facts are very similar to those in *Walker*, *supra* note 24, but the court rejected the obvious similarities. *League*, 295 P.3d at 748. The court reasoned that the mandamus action in *Walker* differed from the declaratory judgment action in *League*—despite the fact that the senator in *Walker* also requested a declaratory judgment. See *Walker*, *supra* note 24.

32. *Id.* SHB 2078 received 52 out of 98 votes in the House. LEV's Opening Brief, *supra* note 20, at 5.

33. *League*, 295 P.3d at 746–47.

34. *Id.* at 747. The plaintiffs also sought a declaratory judgment that the referendum requirement of WASH. REV. CODE § 43.135.034 violated article II, section 1(b) of Washington State's constitution. *Id.* The Washington Supreme Court did not reach this issue. *Id.* at 749.

State Attorney General defended the Supermajority as constitutional.³⁵ The trial court held that the Supermajority violated article II, section 22 of Washington's constitution and declared the statute unconstitutional.³⁶ The State appealed that decision.³⁷

After almost twenty years of finding the controversy nonjusticiable, the Washington Supreme Court held that the legislators who voted in favor of SHB 2078 had standing to challenge the Supermajority.³⁸ The court reasoned that the Supermajority undermined the effectiveness of the legislators' votes because the bill received simple-majority approval, a number that would satisfy article II, section 22's bill passage requirement.³⁹ Finally, the Washington Supreme Court reached the constitutional merits.⁴⁰

B. Arguments to the Supreme Court

Article II, section 22 provides that “[n]o bill shall become a law unless on its final passage . . . a majority of the members elected to each house be recorded thereon as voting in its favor.”⁴¹

LEV argued that the Supermajority requirement conflicted with this language.⁴² Specifically, LEV argued that article II, section 22 requires only a “majority”—more than half (a simple majority)—of members in both legislative houses to pass a law, and therefore, the legislature cannot require more than a simple majority by statute.⁴³ This argument asserted that article II, section 22's voting requirement creates both a floor and a ceiling: A bill cannot receive less than a simple majority and still become law (the floor), and a bill also cannot be required to receive more than a simple majority before it becomes law (the ceiling).⁴⁴

35. *Id.* at 747. Washington's attorney general has statutory permission to defend a statute's constitutionality. WASH. REV. CODE § 7.24.110 (1935) (requiring party who challenges a statute's constitutionality to serve the attorney general and entitling the attorney general an opportunity to be heard).

36. *League*, 295 P.3d at 747.

37. *Id.*

38. *Id.* at 748.

39. *See id.*

40. *Id.* at 749.

41. WASH. CONST. art. II, § 22.

42. LEV's Opening Brief, *supra* note 20, at 23–24.

43. *See id.* at 34–35. Another way of framing this argument, which LEV also asserted, was that the Supermajority requirement, in effect, amended the constitutional language. *Id.* at 1. The Washington State Constitution makes clear that a constitutional amendment cannot occur by statute. *See* WASH. CONST. art. XXIII.

44. LEV's Opening Brief, *supra* note 20, at 34–35.

The State disagreed with the ceiling portion of LEV's interpretation.⁴⁵ According to the State, article II, section 22 merely creates a minimum voting requirement—a floor: No bill can become law if it receives less than a simple majority.⁴⁶ Addressing the ceiling argument, the State contended that the text in article II, section 22 does not address this issue.⁴⁷ Under Washington State constitutional analysis, if the text of article II, section 22 only addresses a minimum voting requirement but does not address a maximum—a ceiling—the legislature may statutorily require more than a simple majority.⁴⁸ Thus, under the State's interpretation, the Supermajority would be constitutional.⁴⁹

C. Constitutional Analysis in Washington State

Several fundamental constitutional principles provide the foundation for Washington constitutional analysis. First, for the purposes of determining a statute's constitutionality, the analysis remains the same whether the legislature enacted the statute or the people approved the statute through an initiative.⁵⁰ Two logical corollaries accompany this analytical doctrine: If an initiative is constitutional, the same law would also be constitutional if passed by the legislature.⁵¹ In addition, if a Washington court strikes down an initiative because the initiative violates the constitution, this result prospectively prohibits the legislature and the people from enacting such a law.⁵²

Second, Washington's constitution differs substantially from the United States Constitution, not merely in language but also in theory.⁵³ The United States Constitution grants specific and limited powers to Congress.⁵⁴ Congress must therefore act pursuant only to powers specifically enumerated in the Constitution's text.⁵⁵ In contrast, Washington's constitution is not a grant of limited power but a restriction on otherwise

45. See Opening Brief of State-Appellant at 26, *League of Educ. Voters v. State*, 295 P.3d 743 (Wash. 2013) (No. 87425-5), 2012 WL 3135663.

46. *Id.* at 28–29.

47. *Id.*

48. *Id.*

49. *Id.*

50. ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE* 51 (2002).

51. See, e.g., *League of Educ. Voters v. State*, 295 P.3d 743, 754 (Wash. 2013).

52. *Id.*

53. See UTTER & SPITZER, *supra* note 50, at 2; see also Charles H. Sheldon & Michael Stohr-Gillmore, *In the Beginning: The Washington Supreme Court a Century Ago*, 12 U. PUGET SOUND L. REV. 248 (1989) (discussing the constitutional premise of Washington's founding fathers compared to their federal counterparts).

54. UTTER & SPITZER, *supra* note 50, at 2.

55. *Id.*

plenary power.⁵⁶ This concept means that the legislature may pass any law not textually restricted by Washington's constitution or federal law.⁵⁷

Third, Washington courts presume statutes are constitutional.⁵⁸ A party challenging a statute's constitutionality must prove the statute is unconstitutional beyond a reasonable doubt.⁵⁹ Therefore, if any doubts exist about a statute's constitutionality, courts must resolve these doubts in the statute's favor and hold the statute constitutional.⁶⁰ The existence of the beyond-a-reasonable-doubt doctrine suggests that textual interpretation of a constitutional provision does not always result in a definitive and conclusive meaning.⁶¹ After all, if courts could always arrive at a definitive and conclusive meaning, the correctness of a particular interpretation would never be doubtful.

Fourth, Washington State constitutional analysis is a textual exercise.⁶² When determining a statute's constitutionality, courts must uphold the statute unless the constitution's text, either expressly⁶³ or by fair inference, limits the legislature's power.⁶⁴ The words in every provision of Washington's constitution possess the same context and meaning that they did at the time the provision was drafted.⁶⁵ Consequently, in their interpretive role, judges must give the words of the text the common and ordinary meaning they had when the provision was drafted.⁶⁶

Fifth, when interpreting the constitution's text, courts may look at extrinsic sources for the purpose of ascertaining the text's meaning.⁶⁷ The Washington Supreme Court stated that "[i]n determining the meaning of a constitutional provision, the intent of the framers, and the history of events and proceedings contemporaneous with its adoption may

56. *See id.* at 2–3.

