RETHINKING EMERGENCY LEGISLATION IN WASHINGTON STATE

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Abstract: The people's right to referendum in Washington State is substantively limited in only one way: the people cannot block through referendum "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."[1] This emergency exception to the referendum power must be explicitly invoked by the Washington State Legislature in what is called an "emergency clause." Washington courts are willing to review emergency clauses to determine if a bill is, in fact, "necessary for the immediate preservation of the public peace, health or safety." However, the courts have failed to articulate a coherent rule for deciding whether a bill meets that standard.[2] As a result, the Legislature routinely exempts from referendum bills that do not address traditional emergencies—a practice that has been widely criticized.

To strike the right balance between the people's referendum right and the Legislature's need to effectuate certain laws immediately, the courts should reexamine the purpose of the emergency exception. This Comment proposes a standard for evaluating whether a bill addresses an emergency. To meet that standard, the bill must accomplish a public purpose that would be substantially destroyed if the Legislature was unable to act immediately. This standard would allow the Legislature to effectively address circumstances that fail to resemble traditional emergencies but nevertheless require immediate action. This standard is also consistent with a key policy reason behind Washington's emergency exception: preventing a small minority (4% of voters required for a referendum) from undermining the ability of the majority's elected representatives to fulfill their legislative duty.

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1. WASH. CONST. art. II, § 1(b).

2. *Id.*

"It might be illegal to yell 'Fire!' under false pretenses in a crowded movie house, but yelling 'Emergency!' on the floor of the state legislature (under false pretenses, for sure) was standard operating procedure this year."[3]

INTRODUCTION

This quote, the opening line of a *Stranger* article from 2005, exemplifies a common criticism of the referendum system in Washington: the Legislature declares bills "emergency legislation" solely to avoid a referendum.[4] The right to referendum allows the general public to block acts by the Legislature from taking effect unless they survive a public vote.[5] Any person may initiate this procedure by gathering signatures that amount to 4% of the votes cast during the previous gubernatorial election.[6] A successful referendum petition will delay a bill from taking effect until it is voted on during the next general election.[7] To avoid the possibility of a referendum, the Legislature can include an "emergency clause" in a bill, indicating that the bill addresses an emergency and must take effect immediately.[8]

The Legislature is often criticized for invoking its emergency legislative power when a bill does not resemble a traditional emergency, such as a public health crisis or natural disaster.[9] But those criticisms are misguided. In seeking to confine emergency clauses to bills addressing traditional health and safety emergencies, the Legislature's critics have

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3. Stefan Sharkansky, *State of Emergency*, THE STRANGER: SOUND BITE (May 19, 2005), https://www.thestranger.com/seattle/sound-bite/Content?oid=21434 [https://perma.cc/S95A-JHU6].

4. *Id.*

5. WASH. CONST. art. II, § 1(b).

6. *Id.* ("The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state."). Referendum petitions originally required 6% of legal voter signatures but no more than thirty-thousand total; amendment 30 reduced this requirement to 4% of votes cast in the last gubernatorial election. Philip A. Trautman, *Initiative and Referendum in Washington: A Survey*, 49 WASH. L. REV. 55, 57 (1973). The signature requirement for an initiative is higher, at 8%. WASH. CONST. art. II, § 1(a).

7. WASH. CONST. art. II, § 1(d).

8. OFFICE OF THE CODE REVISER, WASH. STATE LEGISLATURE, BILL DRAFTING GUIDE 2019, pt. II, § 11(k), at 21 (2019) [hereinafter BILL DRAFTING GUIDE 2019], http://leg.wa.gov/CodeReviser/Documents/2019BillDraftingGuide.pdf [https://perma.cc/K94A-UMSJ].

9. *See, e.g.*, Sharkansky, *supra* note 3.

misconceived the purpose of the emergency exception.[10] A close look at the emergency exception shows that the Legislature should be able to respond immediately to a limited number of other circumstances that do not resemble traditional emergencies but do require prompt action.[11]

Article II, section 1(b) of the Washington Constitution substantively limits the people's right to referendum in only one way: the people cannot block through referendum "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."[12] This type of emergency exception—a public safety exception—is common among states that have adopted the referendum power.[13] Of the twenty-three states that have statewide referendum powers in their constitutions,[14] about half of the constitutions include some version of an emergency exception.[15] The reasoning is relatively simple: an unfettered right to

10. *See infra* Part V.

