

No. 81287-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LISA BROWN, Washington State Senator and Majority Leader of the
Washington State Senate,

Petitioner,

v.

BRAD OWEN, Lieutenant Governor of the State of Washington,

Respondent.

**BRIEF OF *AMICI CURIAE* EVERGREEN FREEDOM
FOUNDATION, WASHINGTON STATE FARM BUREAU,
AMERICANS FOR TAX REFORM, NATIONAL TAXPAYERS
UNION, & NFIB SMALL BUSINESS LEGAL CENTER**

Michael J. Reitz, WSBA No. 36159
Jonathan D. Bechtle, WSBA No. 39074
Evergreen Freedom Foundation
2403 Pacific Ave. SE
Olympia, WA 98501
(360) 956-3482 Phone
(360) 352-1874 Fax

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. IDENTITY AND INTEREST OF *AMICI CURIAE*..... 1

II. STATEMENT OF THE CASE..... 3

III. ARGUMENT 3

 A. The Two-Thirds Vote Requirement is Consistent with
 Washington State’s Formation and Early History. 4

 1. The Washington Constitution was Adopted in a Period of
 Frustration over Legislative Abuses. 4

 2. The Framers of the Washington Constitution Enacted
 Restrictions on Legislative Power. 7

 3. Subsequent Actions of the People Also Indicate a Distrust of
 Legislative Power..... 8

 B. The Two-Thirds Vote Requirement Does Not Violate Article II,
 Section 22 of the Washington Constitution. 10

 1. The Plain Text of Section 22 Sets Only a Minimum Voting
 Requirement for Bill Passage..... 11

 2. The Context of Section 22 Sets a Minimum Requirement,
 Consistent with its Plain Language..... 13

 3. The Constitutional Framers were Concerned about Bill
 Passage by Less Than a Majority, Not by Supermajorities. .. 14

 4. Supermajority Laws are a Vital Part of any Democracy. 17

IV. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

<i>Boeing Aircraft Co. v. Reconstruction Finance Corp.</i> , 25 Wn.2d 652 (1946)	12
<i>Bogert v. Kinzer</i> , 93 Idaho 515, 465 P.2d 639 (1970).....	19
<i>Gerberding v. Munro</i> , 134 Wn.2d 188 (1998)	12
<i>Gordon v. Lance</i> , 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971).....	19
<i>Lenci v. Seattle</i> , 63 Wn.2d 664 (1964)	12
<i>Malyon v. Pierce County</i> , 131 Wn.2d 779 (1997)	12
<i>People v. Cortez</i> , 6 Cal.App.4 th 1202, 8 Cal Rptr. 2d 580 (Cal. Ct. App. 1992)	16
<i>Pierce County v. State</i> , 150 Wn.2d 422 (2003)	6
<i>Public Utility District No. 1 of Snohomish County v. Taxpayers and Ratepayers of Snohomish County</i> , 78 Wn.2d 724 (1971)	11
<i>Seattle School Dist. No. 1 v. Odell</i> , 54 Wn.2d 728 (1959)	9
<i>Second Amendment Foundation v. City of Renton</i> , 35 Wn.App. 583 (1983)	12
<i>State ex rel. Griffiths v. Superior Court In and For King County</i> , 177 Wash. 619 (1934).....	12
<i>State ex rel. Robinson v. Fluent</i> , 30 Wn.2d 194 (1948)	17
<i>State ex rel. Todd v. Yelle</i> , 7 Wn.2d 443 (1941)	11
<i>Thurston v. Greco</i> , 78 Wn.2d 424 (1970)	19
<i>U.S. Term Limits v. Thornton</i> , 514 U.S. 779, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995).....	13

Statutes

Laws of 2000, 2d Spec. Sess., ch. 2, § 2..... 10
Laws of 2002, ch. 33, § 1..... 10
Laws of 2005, ch. 72, § 2..... 10
Laws of 2006, ch. 56, § 8..... 10
Laws of 2007, ch. 484, § 6..... 10
RCW 43.135.035(1)..... 4, 10