57. *Id.*; *see also* *Yelle v. Bishop*, 347 P.2d 1081, 1087 (Wash. 1959).

58. *See, e.g.*, *League of Educ. Voters v. State*, 295 P.3d 743, 749 (Wash. 2013).

59. *Id.*

60. *See, e.g.*, *State v. Brunn*, 154 P.2d 826, 836 (Wash. 1945) (“[A] legislative act is entitled to the presumption of constitutionality, and even if, at the end of this long inquiry, we should be in doubt as to the true intent of the double jeopardy clause of our constitution, we would still be required to hold the questioned act constitutional.”).

61. *See* COOLEY, *supra* note 11, at 218.

62. *See* *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1281 (Wash. 1997) (“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.”).

63. WASH CONST. art. II, § 25; *State ex rel. Todd v. Yelle* provides an example of an express limitation: “The legislature shall never grant any extra compensation to any public officer . . .” 110 P.2d 162, 168 (Wash. 1941).

64. *See, e.g.*, *Todd*, 110 P.2d at 167; *Malyon*, 935 P.2d at 1281.

65. *Todd*, 110 P.2d at 165 (describing constitutional provisions as static); *id.* at 167 (reaffirming that statutes must be upheld unless an express or fairly implied limitation on the legislature's power exists in the constitution).

66. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 90 P.3d 42, 45 (Wash. 2004).

67. *See, e.g.*, *State v. Brunn*, 154 P.2d 826, 835 (Wash. 1945).

properly be considered.”⁶⁸ Thus, if a judge struggles to understand what a word meant in the 1800s, a historical analysis, such as examining debates from Washington’s Constitutional Convention, might have merit.⁶⁹ In addition to history, courts may also employ other helpful aids to interpretation, such as dictionaries.⁷⁰

Finally, a judge’s personal opinion that a statute embodies bad policy provides no justification for voiding a statute and, therefore, should not influence the court’s constitutional analysis.⁷¹

III. THE WASHINGTON SUPREME COURT’S REASONING IN *LEAGUE OF EDUCATION VOTERS V. STATE*

Justice Owens wrote the 6–3 majority opinion⁷² in *League* that struck down the Supermajority requirement as unconstitutional.⁷³ The court reasoned that plain language, constitutional history, and the weight of persuasive authority supported an interpretation of article II, section 22 as setting a minimum and maximum voting requirement.⁷⁴ The court’s reasoning divides into two discussions: textual and other considerations.

A. *The Court’s Textual Discussion*

The court’s textual discussion contains two parts. First, the court examined article II, section 22’s “plain language.”⁷⁵ Second, the court compared article II, section 22’s language to other provisions in the constitution to strengthen its plain language interpretation.⁷⁶

68. *Yelle v. Bishop*, 347 P.2d 1081, 1084 (Wash. 1959).

69. Many Washington courts that conduct a historical analysis appear to delve almost exclusively into the debates at the Constitutional Convention. *See, e.g.*, *Gerberding v. Munro*, 949 P.2d 1366 (Wash. 1998). Although this analysis might have merit depending on the case and what the convention records illuminate, a more fruitful source to resolve confusion might be a dictionary if the judge is perplexed by a constitutional provision’s language.

70. *See, e.g.*, *League of Educ. Voters v. State*, 295 P.3d 743, 750 (Wash. 2013).

71. *See, e.g., id.* at 746; *see also* COOLEY, *supra* note 11, at 86 (discussing how a statute cannot be declared void if it does not violate the text of the constitution, regardless of how unwise the constitution or statute might seem).

72. *League*, 295 P.3d at 745. Three justices dissented, and two of them wrote dissenting opinions. *Id.* at 753 (C. Johnson, J., dissenting) (arguing that the court should have dismissed the case as a nonjusticiable political question and, thus, should have never reached the merits); *id.* at 756 (J.M. Johnson, J., dissenting) (agreeing that the court should not have reached the merits but also arguing that, on the merits, the Supermajority is constitutional).

73. *Id.* at 746 (majority opinion).

74. *Id.* at 745–46. However, as will be discussed in Part III and Part IV, *infra*, the fact that the constitution’s plain language and other factors support an interpretation of the constitution that conflicts with the statute is not dispositive. An interpretation that harmonizes the statute with the constitution must be implausible—unreasonable—before the court strikes down a statute as unconstitutional. *See* COOLEY, *supra* note 11.

75. *League*, 295 P.3d at 749–50.

76. *Id.* at 751.

1. Plain Language Examination

After examining article II, section 22's plain language, the court ultimately concluded that this constitutional provision sets both a minimum and a maximum voting requirement, thus preventing any alteration of the voting requirement by statute.⁷⁷ Article II, section 22 states, "No bill shall become a law unless on its final passage . . . a majority of the members elected to each house be recorded thereon as voting in its favor."⁷⁸

Interpreting the language's ordinary meaning, the court said that "essentially [this provision] states that a bill cannot become a law upon any condition less than receiving more than half the vote."⁷⁹ The court used an 1899 edition of Webster's International Dictionary for support:⁸⁰ Webster's defines "unless" as "[u]pon any less condition than . . . if not";⁸¹ Webster's defines "majority" as "[t]he greater number; more than half."⁸²

With this understanding in mind, the court then committed a logical mistake. In the same paragraph where it explained that article II, section 22 means that a bill must receive "more than half the vote" before it becomes law, the court rephrased this meaning—presumably for the reader's convenience or as a rhetorical sleight of hand—and arrived at an entirely different understanding: "In other words, if a bill has become law, then it must have been supported by a simple majority vote."⁸³ But the court is incorrect.⁸⁴ If a bill becomes law, it must have been supported by *at least* a simple majority vote—more than half. As the dissent correctly notes, the majority mistakes a sufficient condition for a necessary condition.⁸⁵

While a bill that becomes law may have been passed by exactly a "simple majority" vote—51%—the law may also have been passed by 80% of members; 80% is certainly more than half and certainly more

77. *Id.* at 749–50.

78. WASH. CONST. art. II, § 22.

79. *League*, 295 P.3d at 750.

80. *Id.*

81. *Id.*; WEBSTER'S INTERNATIONAL DICTIONARY 1578 (1899).

82. *League*, 295 P.3d at 750; WEBSTER'S INTERNATIONAL DICTIONARY 855 (1899).