11. *See infra* Part V.

12. WASH. CONST. art. II, § 1(b).

13. *See infra* note 14.

14. These states include (listed by year that the referendum process was adopted): South Dakota (1898), Utah (1900), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907), Michigan (1908), Missouri (1908), Maine (1909), Arkansas (1909), Colorado (1910), Arizona (1910), New Mexico (1911), California (1912), Idaho (1912), Nebraska (1912), Ohio (1912), Washington (1912), North Dakota (1914), Maryland (1915), Massachusetts (1918), Alaska (1958), and Wyoming (1967). Chip Lowe, *Public Safety Legislation and the Referendum Power: A Reexamination*, 37 HASTINGS L.J. 591, 592 n.8 (1986).

15. ALASKA CONST. art. XI, § 7 ("The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health, or safety."); ARIZ. CONST. art. IV, pt. 1, § 1(3) ("[E]xcept laws immediately necessary for the preservation of the public peace, health, or safety, or for the support and maintenance of the departments of the state government and state institutions"); CAL. CONST. art. II, § 9(a) ("[E]xcept urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State."); COLO. CONST. art. V, § 1 ("[E]xcept as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions"); ME. CONST. art. IV, pt. 3, § 16 ("An emergency bill shall include only such measures as are immediately necessary for the preservation of the public peace, health or safety; and shall not include (1) an infringement of the right of home rule for municipalities, (2) a franchise or a license to a corporation or an individual to extend longer than one year, or (3) provision for the sale or purchase or renting for more than 5 years of real estate."); MO. CONST. art. III, § 52(a) ("[E]xcept as to laws necessary for the immediate preservation of the public peace, health or safety, and laws making appropriations for the current expenses of the state government, for the maintenance of state institutions and for the support of public schools"); N.M. CONST. art. IV, § 1 ("[E]xcept general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws."); OHIO CONST. art. II, § 1(d) ("Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary

referendum would allow a small minority[16] to block legislation that needs to be enacted quickly, thereby undermining the state legislature's ability to do its job.[17] The objective of an emergency exception is to strike a balance between the people's right to referendum and the legislature's need to carry out certain laws immediately.[18]

To signal that a bill is exempt from a referendum, the Legislature attaches an emergency clause containing the article II, section 1(b) language.[19] That is where things get murky. Although the Washington State Supreme Court is willing to review emergency clauses to ensure that they satisfy article II section 1(b)'s requirements, it has failed to articulate a coherent rule for determining whether those requirements are met.[20] Particularly, the Court has offered inconsistent guidance for whether an act is "necessary for the immediate preservation of the public peace, health or safety."[21] In doing so, the Court has oscillated between a narrow interpretation of the language[22] and a standard that gives the Legislature

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for the immediate preservation of the public peace, health or safety, shall go into immediate effect."); OKLA. CONST. art. V, § 2 ("[E]xcept as to laws necessary for the immediate preservation of the public peace, health, or safety"); OR. CONST. art. IV, § 1(3)(a), § 28 (Under § 1(3)(a), "The people reserve to themselves the referendum power, which is to approve or reject at an election any Act, or part thereof, of the Legislative Assembly that does not become effective earlier than 90 days after the end of the session at which the Act is passed." Under § 28, no act shall take effect until 90 days after the end of the session "except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law"); S.D. CONST. art. III, § 1 ("[E]xcept such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."); WYO. CONST. art. III, § 52(g) ("The referendum shall not be applied to dedications of revenue, to appropriations, to local or special legislation, or to laws necessary for the immediate preservation of the public peace, health or safety.")

16. To place a referendum measure on the ballot in Washington, one must gather signatures amounting to 4% of votes cast in the previous gubernatorial election. WASH. CONST. art. II, § 1(b).

17. *See* State *ex rel.* Blakeslee v. Clausen, 85 Wash. 260, 267, 148 P. 28, 30 (1915).

18. *See* State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 777, 380 P.2d 735, 738 (1963) ("[T]here is a most delicate balance between the emergent powers of the legislature and the people's right of referendum.").

19. BILL DRAFTING GUIDE 2019, *supra* note 8, at 21.

20. Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZ. L. REV. 219, 222 (2008).