Other Authorities

2 Debates and Proceedings of the Constitutional Convention of the State of Cal. (1881)..... 16
Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669 (1992) 6, 7
Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* (1988) 5
Direct Legislation League of Washington, *Direct Legislation or the Initiative, Referendum, and Recall* (1912) 9
Federalist No. 22 18
James L. Fitts, *The Washington Constitutional Convention of 1889* (1951) (unpublished master's thesis, Univ. of Wash.) 6, 8, 15
Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 Gonz. L. Rev. 247 (1996-97)..... 8
John R. Kinnear, *Notes on the Constitutional Convention*, 4 Wash. Hist. Q. 276 (1913) 6
Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247 (1996) 6
Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227 (1913) 5, 6, 7
Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* (2002)..... 4
S.R. 8601, 60th Leg., Reg. Sess. (2007) 10
Tacoma Daily Ledger, July 19, 1889..... 5
The Journal of the Washington State Constitution Convention: 1889 (Beverly Paulik Rosenow ed., 1999) 7, 15, 17

Theodore L. Stiles, <i>The Constitution of the State and its Effects Upon Public Interests</i> , 4 Wash. Hist. Q. 281 (1913).....	8
Thomas J. Cooley, <i>Treatise on Constitutional Limitations</i> (8 th ed., 1927).....	11, 13, 14, 15
Thomas Jefferson, <i>Notes on the State of Virginia</i> (2 nd ed. 1853)	18
Thomas Jefferson, <i>Proposed Constitution for Virginia</i> (1776), in 2 <i>The Writings of Thomas Jefferson</i> (Paul L. Ford ed., 1893).....	18

Constitutional Provisions

Cal. Const. art. IV, § 15	15
Const art. II, § 9	17
Const. art. I, § 1.....	3, 10
Const. art. I, § 12.....	8
Const. art. II, § 1(d).....	14
Const. art. II, § 11	16
Const. art. II, § 12	13
Const. art. II, § 19	8, 16
Const. art. II, § 2	13
Const. art. II, § 21	16
Const. art. II, § 22	passim
Const. art. II, § 24	8
Const. art. II, § 28	8
Const. art. II, § 29	8
Const. art. II, § 31	17
Const. art. II, § 36	16, 17
Const. art. II, § 39	8
Const. art. II, § 7	12
Const. art. III, § 12.....	17
Const. art. III, § 25.....	12
Const. art. V, § 1	17
Const. art. VII, § 2	9
Const. art. VIII, § 3	8
Const. art. VIII, § 5	8
Const. art. XII, § 9	8
Const. art. XXIII, § 1	17
Const. art. XXIII, § 2	17

I. IDENTITY & INTEREST OF *AMICI CURIAE*

Evergreen Freedom Foundation (EFF) is a Washington nonprofit corporation dedicated to advancing individual liberty, free enterprise and limited, accountable government, and is supported by more than 4,500 Washington citizens. EFF staff provide public policy analysis to legislators in the areas of state budgeting and taxation. EFF supports a supermajority requirement for tax increases as a useful mechanism to ensure fiscally-responsible budgeting.

Washington State Farm Bureau Federation (Farm Bureau) is a nonprofit agricultural advocacy association representing farmers and ranchers in this state since 1920. It is a grassroots organization with 25 county chapters and a total membership in excess of 35,000. Farm Bureau represents a broad range of agricultural commodities and farming interests through local, state, and national affiliates. Farm Bureau members participate in a grassroots policy process in order to develop the organization's priorities, and new policies are voted on by members from every county affiliate. Farm Bureau's policy concerning Tax Reform, adopted in 1995, strongly supports I-601 and the notion of a two-thirds majority to impose new taxes.