83. *League*, 295 P.3d at 750.

84. I assume the majority does not mean that a bill fails to become law if it receives more than a simple majority. Yet, under a plain language reading of the majority's sentence, the majority interprets article II, section 22 to mean that if a bill gets 100% of the vote, the bill cannot become law because the bill must garner a simple majority vote. For the word "majority" to be both a minimum and a maximum, logic dictates that a bill cannot receive more or less than a simple majority vote.

85. *League*, 295 P.3d at 760 (J.M. Johnson, J., dissenting) (arguing that the confusion of necessary and sufficient conditions defies logic and allows the majority to misinterpret article II, section 22's plain language).

than, not equal to, a simple majority. Yet, under the court's rephrasing of article II, section 22, a bill that receives 80% of member votes must fail to become a law because 80% does not equal a simple majority. Although the court's inaccurate restatement of article II, section 22's meaning might seem like minor semantics, the court's opinion hinges on this inaccurate misstatement.⁸⁶

After concluding that a law must have received exactly a simple majority vote, the court rejected the interpretation that a bill needs "at least a majority vote" because no language in section 22 qualifies "majority."⁸⁷ The court then provided a "commonsense understanding" of section 22's language: "[A]ny bill receiving a simple majority vote will become law."⁸⁸ The court's commonsense interpretation, however, fails to comport with reality. Before a bill can become law, the bill must comply with article II, section 32,⁸⁹ and the governor must sign it or neglect to veto it within the constitutionally prescribed time frame.⁹⁰

2. Article II, Section 22 Compared to Other Constitutional Provisions

The court attempted to strengthen its plain language interpretation by comparing article II, section 22 to other constitutional provisions. First, the court found importance in the fact that other sections of the constitution contain supermajority vote requirements while article II, section 22 requires only a simple majority.⁹¹ Second, the court found a restriction on the legislature's statutory power by misreading article II, section 32.⁹²

a. Other Supermajority Requirements

The court noted that the framers used supermajority requirements in other portions of the constitution.⁹³ For example, the constitution requires a supermajority to expel a member of the legislature⁹⁴ or override a veto.⁹⁵ Thus, the court reasoned, the fact that the framers knew

86. *See id.* at 749–50 (majority opinion).

87. *Id.* at 750.

88. *Id.*

89. WASH. CONST. art. II, § 32 (requiring that before a bill become law it must be signed by the presiding officers of both houses).

90. WASH. CONST. art. III, § 12 (requiring that before a bill becomes law the governor must sign it or must not veto it within five days).

91. *League*, 295 P.3d at 751 (noting that the original constitution contained seven supermajority requirements in "special circumstances"); *see also* WASH. CONST. art. II, §§ 9, 36; art. III, § 12; art. IV, § 9; art. V, § 1; art. XXIII, §§ 1, 2.

92. *See League*, 295 P.3d at 751.

93. *Id.*

94. WASH. CONST. art. II, § 9 (expelling a member).

95. WASH. CONST. art. III, § 12 (overriding a veto).

how to include supermajority vote requirements but chose not to include one in article II, section 22 evidences that the framers intended ordinary legislation to need only a simple majority to pass.⁹⁶

The court's conclusion, however, does not follow logically. A constitutional requirement and a statutory requirement differ in theory and effect.⁹⁷ Therefore, an opinion about one cannot also address the other without more information. A constitutional provision is and remains the status quo unless the provision is amended through the constitution's amendment procedure.⁹⁸ Conversely, a statute alters the legal status quo and can be repealed any time by a simple majority vote.⁹⁹ Because a constitutional provision and a statute differ in nature, the framers' decision not to impose a supermajority requirement for bill passage says nothing about the framers' opinion regarding the legislature's statutory power to do so. As the court itself admitted about the framers' convention debates, "[t]here was no discussion of whether the legislature should be allowed to alter this [simple majority] requirement."¹⁰⁰

b. Article II, Section 32

The court compared the language of article II, section 22 to the language of article II, section 32.¹⁰¹ Article II, section 32 reads, "No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the legislature shall prescribe."¹⁰²

Looking at section 32's language, the court reasoned that the proviso "and under such rules as the legislature shall prescribe"—in a

96. *Compare League*, 295 P.3d at 751 ("Thus, the framers were aware of the significance that a supermajority vote requirement entailed and consciously limited it to special circumstances; the passage of ordinary legislation is not one of those."), *with id.* (When the framers debated article II, section 22, "[t]here was no discussion of whether the legislature should be allowed to alter this requirement.").

97. *Compare* WASH CONST. art. I, § 29: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise," and WASH. CONST. art. XXIII, § 1 (establishing the constitution's amendment procedure), *with* *Wash. State Farm Bureau Fed'n v. Gregoire*, 174 P.3d 1142, 1145 (Wash. 2007) ("No legislature can enact a statute that prevents a future legislature from exercising its law-making power. That which a prior legislature has enacted, the current legislature can amend or repeal.")

98. *See* WASH CONST. art. I, § 29 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."); *see also* WASH. CONST. art. XXIII, § 1 (establishing the constitution's amendment procedure).

99. *See Wash. State Farm*, 174 P.3d at 1145. A statute requires more than a simple majority vote to modify or repeal only when the statute was passed by initiative. *See* WASH. CONST. art. II, § 1(c).

100. *League*, 295 P.3d at 751.

101. *Id.* at 751.

102. *Id.* at 760; WASH. CONST. art. II, § 32.

negatively phrased provision similar to article II, section 22's "[n]o bill shall become a law unless"—indicates that the framers intended all provisions in article II to be exhaustive unless they expressly stated otherwise.¹⁰³ "Any other reading would render the proviso in section 32 superfluous, contrary to our canons of constitutional interpretation."¹⁰⁴ Unfortunately, the court did not explain the logic of this conclusion.¹⁰⁵

The majority probably reasoned as follows:¹⁰⁶ Washington State's constitution is not a grant of power but a restriction on power.¹⁰⁷ Therefore, unless the constitution restricts legislative power either expressly or by fair inference, the legislature's power is unrestrained.¹⁰⁸ No provision in the constitution restricts the legislature from creating internal rules regarding how a bill is signed, so the legislature must have this power by default. But in article II, section 32, the framers expressly granted the legislature this procedural power.¹⁰⁹ The framers would have felt this express grant necessary only if they believed that the provisions in article II were "exhaustive"—that article II provisions create a status quo that can be altered only if expressly allowed, as in article II, section 32. Therefore, any other reading of section 32's proviso—"and under such rules as the legislature shall prescribe"—renders it unnecessary—"superfluous"¹¹⁰—because, in theory, the legislature should have this procedural power by default.