21. The emergency exception has been interpreted as two separate exceptions. Farris v. Munro, 99 Wash. 2d 326, 336, 662 P.2d 821, 827 (1983). The second exception, "support of the state government and its existing public institutions," has been reviewed more frequently by the courts, and the rule is better developed. *See generally Clausen*, 85 Wash. 260, 148 P. 28. Although there is still some uncertainty around the second exception (the support-of-the-state-government exception), this Comment focuses primarily on the first exception, the public safety exception, which covers laws "necessary for the immediate preservation of the public peace, health or safety." *Farris*, 99 Wash. 2d at 336, 662 P.2d at 827.

22. *See, e.g.*, State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 318, 147 P. 11, 16–17 (1915) (adopting a narrow interpretation of the public safety exception).

more wiggle room (for example, upholding an emergency clause in a bill financing a baseball stadium).[23] Therefore, aside from waiting for courts to make determinations on an ad hoc basis, there is no clear method to predict whether an emergency clause is valid. The absence of a clear rule is openly acknowledged in case law[24] and in academic literature.[25]

The most perplexing case evaluating an emergency clause is *CLEAN v. State*,[26] in which the Washington State Supreme Court held that a bill financing construction of a baseball stadium was validly exempt from a referendum.[27] Critics of the decision fail to see how funding a stadium could possibly constitute an emergency.[28] This reaction is understandable; financing a baseball stadium hardly seems comparable to a traditional emergency, and it is intuitively appealing to define "emergency" in the traditional sense. However, this Comment argues that the desire to cabin the emergency exception to traditional emergencies is misguided because it fails to address other scenarios that legitimately require immediate action.

This Comment proposes a standard for evaluating whether a bill fits within the public safety exception to the right to referendum. The public safety exception should exempt a bill from a referendum where the bill accomplishes a public purpose and where that purpose would be substantially thwarted if the Legislature was unable to act immediately. This standard encompasses two scenarios requiring prompt action: (1) cases where the harm is so severe that an immediate response is necessary to mitigate ongoing damage, and (2) instances where a law's purpose would be irreparably undermined if the effective date were delayed pending referral. This standard provides clarity in determining whether a bill addressing a non-traditional emergency warrants exemption

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23. *See, e.g.*, CLEAN v. State, 130 Wash. 2d 782, 805, 928 P.2d 1054, 1065 (1996) (adopting a broad interpretation of the public safety exception compared to that in *Brislawn*).

24. State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 777–78, 380 P.2d 735, 738–39 (1963) ("[I]n almost every prior decision on this point, the court was divided, or there was a concurring opinion based on reasons different from those expressed by the majority . . . . It would be inaccurate to say that our former decisions have been consistent in discussing and announcing the rule to be applied.").

25. Trautman, *supra* note 6, at 72 ("The court has interpreted this provision in a series of not always consistent cases."); Page, *supra* note 20, at 222 ("[C]ourts have been marred in confusion when deciding cases challenging the validity of emergency clauses.").

26. 130 Wash. 2d 782, 928 P.2d 1054 (1996).

27. *Id.* at 782, 928 P.2d at 1054.

28. *See Emergency Clause Reform Scheduled for Public Hearing*, WASH. POLICY CTR (Jan. 24, 2013), https://www.washingtonpolicy.org/publications/detail/emergency-clause-reform-scheduled-for-public-hearing [https://perma.cc/EVQ6-K836] (last updated Jan. 28, 2013); *CLEAN*, 130 Wash. 2d at 825 (Sanders, J. dissenting).

under the clause and will also preclude the Legislature from misusing emergency clauses to avoid a referendum.

By holding the Legislature accountable to a concrete definition of emergency, this proposed standard also addresses a major criticism of the Legislature's use of emergency clauses: that the Legislature improperly exempts bills from referendum that do not address traditional emergencies. Currently, the perception of improper use of emergency clauses comes from the absence of a clear standard for evaluating whether a bill falls under the public safety exception.[29] Because the Legislature and courts have failed to articulate why certain non-traditional emergencies require exemption, they *appear* to be ignoring the scope of the public safety exception. This perception is bolstered when the Legislature attaches an emergency clause to legislation addressing issues that do not resemble traditional emergencies, such as public health crises or natural disasters.[30] But by clearly defining "emergency," this Comment's standard would place the Legislature on notice of what a valid emergency clause looks like. At the same time, it would give the public a standard by which to judge emergency clauses. As a result, the Legislature would be less likely to misuse emergency clauses to avoid a referendum, and the public would be less likely to misjudge the Legislature's behavior.