Americans for Tax Reform (ATR), based in Washington, D.C., is a 501c(4) nonpartisan coalition of taxpayers and taxpayer groups who

oppose all tax increases. ATR has long been a proponent of supermajorities because taxes are assessed on wide cross-sections of the populace. A simple majority is an insufficient expression of the will of the people for the government to compel the citizenry to release more funds. ATR believes that taxes are too high now, and the taxpayer will benefit by raising the bar for future tax increases.

National Taxpayers Union (NTU) is a nonprofit, nonpartisan citizen group founded in 1969 to work for lower taxes, smaller government, and more accountability for elected officials at all levels. NTU has 362,000 members nationwide, with 11,000 members in Washington. NTU supports supermajority requirements for tax increases because they: (1) put effective tax control into place by preventing unnecessary additions to existing burdens, (2) lead to smarter budgeting by setting meaningful boundaries, and (3) help to grow the economy by attracting new business investment.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm and the legal arm of NFIB. NFIB is the nation's leading small business association, whose mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide, including over 8,000 in Washington. To fulfill its

role as the voice for small business, the NFIB Small Business Legal Center frequently files *amicus* briefs in cases that will impact small businesses nationwide. NFIB is very concerned about Petitioner's attempt to make it easier for the state legislature to raise taxes. Washington small business owners are already taxed at a very high level through, among other things, taxes on a business' monthly gross income, whether or not the business makes a profit for that month, and unemployment insurance taxes that are the second highest in the country.

II. STATEMENT OF THE CASE

Amici adopt Respondent's Statement of the Case.

III. ARGUMENT

Amici agree with Respondent that this Court can dismiss this action without reaching the constitutional question. But should the Court reach the merits, the Washington Constitution does not prohibit a supermajority requirement for tax increases. From the state's earliest days, Washingtonians have sought to safeguard their personal rights and economic interests from encroachment. The constitution emphasizes this from its opening line: "governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." Const. art. I, § 1.

Article II, Section 22 of the constitution sets a minimum threshold for passage of legislation. A review of the convention debates shows that delegates sought only to prevent hasty passage with less than a majority of both houses. Where the constitution is silent the legislature (or the people) can impose additional restrictions upon itself. There is no evidence that our framers would have opposed requiring a higher degree of consensus for tax increases.

The two-thirds vote requirement at issue is therefore consistent with the historical record, a textual analysis, and with our constitution's emphasis on individual rights.

A. The Two-Thirds Vote Requirement is Consistent with Washington State's Formation and Early History.

A discussion of Washington's historical context shows that the two-thirds vote requirement in RCW 43.135.035(1) is consistent with the framers' intent to protect individual economic rights.

1. The Washington Constitution was Adopted in a Period of Frustration over Legislative Abuses.

The Washington Constitution was formed during a period of great skepticism toward legislative bodies. Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 51 (2002). By 1889, the year Washington achieved statehood, the constitutions of states entering the union bore many similarities, and constitutional

“experimentation” had been all but exhausted. Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* 18 (1988). But one of the prime concerns addressed at this time was the legislature. Many “detailed limitations on government were directed toward the lawmaking branch.” *Id.*

State legislatures were seen as easily corruptible and prone to abuses of individual rights, thereby earning passionate criticism: “of all oppressive and unjust instruments of government the legislature is the greatest and most irresponsible.” Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 250 (1913). Constitutional drafters therefore constructed lengthy documents to control the “excesses” of “sloppy, corrupt, and selfish legislation.” Sheldon, *supra*, at 19.

The delegates to the Washington Constitutional Convention were certainly possessed of a strong distrust of legislative bodies. General sentiment “placed the responsibility of financial distress upon the legislative bodies of the country.” Knapp, *supra*, at 230. The “wholesale corruption of state legislatures [was] laughed at by honest men throughout America.” *Tacoma Daily Ledger*, July 19, 1889. During the convention, the attitude toward the legislature was so adversarial, one delegate remarked, “If . . . a stranger from a foreign country were to drop into this

convention, he would conclude that we were fighting a great enemy, and that this enemy is the legislature.” Knapp, *supra*, at 265.