The Washington Supreme Court, by concluding that no other meaningful interpretation of article II, section 32 exists, challenged its readers to conclude otherwise.

103. *League*, 295 P.3d at 751.

104. *Id.*

105. *See id.* The majority also neglects to explain why, even if the language of article II, section 22 is "exhaustive," the "exhaustive" nature of section 22 prevents the legislature from increasing the vote requirement by statute. *See id.* Indeed, if section 22 means "at least a majority," then this meaning is all that can be exhausted in section 22. But at this juncture, the majority already concluded that article II, section 22 means a bill must be passed by exactly a simple majority. *Id.* at 750. Thus, the majority makes a circular argument by stating section 22 is "exhaustive": The words mean what they mean, and therefore, the words mean what they mean.

106. This rendition of the majority's probable reasoning is not intended to create a straw man argument. Because the court failed to detail its reasoning, the reader is necessarily forced to speculate. However, this probable reasoning is implicit in what the court actually states. *See id.* at 750–51.

107. Although the majority struggles to find article II, section 32's proviso that bills shall be signed "under such rules as the legislature shall prescribe" as meaningful, not superfluous, at least one other court implicitly stated that this proviso is superfluous. *See State v. State Bd. of Equalization*, 249 P. 996, 1001 (Wash. 1926) (holding that, upon repassage of a bill following a governor's veto, the Legislature may adopt any procedure through its "inherent power" to transmit information to the Secretary of State that the bill passed and to present the enrolled bill for filing).

108. *See, e.g., Yelle v. Bishop*, 347 P.2d 1081, 1087 (Wash. 1959).

109. *See WASH. CONST.* art. II, § 32.

110. *League*, 295 P.3d at 751.

c. A Different, but Not Superfluous, Reading of Article II, Section 32

In legal theory, the court appears correct that section 32's proviso is superfluous. Yet, the court's conclusion—article II, section 32's proviso has purpose only if article II is understood to be exhaustive—is wrong under textual scrutiny. When the text of article II, section 32 is compared to the text of article II, section 9, the framers' intent becomes clear: The framers were not granting a power that did not already exist; the framers wanted to demarcate inherent, procedural-rulemaking authority between the houses.¹¹¹

Article II, section 32 imposes a duty on the presiding officer of each house to sign bills before they become law.¹¹² Absent section 32's proviso, section 32 provides no guidance or specifications regarding how this duty should be accomplished. For example, must the officers sign in blue or black ink? Must the officers sign in the physical presence of each other? Must witnesses be present when the officers affix their signatures? Section 32 does not answer these questions, and without an answer and even with section 32's proviso, the legislature necessarily must agree on this minutia in order to accomplish section 32's signature requirement. In legal theory, when a person is charged with accomplishing a task, without minute specification for how that task should be accomplished, the person has incidental power to exercise discretion as to the manner and means of accomplishing that task.¹¹³ Thus, because article II, sections 32 does not provide specifications, in legal theory, section 32's proviso is completely unnecessary.

Section 32's proviso, however, gains meaning when compared to article II, section 9.¹¹⁴ Article II, section 9 allows each house of the legislature to determine the rules of its own proceedings.¹¹⁵ In legal theory,

111. Compare WASH. CONST. art. II, § 9 ("Each house may determine the rules of its own proceedings . . ."), with WASH. CONST. art. II, § 32 ("under such rules as the legislature shall prescribe").

112. WASH. CONST. art. II, § 32.

113. The idea is not novel in constitutional law that a legitimate end to be accomplished by the legislature includes all "necessary"—incidental—power for accomplishing that end. See *M'Culloch v. Maryland*, 17 U.S. 316, 422 (1819) ("But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it . . ."). Agency law might also be instructive. See RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2006) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.").

114. Compare WASH. CONST. art. II, § 9 ("Each house may determine the rules of its own proceedings . . ."), with WASH. CONST. art. II, § 32 ("under such rules as the legislature shall prescribe").

115. *Id.*

this provision seems as superfluous as article II, section 32's proviso. The constitution does not detail every aspect of how the legislature executes its power, and therefore, the legislature already has implied discretion in its authority to act.¹¹⁶ Like section 32, article II, section 9 appears to state the obvious. But article II, section 9 states that "[e]ach house may determine the rules of its own proceedings"¹¹⁷ while section 32 states that the signature requirement must occur "under such rules as the legislature shall prescribe."¹¹⁸ Article II, section 9 allows each house to determine its own rules without interference from the other house, but article II, section 32 requires that the legislature work together.

If the framers' intent is deduced from the text,¹¹⁹ the framers intended that each house exclusively govern the day-to-day minutiae of its own proceedings. In the specific formal proceeding of signing a bill before it becomes law, however, the framers intended for the houses to confer and agree about the proper procedure.¹²⁰ Thus, under this interpretation, section 32's proviso gains a purposeful meaning that does not rely on interpreting article II as exhaustive. Therefore, the court incorrectly concluded that "[a]ny other reading [of section 32] would render the proviso in section 32 superfluous . . ."¹²¹ The court also incorrectly relied on this conclusion as a basis for holding the Supermajority unconstitutional.

B. Other Considerations

At its core, constitutional analysis is a textual exercise.¹²² As the textual discussion revealed, the court's textual analysis did not establish the floor-without-a-ceiling interpretation of article II, section 22 as unreasonable. Although the textual discussion should be dispositive for constitutional analysis, the court went beyond the text in three ways—presumably to strengthen its textual conclusion that rejected the floor-

116. See *M'Culloch*, 17 U.S. at 422.

117. WASH. CONST. art. II, § 9.

118. WASH. CONST. art. II, § 32.

119. See, e.g., *Newell v. People*, 7 N.Y. 9, 97 (N.Y. 1852) ("Whether we are considering an agreement between parties, a statute, or a constitution, with view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument placed them. If thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed.") (emphasis in original).

120. See WASH. CONST. art. II, § 32.

121. *League of Educ. Voters v. State*, 295 P.3d 743, 751 (Wash. 2013).