This Comment also rejects the primarily procedural solutions that critics of the emergency clause have proposed. These solutions (e.g., requiring a supermajority vote to pass bills with emergency clauses)[31] attempt to make it more challenging to attach an emergency clause to a bill. However, they fail to address the underlying issue: Washington law has yet to coherently define what *should* constitute an emergency.[32] By looking to the purpose of the emergency exception to define "emergency," this Comment shows that procedural solutions are either inconsistent with that purpose or unhelpful absent a coherent definition of emergency.

Part I of this Comment discusses the history of the people's right to referendum in Washington. Part II explains the technical requirements for

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29. Sharkansky, *supra* note 3 ("Hardly any of these bills address palpable emergencies like hurricanes or terrorist attacks.").

30. *Emergency Clause Reform Scheduled for Public Hearing*, *supra* note 28 (asserting that emergency clauses should only validly apply for "true public emergencies, like a large-scale natural disaster or wide-spread epidemic disease").

31. Page, *supra* note 20, at 271–79.

32. *See* State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 777–78, 380 P.2d 735, 738–39 (1963) ("It would be inaccurate to say that our former decisions have been consistent in discussing and announcing the rule to be applied."); *see also* Page, *supra* note 20, at 222 ("[C]ourts have been marred in confusion when deciding cases challenging the validity of emergency clauses."); Trautman, *supra* note 6, at 72 ("The court has interpreted this provision in a series of not always consistent cases.").

and the historical use of both referendum measures and emergency clauses in Washington. Part III examines judicial review of emergency clauses. Part IV describes how the public has criticized emergency declarations and surveys proposed reforms to the referendum process. Finally, Part V proposes a standard for evaluating emergency clauses. The proposed standard is consistent with Washington case law but provides a simpler and more workable definition of emergency.

I. THE PEOPLE'S RIGHT TO REFERENDUM IN WASHINGTON

In 1912, Washington State adopted, through amendment VII to the Washington Constitution, an initiative and referendum process.[33] The right to referendum gives the people power to refer acts of the Washington Legislature to a public vote before they become law.[34] Essentially, a referendum measure requires that a statute adopted by the Legislature be approved or rejected by the people before taking effect.[35] This right to block legislative acts is considered an important check on the government.[36] For example, the referendum power enhances legislative accountability to the people by forcing the Legislature to consider how the public will respond to its actions.[37] Although the original Washington State Constitution, adopted in 1889, did not include an initiative and referendum clause, article I, section 1, stated that "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed."[38] Washington expressly reserved to the people the right to initiative and referendum following a nationwide trend toward restricting representative government and strengthening direct

33. Trautman, *supra* note 6, at 55.

34. *Id.*; OFFICE OF SEC'Y OF STATE, INITIATIVES & REFERENDA IN WASHINGTON STATE 3 (2017), https://www.sos.wa.gov/_assets/elections/initiatives/initiative%20and%20referenda%20handbook%202017%20.pdf [https://perma.cc/5DT9-QZB5] (last visited Aug. 14, 2019, 8:41 AM) [hereinafter INITIATIVES & REFERENDA IN WASHINGTON].

35. Jeffrey T. Even, *Direct Democracy in Washington: A Discourse on the Peoples' Powers of Initiative and Referendum*, 32 GONZ. L. REV. 247, 251 (1996).

36. Page, *supra* note 20, at 234.

37. *Id.* ("The referendum forces the legislature to think about how the people will react to legislation if enacted. Legislatures are often reluctant to pass bills that might mobilize referendum efforts to strike down the law.").