The “troubled record” of Washington’s territorial legislature inflamed these concerns. Brian Snure, Comment, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 Wash. L. Rev. 669, 677 (1992). Legislative abuses abounded—the territorial legislature was notorious for adopting special legislation that benefited only private interests. *Id.* at 671. “Logrolling,” the practice of embracing several distinct matters in one bill in order to procure passage, also troubled the constitutional delegates. *Pierce County v. State*, 150 Wn.2d 422, 429-30 (2003).

The delegates looked with suspicion even upon well-intentioned legislators. As one delegate commented dryly, the constitution protected citizens’ rights from “the greed and rapacity of trusted servants.” John R. Kinnear, *Notes on the Constitutional Convention*, 4 Wash. Hist. Q. 276, 279 (1913).

The Washington constitution, therefore, was viewed as a opportunity to correct legislative abuses, and even out-of-state newspapers urged Washington to prevent the corruption that had characterized other legislatures. James L. Fitts, *The Washington Constitutional Convention of 1889*, at 28-29 (1951) (unpublished master’s thesis, Univ. of Wash.).

The delegates who gathered in Olympia had the benefit of a proposed constitution written by W. Lair Hill. *The Journal of the Washington State Constitution Convention: 1889*, at v (Beverly Paulik Rosenow ed., 1999). Even this resource stressed the need to protect individual rights from legislative power. Mr. Hill wrote that state constitutions “contain not much of value except inhibitions, restraints, regulations and other precautionary safeguards against encroachments by legislative authority upon the rights of individuals” W. Lair Hill, “A Constitution Adapted to the Coming State,” *The Morning Oregonian*, July 4, 1889, at viii.

2. The Framers of the Washington Constitution Enacted Restrictions on Legislative Power.

Consistent with “the growing distrust of the people in legislative bodies,” Washington delegates sought to restrict legislative power in order to protect individual rights and individual pocketbooks. Knapp, *supra*, at 228. The framers removed many traditional powers from the legislature. Snure, *supra*, at 670. One delegate, who later served on the state supreme court, noted the significance of the constitution: “In its operation upon the executive, and especially the legislative branches of government, the constitution is an instrument of limitation” Theodore L. Stiles, *The Constitution of the State and its Effects Upon Public Interests*, 4 Wash.

Hist. Q. 281, 282 (1913). Numerous constitutional provisions illustrate the delegates' motivation to restrict legislative power, especially in areas of fiscal appropriation and special legislation.¹ Details about the legislature's operation, such as the body's size and the duration of the session, were aimed at restricting the legislature. Fitts, *supra*, 29-31.

Given this context, the delegates were concerned with placing *too much* power in the hands of the legislature—not, as Petitioner argues, additional limitations imposed by the people in order to protect their economic interests.

3. Subsequent Actions of the People Also Indicate a Distrust of Legislative Power.

Actions of the electorate in Washington's early years also demonstrate the desire to protect their pocketbooks from legislative abuse. The populist "direct democracy" movement in Washington resulted in adding the people's right to initiative and referendum to the constitution. See Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 *Gonz. L. Rev.* 247, 251-56 (1996-97). Supporters of direct democracy forthrightly stated their

¹ The delegates prohibited the legislature granting special privileges or immunities (Const. art. I, § 12); prohibited "logrolling" (Const. art. II, § 19); prohibited authorizing lotteries and granting divorces (Const. art. II, § 24); prohibited 18 categories of special legislation (Const. art. II, § 28); prohibited contracting out convict labor (Const. art. II, § 29); prohibited accepting free transportation passes (Const. art. II, § 39); required special indebtedness to be submitted to a vote (Const. art. VIII, § 3); and prohibited lending money or credit to private companies (Const. art. VIII, § 5; Const. art. XII, § 9).

motivations for the amendment: “Direct legislation will make it possible to stop graft, reduce the tax rate and bring about honesty in the politics of the state.” Direct Legislation League of Washington, *Direct Legislation or the Initiative, Referendum, and Recall* (1912) (emphasis omitted).² Supporters complained of an out-of-control legislature, and argued that taxes could be reduced with direct legislation. *Id.* at 1.