122. See *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1281 (Wash. 1997) ("Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well."); see also Part II, *supra*.

without-a-ceiling interpretation. First, the court cited *Gerberding v. Munro* as precedent that supports reading article II, section 22 as both a floor and a ceiling.¹²³ Second, the court expressed concern that upholding the Supermajority would create a “tyranny of the minority.”¹²⁴ Finally, the court worried that if it upheld the Supermajority, the legislature or the people of Washington could impose a supermajority requirement on all legislation.¹²⁵

1. The Precedent of *Gerberding v. Munro*

The majority in *League* cited to *Gerberding v. Munro*¹²⁶ for the proposition that negatively phrased constitutional provisions do not create minimum requirements to which the legislature may statutorily add.¹²⁷ However, the court misunderstood the reasoning in *Gerberding*. The *Gerberding* majority merely held that the negative language at issue was not dispositive.¹²⁸ The court, however, did not hold that negative language cannot create minimum threshold requirements or that negative language becomes irrelevant in textual interpretation.¹²⁹ The *League* majority expanded *Gerberding*'s reasoning and therefore improperly used it as justification to void the Supermajority.¹³⁰

In *Gerberding*, the Washington Supreme Court determined whether qualifications for state officers established in the constitution were exclusive; if not, the legislature could statutorily add qualifications, such as term limits.¹³¹

In 1992, Washington voters passed initiative I-573 into law.¹³² I-573 prevented individuals who previously held legislative seats, the position of governor, or the position of lieutenant governor for a specified period of time from appearing on consecutive ballots for those offices.¹³³ Effectively, the initiative imposed term limits.¹³⁴

123. *League*, 295 P.3d at 751.

124. *Id.*

125. *Id.*

126. *Gerberding v. Munro*, 949 P.2d 1366 (Wash. 1998).

127. *League*, 295 P.3d at 750.

128. *Gerberding*, 949 P.2d at 1376.

129. *See id.* at 1374.

130. *League*, 295 P.3d at 750. A more expansive discussion of the Washington Supreme Court's *Gerberding* analysis is beyond the scope of this article, but one point is worth considering: How can the Washington Supreme Court find that *Gerberding* supports ignoring the context and meaning of words, such as a provision's negative phrasing, when the court must interpret words within their grammatical context? *See id.* If Washington's Supreme Court really believes *Gerberding* stands for that proposition, it should overrule *Gerberding* as contrary to the judiciary's interpretive role. *See* COOLEY, *supra* note 11, at 84.

131. *Gerberding*, 949 P.2d at 1373.

132. *Id.* at 1368.

133. *Id.* at 1368–69.

Article II, section 7 provides legislative qualifications: “No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.”¹³⁵ Article III, section 25 provides executive officer qualifications: “No person, except a citizen of the United States and a qualified elector of this state, shall be eligible to hold any state office”¹³⁶

The *Gerberding* majority resolved the issue textually. The court looked at article III, sections 19–23.¹³⁷ Those provisions create the offices of treasurer, state auditor, attorney general, superintendent of public instruction, and commissioner of public lands. All of these provisions contain similar language to the effect that the position “shall perform such duties as shall be prescribed by law”¹³⁸—indicating the framers intended that the legislature maintain control over these offices.¹³⁹ As a default rule, the legislature has plenary power unless the constitution’s text restricts the legislature either expressly or by fair inference.¹⁴⁰ The express grant of power to the legislature in sections 19–23 acts as an implied restriction on legislative power: The *Gerberding* majority concluded that the framers’ express grant of power to the legislature over specific executive offices indicated that the framers thought the legislature lacked this default power.¹⁴¹ Therefore, the legislature lacks power over constitutional offices unless the constitution expressly provides otherwise.¹⁴²

Because the framers did not grant the legislature express power over the governor or over qualifications for legislators, the people and the legislature lacked power to impose statutory term limits.¹⁴³ It was

134. *Id.*

135. WASH. CONST. art. II, § 7

136. WASH. CONST. art. III, § 25

137. WASH. CONST. art. III, § 19 (providing that the treasurer “shall perform such duties as shall be prescribed by law”); WASH. CONST. art. III, § 20 (providing that the state auditor “shall have such powers and perform such duties in connection therewith as may be prescribed by law”); WASH. CONST. art. III, § 21 (providing that the attorney general “shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law”); WASH. CONST. art. III, § 22 (providing superintendent of public instruction “shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law”); WASH. CONST. art. III § 23 (providing that commissioner of public lands “shall perform such duties and receive such compensation as the legislature may direct”).

138. *See* sources cited *supra* note 137.

139. *Gerberding*, 949 P.2d at 1374.

140. *See, e.g.*, *Yelle v. Bishop*, 347 P.2d 1081, 1087 (Wash. 1959).

141. *Gerberding*, 949 P.2d at 1374. (“The framers were careful to spell out the extent of legislative power over other constitutional offices, indicating that if the framers intended the Legislature to have authority to add to the qualifications of WASH. CONST. art. II, § 7, and art. III, § 25, they would have so stated.”).

142. *Id.* at 1377.

143. *See id.*

with this textual logic—not the broad proposition that negative language cannot create minimum requirements—that the *Gerberding* majority resolved the textual question at issue.¹⁴⁴

2. “Tyranny of the Minority”—A Red Herring

The court in *League* invoked the policy concern that if it upheld the Supermajority, the Supermajority would “fundamentally alter” Washington’s system of government.¹⁴⁵ The court reasoned that the history and language of Washington’s constitution demonstrate a principle that favors a simple majority vote for legislation.¹⁴⁶ If the court read article II, section 22 as permitting the Supermajority, legislative power would shift. Instead of a simple majority possessing power to control legislation, now a small minority would possess power to resist legislation, creating a “tyranny of the minority.”¹⁴⁷ On further examination, however, the court’s tyranny of the minority concern is a red herring.

Under Washington’s constitution, a legislature cannot pass a law that prevents a future legislature from exercising its power to amend or repeal that law.¹⁴⁸ Therefore, the court incorrectly concluded that the Supermajority would “fundamentally alter” Washington’s government.¹⁴⁹ Imagine this hypothetical: The legislature passes the Supermajority requirement by statute. After the legislature is “fundamentally altered,” a special interest group, such as the League of Education Voters, comes to the legislature. The special interest group makes a worthy policy suggestion: The legislature should pass a law that closes tax loopholes to wealthy businesses, and the tax revenue generated by this action can then support underfunded education issues. A simple majority of the legislature—both houses—applaud this proposal. Yet the remaining members refuse to consider the bill. A dutiful legislator reminds everyone that a simple majority of the legislature cannot pass the bill because of the stat-

144. *Id.* at 1376.

145. *League of Educ. Voters v. State*, 295 P.3d 743, 751 (Wash. 2013).

146. *Id.*

147. *Id.* at 751. The court stated that “the framers were particularly concerned with a tyranny of the minority.” As support for the framers’ fear, the majority cites a law review article: Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington’s Law of Law-Making*, 39 GONZ. L. REV. 447, 449–50 (2004) (noting framers feared “special interests that might capture or corrupt public institutions” without further elaboration or citation). Ironically, the majority seems unaware that League of Education Voters—a special interest group, albeit with the laudable goal of education reform—lobbied for the failed passage of SHB 2078, as discussed *supra* in Part II.