The history of Amendment 17, some years later, illustrates how the people asserted control over public expenditures. *Seattle School Dist. No. 1 v. Odell*, 54 Wn.2d 728, 729 (1959). In 1932, voters approved a measure that limited property taxes and required a sixty percent vote to exceed the limit. Thereafter, at two-year intervals, the voters approved similar measures. Finally, in 1944, the voters adopted Amendment 17 to fix a similar limitation in the constitution. Const. art. VII, § 2. The reenactment of the property tax limitation by the voters from 1932 through 1942 effectively barred the legislature from eliminating the supermajority requirement.³

In recent years, the legislature has recognized the necessity of supermajority requirements. As noted by Respondent Owen (Br. of Resp’t at 31-32), since passage of Initiative 601 in 1993, the legislature has

² Available at: <http://www.secstate.wa.gov/oralhistory/pdf/OH448.pdf> (last visited August 1, 2008).

³ Prior to the adoption of Amendment 26 (1952), an initiative could not be amended in the two years following approval except by a vote of the people.

amended the measure numerous times, but has not repealed or permanently suspended the two-thirds requirement in RCW 43.135.035(1).⁴ The legislature has placed similar restrictions upon its own internal functions. The senate's permanent rules require a supermajority vote to amend the budget on the floor—a rule not specifically mandated by the constitution. “Rule 53. No amendment to the budget, capital budget or supplemental budget, not incorporated in the bill as reported by the ways and means committee, shall be adopted except by the affirmative vote of sixty percent of the senators elected or appointed.” S.R. 8601, 60th Leg., Reg. Sess. (2007).

Throughout Washington's history, therefore, the people have attempted to safeguard their personal and economic rights. The two-thirds requirement in RCW 43.135.035(1) is entirely consistent with this history.

B. The Two-Thirds Vote Requirement Does Not Violate Article II, Section 22 of the Washington Constitution.

While the people are the original source of political power, they granted power to the legislature to act as their representatives when they formed a republican government. Const. art. I, § 1. Limitations on this power were expressly written or “fairly implied” in the constitution, *State*

⁴ Laws of 2000, 2d Spec. Sess., ch. 2, § 2; Laws of 2002, ch. 33, § 1 (temporary suspension of 2/3 requirement); Laws of 2005, ch. 72, § 2 (temporary suspension of 2/3 requirement); Laws of 2006, ch. 56, § 8; Laws of 2007, ch. 484, § 6. It should be noted that Petitioner Lisa Brown voted “yea” on each of the bills above, all of which left intact the supermajority requirement at issue.

ex rel. Todd v. Yelle, 7 Wn.2d 443, 451 (1941), and this Court has been “reluctant to find a restriction on the legislature’s power unless some limitation is found in the wording of the constitution itself.” *Public Utility District No. 1 of Snohomish County v. Taxpayers and Ratepayers of Snohomish County*, 78 Wn.2d 724, 728-29 (1971). But Petitioner wishes to turn this rule on its head, asking the court to ignore (1) the plain language of Section 22, (2) its context in the constitution, (3) the intent of its writers and adopters, and (4) the positive role supermajority requirements play in a balanced democracy.

1. The Plain Text of Section 22 Sets Only a Minimum Voting Requirement for Bill Passage.

When attempting to determine the meaning of a constitutional section, scholar Thomas J. Cooley suggests “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 have placed them.” Thomas J. Cooley, *Treatise on Constitutional Limitations* 127 (8th ed., 1927). It is “elementary . . . that, in construing the constitution, words are to be given the usual and ordinary meaning.” *Yelle*, 7 Wn.2d at 167. That’s how the people who adopted the constitution understood them, and “[t]he fundamental principle of constitutional construction is to give effect to the intent of the . . . people adopting it.”

Boeing Aircraft Co. v. Reconstruction Finance Corp., 25 Wn.2d 652, 659 (1946).⁵

On its face, the negative phrasing of Section 22 (“No bill shall become a law unless”) sets a minimum standard: a bill cannot pass if a majority of members do not vote for it. A bill passing by a two-thirds vote satisfies this requirement. Courts have noted the significance of negative phrasing and how such wording “merely fixes a minimum of qualifications below which [government] may not go.” *State ex rel. Griffiths v. Superior Court In and For King County*, 177 Wash. 619, 624 (1934).⁶

Even the cases Petitioner cites as supporting her position actually strengthen the view that Section 22’s negative phrasing sets a minimum requirement in its ordinary usage. (Pet’r Reply Br. at 7.) When this Court found the qualifications clauses (Const. art. II, § 7; art. III, § 25) exclusive, it did so in spite of the negative phrasing, which normally would have set only a minimum. *Gerberding v. Munro*, 134 Wn.2d 188, 199 (1998). But the clauses were deemed exclusive due to Washington’s judicial and political history of substantial bias toward unrestricted access to public office. *Id.* at 207. The principles espoused by Washington voters are

⁵ See also *Malyon v. Pierce County*, 131 Wn.2d 779 (1997); *Second Amendment Foundation v. City of Renton*, 35 Wn.App. 583 (1983).

⁶ See also *Lenci v. Seattle*, 63 Wn.2d 664 (1964).

entirely different in the petition today, and strongly support the idea that the legislature has the power to restrict itself in the arena of tax increases. In a similar case, the U.S. Supreme Court reviewed qualification clauses for members of Congress, and also found them to be exclusive in spite of the negative phrasing. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 792 n.8, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995). Agreeing on this point in his dissent, Justice Thomas noted that the negative phrasing was “quite different from an *exclusive* formulation, and that it “merely establish[ed] *minimum* qualifications.” *Id.* at 867.

2. The Context of Section 22 Sets a Minimum Requirement, Consistent with its Plain Language.

While the meaning of Section 22 is plain on its face, prudence dictates that we look at it in light of the remainder of the constitution, to ensure there is “no absurdity and no contradiction between different parts of the same writing” Cooley, *supra*, at 127. There is none here.

Other constitutional sections make it abundantly clear that the constitutional writers knew how to write “ceilings” and “floors” into the text. For example, Article II, Section 2 limits the number of representatives to “not less than sixty-three nor more than ninety-nine members,” and Article II, Section 12 limits legislative sessions to “not be

more than sixty consecutive days.”⁷ And as one Justice wrote, “exclusive language was employed in the voter qualification clause, evidencing the qualifications set forth therein were intentionally exclusive” *Gerberding*, 134 Wn.2d at 217 (Sanders, J., dissenting).⁸

It is reasonable to assume the drafters used exclusive-sounding text when they intended a requirement to be exclusive and used phrasing like Section 22’s to set only a minimum requirement. Such reasoning leads to no absurdities, and allows the Court to maintain a general approach of not reading hidden meanings into the text.⁹

Ignoring the grammar of Section 22 and its surrounding clauses should not be done lightly. “Courts must . . . lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.” *Cooley, supra*, at 128.

3. The Constitutional Framers were Concerned about Bill Passage by Less Than a Majority, Not by Supermajorities.

Based on its plain text and context, Article II, Section 22 does not prevent the legislature from passing a supermajority requirement. But if

⁷ For even years. In odd years, “not more than one hundred five consecutive days.” Const. art. II, § 12.

⁸ While not an original clause, the positive wording in Article II, Section 1(d) of the constitution is instructive, “Any measure . . . shall take effect and become the law if it is approved by a majority of the votes cast.” This provision, adopted in 1913, strengthens the assumption that the constitutional drafters understood the difference between exclusive and non-exclusive language.