148. *Wash. State Farm Bureau Fed’n v. Gregoire*, 174 P.3d 1142, 1145 (Wash. 2007) (“No legislature can enact a statute that prevents a future legislature from exercising its law-making power. That which a prior legislature has enacted, the current legislature can amend or repeal. Like all previous legislatures, it is limited only by the constitutions.”); *see also* WASH. CONST. art II, § 22.

149. *See League*, 295 P.3d at 750.

tory Supermajority requirement. Suddenly, another legislator has a brilliant idea: A simple majority of the legislature—those favoring the tax-loop-hole-closing proposal—can repeal the Supermajority requirement and pass the bill.¹⁵⁰

This hypothetical shows that a statutory supermajority poses no real threat against Washington’s system of government because the legislature can always repeal the supermajority by a simple majority vote.¹⁵¹

3. Slippery Slope, i.e., Democracy

The court raised a slippery slope argument¹⁵² as another reason to reject an interpretation that would uphold the Supermajority.¹⁵³ In that discussion, the court broke the promise made in the beginning of its opinion: “[O]ur opinion does not reflect whether [the supermajority provision] embod[ies] sound policies.”¹⁵⁴ Yet, toward the end of the opinion, the court chastised the Supermajority and its hypothetical ilk as “antithetical to the notion of a functioning government and [they] should be rejected as such.”¹⁵⁵

The court feared that if it upheld the Supermajority, “a simple majority . . . of the legislature could require particular bills to receive 90 percent approval rather than just a two-thirds approval, thus essentially ensuring that those types of bills would never pass.”¹⁵⁶ Given the repeal discussion, *supra*,¹⁵⁷ the court’s fear seems excessive. Even if a simple

150. If the legislature had solely passed the Supermajority proposal, the solution would really be this simple. You might wonder: Why did anyone care about this statutory Supermajority requirement if the issue could be resolved so easily? The Supermajority proposal presented a practical issue because the people of Washington State passed the Supermajority by initiative. *See* discussion *supra* Part II. When the people pass an initiative, Washington’s constitution restricts the legislature from modifying or repealing that initiative for two years unless the legislature can amass two-thirds—a supermajority—of elected members in both houses. WASH. CONST. art. II, § 1(c). However, for the purpose of constitutional analysis, the judiciary treats laws passed by the legislature and by initiative in the same manner. *See* discussion *supra* Part II. Therefore, on a theoretical level, the fact that the Supermajority was passed by initiative does not change the legal analysis. On a practical level, however, the initiative process created a significant hurdle for the legislature to either modify or repeal the Supermajority. Because the practical impact of an initiative-passed law is a common aspect of the initiative process, it is not especially germane to the Supermajority discussion. *See* discussion *supra* Part II. For a discussion on the perils created by the initiative process, see Brewster C. Denny, *Initiatives—Enemy of the Republic*, 24 SEATTLE U. L. REV. 1025 (2001).

151. *See Wash. State Farm*, 174 P.3d at 1145; *see also* WASH. CONST. art II, § 22.

152. BLACK’S LAW DICTIONARY 1731 (9th ed. 2009) (A slippery-slope argument is also known as the “wedge principle,” which means “[t]he argument that relaxation of a constitutionally imposed restraint under specific circumstances may justify further relaxation in broader circumstances”).

153. *League*, 295 P.3d at 751.

154. *Id.* at 745.

155. *Id.* at 751.

156. *Id.*

157. *See* discussion *supra* Part III.B.2.

majority of the legislature required 100% approval on all legislation, a simple majority could always repeal this restriction.¹⁵⁸ Although the court rejected the wisdom of the Supermajority, judicial disfavor of a statute cannot justify holding that statute unconstitutional.¹⁵⁹

IV. INTERPRETIVE DOUBT: THE KEY TO JUDICIAL SELF-RESTRAINT

Historically, when a party challenged a statute's constitutionality in state court, the court invoked the rule that it would not strike down a statute unless the challenger proved the statute unconstitutional beyond a reasonable doubt.¹⁶⁰ The majority in *League* also invoked this rule, as have many Washington courts before it.¹⁶¹ This rule creates a presumption that the challenged statute is constitutional, and the party bringing the challenge bears the burden of proving the statute unconstitutional beyond a reasonable doubt.¹⁶²

At one time, the beyond-a-reasonable-doubt doctrine presented a formidable obstacle against courts voiding a statute, causing at least one justice to complain that the court may uphold unconstitutional statutes under the doctrine's burdensome presumption.¹⁶³ If the doctrine once created a heavy burden for a challenger to prevail, like a large boulder that must be pushed uphill, the burden no longer appears so heavy. Instead, the boulder has been reduced to the size of a pebble, and some justices appear willing to help challengers push.¹⁶⁴

This Part suggests a new paradigm for conceptualizing and applying the beyond-a-reasonable-doubt doctrine in the context of state constitutional interpretation. Washington courts must reinvigorate the beyond-a-reasonable-doubt doctrine to prevent judges and justices from holding statutes unconstitutional when the statute does not clearly conflict with the constitution's text. After all, the judiciary should void a statute because the constitution requires this outcome; judges should not

158. See *Wash. State Farm Bureau Fed'n v. Gregoire*, 174 P.3d 1142, 1145 (Wash. 2007); see also WASH. CONST. art II, § 22.

159. See COOLEY, *supra* note 11, at 218.

160. *Id.*

161. See, e.g., *League*, 295 P.3d at 749; *Ferguson-Hendrix Co. v. Fidelity & Deposit Co. of Md.*, 140 P. 700, 701 (Wash. 1914) ("The presumption always obtains that a legislative act is constitutional, and it will only be held unconstitutional where it so plainly appears to be so as to free the mind from reasonable doubt.").

162. *League*, 295 P.3d at 749.

163. See *Island Cnty. v. State*, 955 P.2d 377, 391 (Wash. 1998) (Sanders, J., dissenting) ("For, quite literally, the maxim requires us to hold either a statute is proved unconstitutional beyond a reasonable doubt, or we must uphold it, which literally requires us to opine: Either a statute is proved unconstitutional beyond a reasonable doubt, or we will hold it is constitutional even if it really isn't.").