⁹ The holding in *Gerberding* does not conflict with this assumption, as it was based not on the constitutional text, but on the history of the convention and ballot access cases.

there are any doubts, extrinsic aids can help determine the intent of those who wrote and approved the section, in order to find “the object to be accomplished or the mischief designed to be remedied or guarded against.” Cooley, *supra*, at 141. The available evidence suggests that the “mischief designed to be remedied” was not a two-thirds threshold, but a fear of bills being passed hastily by *less* than a majority of the full houses.

Looking first to the minutes of the constitutional convention, we find that what little debate there was on Section 22 concerned whether bills could pass with less than a majority. *Journal, supra*, at 536. Two amendments offered would have struck the majority requirement. Both motions lost, indicating concern about bills passing with a mere majority of those present. *Id.*¹⁰

Why was there concern? The drafters of California’s 1879 constitution provide a likely answer in their debates over the provision that served as a basis for Section 22.¹¹ Every California delegate who spoke about the purpose of the section said it was designed “to guard against

¹⁰ Delegate George Turner’s amendment would have struck the last clause, beginning with “and a majority.” James Power’s amendment would have inserted a provision that a majority of those present could pass a bill. *Journal, supra*, at 536.

¹¹ Article II, Section 22, was modeled on a California provision. *Journal, supra*, at 535. Cal. Const. art. IV, § 15 (now Section 8) read in part, “No bill may be passed unless, by roll call vote entered in the journal, a majority of the membership of each house concurs.” The influence of the California Constitution was so strong on the Washington drafters that the *Seattle Post-Intelligencer* reported: “So marked is the tendency to imitate [the California Constitution] that a member one day objected to a certain provision because it was not found in that Constitution.” Fitts, *supra*, at 35 n.33.

hasty legislation, so that a bill could not be rushed through when there is a very thin house.” 2 *Debates and Proceedings of the Constitutional Convention of the State of Cal.* 780 (1881). One delegate even alluded to the minimum nature of the section when he complained an early version would not prevent hasty legislation, saying, “A bill may be . . . voted upon immediately . . . in the course of fifteen minutes, and, perhaps, one half of the members know nothing about it. There is no safety in that, *unless the laws of the Assembly should prevent it . . .*” *Id.* at 778 (emphasis added). Subsequent California case law affirmed that the language merely established a “floor” for the legislature. *People v. Cortez*, 6 Cal.App.4th 1202, 8 Cal Rptr.2d 580 (Cal. Ct. App. 1992).

The other procedural requirements the Washington drafters included around Section 22 strengthen the evidence that they had the same primary concern as the California delegates. The ten-day cutoff for introduction, the journal requirements, the single subject rule and similar rules all appear designed to prevent hasty legislation.¹²

Petitioner has suggested that the use of supermajority requirements in other sections shows the drafters disliked the tool, and wanted to limit its use to only those issues. (Pet’r Reply Br. at 5.) But “a state constitution is not a grant, but a restriction upon the powers of the legislature, and,

¹² Const. art. II, §§ 11, 19, 21, 22 and 36.

hence, an express enumeration of legislative powers is not an exclusion of others not named, unless accompanied by negative terms.” *State ex rel. Robinson v. Fluent*, 30 Wn.2d 194, 203 (1948).

The seven supermajority requirements in the 1889 constitution contained no exclusionary language, nor was there any expressed intent to make them so in the convention debates.¹³ It appears the constitutional drafters wanted to ensure widespread agreement to waive constitutional requirements, change the state’s founding document or take the grave step of impeaching an official. Requiring a two-thirds vote in these instances does not mean the drafters hoped to preclude other uses of a supermajority vote, but only that these seven far-reaching actions were questions worthy of constitutional safeguards.¹⁴

4. Supermajority Laws are a Vital Part of any Democracy.

Petitioner is reduced to offering the Court a few quotes cherry-picked from writings of the Founding Fathers to prove a bias against supermajority votes. (Pet’r Reply Br. at 3-4.) But at least one of these is

¹³ The 1889 constitution required supermajority votes for: expelling a legislator (Const. art. II, § 9); waiving the waiting period for bills to go into effect (Const. art. II, § 31 (*repealed*)); waiving the cutoff for bill introduction (Const. art. II, § 36); overriding a veto (Const. art. III, § 12); impeachment (Const. art. V, § 1); amending the constitution (Const. art. XXIII, § 1); and calling a constitutional convention (Const. art. XXIII, § 2).

¹⁴ For example, in the extensive debate over the governor’s veto power, several of the delegates commented on the need for a working veto power as a foundational element in the balance of power. While several delegates wanted to reduce the veto requirement to three-fifths or a simple majority, the two-thirds requirement was set to ensure the survival of this “fundamental principle of government.” *Journal, supra*, at 573.

taken out of context. Using Thomas Jefferson’s statement that “majority rule ‘is the natural law of every assembly of men’” to support an argument against supermajorities is misleading at best. *Id.* The rest of the quote reads, “whose numbers are not fixed by any other law.” Thomas Jefferson, *Proposed Constitution for Virginia* (1776), in 2 *The Writings of Thomas Jefferson* 17 (Paul L. Ford ed., 1893). This modifying phrase, plus Jefferson’s quorum requirement in his draft Virginia constitution of two-thirds of the members, shows he had no fear of supermajority requirements. His fear was of legislatures having quorums of *less than a majority*. He lamented that Virginia allowed forty members, or less than a majority, count as a quorum during wartime. As he warned: “From forty it may be reduced to four, and from four to one . . . and thus an oligarchy or monarchy be substituted” Thomas Jefferson, *Notes on the State of Virginia* 135 (2nd ed. 1853).

Unlike the extreme requirement for unanimous consent in the Articles of Confederation that Hamilton addressed in *Federalist No. 22*, Washington’s delegates saw the utility of two-thirds votes without any evident concern about destroying a bedrock of democracy.¹⁵ As have

¹⁵ Petitioner uses the extreme hypothetical of a 9/10 vote requirement to attack the concept of supermajorities. (Pet’r Reply Br. at 4.) This argument is frankly absurd, and is in no way a foreseeable consequence of Respondent’s position. A 9/10 requirement would raise many constitutional and practical issues not applicable to a 2/3 requirement, which has a long history as a valuable tool of democracy in this state and nation.

many courts, finding that “there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.” *Gordon v. Lance*, 403 U.S. 1, 6, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971). The Washington Supreme Court, when reviewing a challenge to a sixty percent vote requirement for school levies, opined, “the proposition of majoritarianism . . . [is] wrong historically [and] carried to a logical conclusion, would open a Pandora’s box of governmental ills that would grind the teeth from the gears of government.” *Thurston v. Greco*, 78 Wn.2d 424, 427 (1970). Idaho’s Supreme Court also ruled in favor of supermajorities, explaining: “majorities sometimes act rashly and even mindlessly . . . in short, influence and even power should be distributed more widely than they would be in rigid adherence to the majoritarian principle, so that government may rest on widespread consent rather than teetering on the knife-edge of a transient 51 percent.” *Bogert v. Kinzer*, 93 Idaho 515, 524, 465 P.2d 639 (1970).

///

///

///

///

///

IV. CONCLUSION

The two-thirds vote requirement at issue is therefore consistent with the historical record, is consistent with a textual analysis, and is consistent with our constitution's emphasis on individual rights.

For the foregoing reasons, *amici* urge the Court to dismiss this Petition.

RESPECTFULLY SUBMITTED this 8th day of August, 2008.

EVERGREEN FREEDOM FOUNDATION

Michael J. Reitz, WSBA No. 36195
Jonathan D. Bechtle, WSBA No. 39074
Attorneys for *Amici Curiae*