164. See discussion *supra* Part III.

strike down a statute simply because they dislike its wisdom and simply because they can.¹⁶⁵ When a judge strikes down a statute that can be harmonized with the constitution, the judge's invocation of judicial province to "say what the law is" transforms this phrase from a constitutional job description of judicial power into a pompous phrase that justifies its abuse.¹⁶⁶

A. Historical Justification for the Beyond-a-Reasonable-Doubt Doctrine

In *Constitutional Limitations*, Cooley noted that state courts tasked with determining the constitutionality of a statute applied the beyond-a-reasonable-doubt doctrine out of deference to the legislature.¹⁶⁷ Washington cases adopted this theoretical justification for Washington constitutional analysis.¹⁶⁸ In 1998, the court in *Island County v. State* explained the doctrine's rationale:

The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.¹⁶⁹

The beyond-a-reasonable-doubt doctrine's historical rationale—deference based on the belief that the legislature considered the constitutionality of its enactment—has three primary weaknesses. First, the legislature does not pass all laws in Washington.¹⁷⁰ The people of Washington State also pass legislation through the initiative process.¹⁷¹ Yet, even when Washington courts confront a constitutional challenge to an initiative-created statute, they still invoke the language that the challenger must prove the statute unconstitutional beyond a reasonable doubt.¹⁷² The doctrine's historical rationale, however, applies only to statutes enacted

165. See COOLEY, *supra* note 11, at 205 (discussing how courts are not free to declare a statute void when the statute violates no express words in the constitution, even if the court feels the statute violates the constitution's "spirit").

166. See *League*, 295 P.3d at 753.

167. COOLEY, *supra* note 11, at 219.

168. See Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 721 (1999).

169. *Island Cnty. v. State*, 955 P.2d 377, 380 (Wash. 1998).

170. The supermajority requirement, for example, originated from an initiative. See discussion *supra* Part II.

171. WASH. CONST. art. II, § 1(c) (detailing the people's initiative power).

172. See, e.g., *League of Educ. Voters v. State*, 295 P.3d 743, 749 (Wash. 2013).

by the legislature. Therefore, the doctrine's historical rationale does not always justify its utility in state court constitutional analysis.

Second, the historical rationale rests on the assumption that the legislature "considered the constitutionality of its enactments," and therefore, as a coequal branch, the legislature's consideration deserves great deference.¹⁷³ This rationale assumes that the legislature, sworn to uphold the constitution, would not intentionally pass an unconstitutional law.¹⁷⁴ While this assumption might be true, the assumption serves no purpose in constitutional analysis because the court must still interpret the challenged text and void unconstitutional statutes, regardless of the legislature's good intentions.

Imagine the legislature intends to pass an unconstitutional law.¹⁷⁵ Unfortunately, due to sloppy drafting, the legislature's statute does not conflict with any constitutional provision. A constitutional challenge against the statute reaches the Washington Supreme Court. The underlying presumption—that the legislature intended to pass a constitutional law—has been rebutted, but the statute clearly does not conflict with the constitution. In this situation, the court should uphold the statute despite the legislature's unconstitutional intent.¹⁷⁶ Similarly, the court should strike down a statute when it clearly conflicts with the constitution, regardless of the legislature's good intentions.¹⁷⁷ Thus, the Washington Supreme Court's deference rationale serves no practical purpose for the court's constitutional analysis or judicial function.

Third, a court's reluctance to void legislative judgment—the legislature's belief that it passed a constitutional law—distracts from what courts actually void by declaring a statute unconstitutional: legislative power. Under Washington's constitution, the legislature has plenary power unless the constitution's text, either expressly or by fair inference, limits that power.¹⁷⁸ Courts should hesitate to void statutes because any unnecessary finding of unconstitutionality impermissibly invades the legislature's province to make laws.¹⁷⁹ If the text does not require an un-

173. *Island Cnty.*, 955 P.2d at 380.

174. *Id.*

175. In reality, it might be difficult to show that the legislature intended to pass an unconstitutional law. For the sake of argument, we will assume that the legislature included its unconstitutional intent in the statute's preamble.

176. *See* COOLEY, *supra* note 11.

177. *See id.*

178. *See, e.g., State ex rel. Todd v. Yelle*, 110 P.2d 162, 167 (Wash. 1941); *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1281 (Wash. 1997).

179. *See* sources cited *supra* note 178.

constitutional outcome, the judicial branch has no authority to invade the legislature's province of power.¹⁸⁰

B. The Confusing Articulation of the Doctrine—Not an Evidentiary Standard

The court in *Island County* distinguished the beyond-a-reasonable-doubt standard in the context of constitutional interpretation from the reasonable doubt standard applied in criminal proceedings, creating an unnecessarily confusing articulation of the doctrine: “[I]n the context of a criminal proceeding as the standard necessary to convict an accused of a crime, [beyond a reasonable doubt] is an evidentiary standard and refers to ‘the necessity of reaching a subjective state of certitude of the facts in issue.’”¹⁸¹ But in the context of constitutional interpretation when a statute’s constitutionality is challenged, the standard “refers to the fact that one challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution.”¹⁸²

The court’s description, comparing the standard in a criminal prosecution to the standard in constitutional interpretation, creates confusion rather than clarity. When articulating the beyond-a-reasonable-doubt doctrine, courts often cite *Island County* for the proposition that the doctrine is not an “evidentiary standard.”¹⁸³ But no court has since elaborated on why this distinction matters for the purpose of constitutional analysis. Although the focus obviously differs for reaching a judgment in a criminal prosecution versus a constitutional challenge—a bloody knife in a murder prosecution, for example, versus the text of Washington’s constitution—it is unclear beyond stating this obvious distinction why *Island County*’s description matters. Moving forward, courts should ignore this unhelpful description when articulating the beyond-a-reasonable-doubt doctrine and, instead, focus on its application.

180. See COOLEY, *supra* note 11, at 205 (discussing how the judicial branch has no authority to void a statute unless the express words in the constitution justify that result).

181. *Island Cnty. v. State*, 955 P.2d 377, 380 (Wash. 1998) (citing *State v. Smith*, 759 P.2d 372, 380 (Wash. 1988) (Utter, J., dissenting) (quoting *In re Winship*, 397 U.S. 358, 368 (1970)).

182. *Island Cnty.*, 955 P.2d at 380.

183. See, e.g., *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 244 P.3d 1, 5 (Wash. 2010) (stating “when we say ‘beyond a reasonable doubt,’ we do not refer to an evidentiary standard” without explaining the importance of this distinction); *Wash. Off Highway Vehicle Alliance v. State* 290 P.3d 954, 958 (Wash. 2011) (stating “[w]hile not an evidentiary standard . . .”).

C. A New Paradigm for the Beyond-a-Reasonable-Doubt Doctrine

1. A New Theoretical Rationale

Under Washington's constitution, the legislature has plenary power unless the constitution's text either expressly or by fair inference limits that power.¹⁸⁴ Courts should therefore hesitate to void statutes when they do not clearly conflict with the constitution because, without clear conflict, the legislature's power remains unrestrained.¹⁸⁵ If a reasonable interpretation of the constitution exists that will harmonize the constitution with the statute, the existence of this reasonable interpretation means that the constitution's text does not clearly conflict with the statute, and the statute is, therefore, constitutional.¹⁸⁶ The judicial branch must uphold the statute in light of this reasonable interpretation.¹⁸⁷ Otherwise, when the court voids the statute, it is the judiciary and not the constitution that forced the unconstitutional outcome, and the judiciary lacks authority to void constitutional laws.¹⁸⁸

Under the new theoretical rationale, the beyond-a-reasonable-doubt doctrine will exist to prevent judges from voiding otherwise constitutional laws and from unconstitutionally invading the legislature's province of plenary power.

2. Principles of the Recreated Beyond-a-Reasonable-Doubt Doctrine

Four principles should guide courts when they apply the beyond-a-reasonable-doubt doctrine. First, the statute's wisdom should not influence the court.¹⁸⁹ For example, the court in *League* said it would restrain itself from judging the Supermajority's wisdom and then proclaimed that a tyranny of the minority would occur if it upheld the statute as constitutional.¹⁹⁰ This commentary may be apt for discussing the wisdom of Washington's constitution; it does not belong as a judicial justification for finding a statute unconstitutional.¹⁹¹

Second, sources extrinsic to the constitution's text, such as convention debates and dictionaries, are permissible aids for interpreting the

184. See, e.g., *State ex rel. Todd v. Yelle*, 110 P.2d 162, 167 (Wash. 1941); *Malyon v. Pierce Cnty.*, 935 P.2d 1272, 1281 (Wash. 1997) ("Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.").

185. See sources cited *supra* note 184.

186. See sources cited *supra* note 184.

187. See COOLEY, *supra* note 11, at 218.

188. *Id.*

189. See, e.g., *League of Educ. Voters v. State*, 295 P.3d 743, 746 (Wash. 2013); see also COOLEY, *supra* note 11, at 86.

190. *League*, 295 P.3d at 751.

191. See COOLEY, *supra* note 11, at 86.

constitution's text.¹⁹² But when a reasonable constitutional interpretation remains after consulting these sources that harmonizes the challenged statute with the constitution's text, the court must uphold the statute.¹⁹³

Third, the goal of the beyond-a-reasonable-doubt doctrine is not to determine if an unconstitutional interpretation of the challenged text is more reasonable than a constitutional interpretation. Instead, the goal is to determine if no reasonable interpretation exists that will uphold the statute as constitutional.¹⁹⁴

Fourth, if the constitution's text does not address an issue, either expressly or by fair inference, the challenged statute cannot conflict with the constitution's text, and therefore, the court cannot declare the statute unconstitutional.¹⁹⁵

3. Applying the Doctrine to *League of Education Voters v. State*

The court in *League* found a reasonable interpretation of article II, section 22 that harmonized the constitution with the Supermajority. In its plain language discussion, the court said that "essentially [article II, section 22] states that a bill cannot become a law upon any condition less than receiving more than half the vote."¹⁹⁶

Here, the court interpreted article II, section 22's plain text as creating a minimum vote requirement; a bill must receive "more than half the vote."¹⁹⁷ If this interpretation is accepted as complete, the text of article II, section 22 does not address a maximum voting requirement,¹⁹⁸ and therefore, the legislature's power in this area remains unrestrained.¹⁹⁹ If the court had accepted its own textual analysis, the legislature could statutorily increase the vote requirement above the simple-majority minimum, rendering the Supermajority constitutional.

The court further strengthened this harmonious interpretation when it discussed the framers' convention debates.²⁰⁰ Although the framers specifically included a majority vote requirement in article II, section 22, "[t]here was no discussion of whether the legislature should be allowed to alter this requirement."²⁰¹ While we can ascertain from the text that the

192. See, e.g., *State v. Brunn*, 154 P.2d 826, 836 (Wash. 1945).

193. See COOLEY, *supra* note 11, at 218.

194. See *id.*

195. See *id.* at 86.

196. *League of Educ. Voters v. State*, 295 P.3d 743,750 (Wash. 2013).

197. *Id.*

198. See *id.*

199. See, e.g., *Yelle v. Bishop*, 347 P.2d 1081, 1087 (Wash. 1959).

200. See *League*, 295 P.3d at 751.

201. *Id.*

framers wanted to establish a minimum vote requirement,²⁰² the court obviously makes clear that we can only speculate about what they might have thought about a statutory increase.²⁰³

Because a reasonable interpretation of the text existed that harmonized the Supermajority with the constitution, the Washington Supreme Court had no constitutional authority to strike down the statute.²⁰⁴ The beyond-a-reasonable-doubt doctrine requires the court to uphold the statute in this situation, even if an unconstitutional interpretation, in the court's mind, is more reasonable.

V. CONCLUSION

The Washington Supreme Court's decision in *League* misinterpreted the judiciary's role and Washington's constitution. In Washington, the legislature's power to pass laws is unrestrained unless the constitution's text expressly or inferentially prohibits the use of legislative power. Therefore, the constitution authorizes the judiciary to void statutes as unconstitutional only when the statute clearly violates the constitution's text. If a reasonable interpretation harmonizes the constitution with a challenged statute, the statute does not conflict with the constitution, and the judiciary must uphold it.

In *League*, the court found a reasonable interpretation of article II, section 22 of Washington's constitution as creating a minimum vote requirement, a simple majority, for bill passage. Under this interpretation, the constitution's text remains silent about the legislature's ability to statutorily increase the vote requirement, and therefore, the legislature's lawmaking power in this area is unrestrained. Because this constitutional interpretation would uphold the Supermajority as constitutional, the court lacked authority to ignore it and to void the Supermajority. By voiding the Supermajority, the Washington Supreme Court unconstitutionally invaded the legislature's province and voided the legislature's power.

Courts must reinvigorate the beyond-a-reasonable-doubt doctrine in state constitutional analysis to prevent judges from striking down constitutional laws. While the application of the doctrine might appear judicially self-imposed, the doctrine is constitutionally required. If a reasonable interpretation of the constitution will uphold a statute, the judiciary lacks constitutional authority to declare the statute void.

202. See WASH. CONST. art. II, § 22.

203. See *League*, 295 P.3d at 751. After making this statement, the court managed to divine the framers' intent by misinterpreting article II, section 32. See *id.* Part III, *supra*, challenged the court's logic. For a discussion about the uncertainty of ascertaining the constitutional framers' intent, see Schlag, *supra* note 5, at 191–92.

204. See COOLEY, *supra* note 11, at 218.