38. WASH. CONST. art. I, § 1.

democracy.[39] By some accounts, the intent of amendment VII was to give "maximum power to the people in relation to the legislature."[40]

Although the people's right to referendum is viewed as an important check on the Legislature, it is not unlimited. Amendment VII contains an "emergency exception," which limits the public's right to referendum.[41] Article II, section 1(b) exempts from referendum power "such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions."[42] Thus, a bill containing article II, section 1(b) language (for instance, a bill containing an emergency clause)[43] is exempt from a referendum and cannot be delayed or ultimately blocked by a popular vote.[44]

In addition to adding the right to initiative and referendum, amendment VII also eliminated a requirement that emergency measures be approved by two-thirds of each house.[45] Originally, laws (other than appropriations bills) took effect ninety days after adjournment of the session in which they were enacted.[46] However, in cases of emergency, a law could take effect before the ninety-day period if the Legislature included a declaration of emergency in the act and if two-thirds of each house voted for the measure.[47] After amendment VII was enacted, emergency measures no longer required approval by two-thirds of each house.[48]

While the right to referendum is an important form of direct democracy in Washington, the right is not without limits. The emergency exception in article II, section 1(b) fundamentally limits the availability of the referendum.[49] This Comment explores the appropriate balance between

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39. Trautman, *supra* note 6, at 55; *see also* Even, *supra* note 35, at 253 ("In 1898, South Dakota became the first state to adopt the initiative and referendum. Between 1898 and 1918, 23 states adopted at least one form of direct democracy.").

40. Trautman, *supra* note 6, at 68.

41. WASH. CONST. art. II, § 1(b).

42. *Id.*

43. The draft bill guide includes the following standard emergency clause language based on Art. II § 1(b): "[t]his act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect (immediately or a specific date)." BILL DRAFTING GUIDE 2019, *supra* note 8, at 21.

44. Trautman, *supra* note 6, at 72.

45. Page, *supra* note 20, at 224.

46. WASH. CONST. art II § 31, *repealed by* WASH. CONST. amend. VII.

47. *Id.*

48. Page, *supra* note 20, at 224.

49. WASH. CONST. art. II, § 1(b).

the people's right and the Legislature's need to avoid a referendum in certain circumstances.

II. TECHNICAL REQUIREMENTS FOR, AND HISTORICAL USE OF, REFERENDUM MEASURES AND EMERGENCY CLAUSES IN WASHINGTON

A. Referendum Measures

The procedures for filing a referendum measure are fairly straightforward. Any registered voter may file a petition for referendum.[50] A referendum may target all or part of a statute.[51] To successfully refer an act of the Legislature to the ballot, a petitioner must gather signatures from legal voters that amount to at least 4% of the votes cast during the previous gubernatorial election.[52] The petitioner must then file their petition with the Secretary of State after the governor signs the bill into law (which could happen before or after the legislative session is adjourned)[53] and no later than ninety days after adjournment of the session in which the bill was passed.[54] Once the Office of the Secretary of State certifies the referendum petition, the statute is suspended and the referendum measure is submitted to a public vote in the next state general election.[55] Referendum measures are accepted or rejected by a simple majority vote.[56] If the people vote to support the Legislature and the bill is therefore enacted, it cannot be amended or repealed within a period of two years following its enactment unless two-thirds of each house vote to overturn

50. There are two types of referenda: referendum measures (laws passed by the legislature but referred to a public vote by referendum petition) and referendum bills (proposed laws referred to a public vote by the Legislature). At issue here are referendum measures. *See* INITIATIVES & REFERENDA IN WASHINGTON, *supra* note 34, at 8.

51. *Id.*

52. WASH. CONST. art. II, § 1(b). ("The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state."). Referendum petitions originally required 6% of legal voter signatures but no more than thirty-thousand total signatures; amendment 30 reduced this requirement to 4% of votes cast for in the last gubernatorial election. Trautman, *supra* note 6, at 57. The signature requirement for an initiative is higher: 8%. WASH. CONST. art. II, § 1(b).

53. Even, *supra* note 35, at 260–61.

54. *Id.* at 260.

55. INITIATIVES & REFERENDA IN WASHINGTON, *supra* note 34, at 13.

56. *Id.* at 9. An exception is that gambling and lottery measures require 60% approval. *See id.*

the bill.[57] If the referendum measure successfully blocks the Legislature, the bill will not go into effect.[58]

Many referendum measures fail to make the ballot because of the difficulty of gathering signatures. From 1912 to the present, eighty-two referendum measures have been proposed, but only thirty-seven have been placed on the ballot for public vote.[59] Of the referendum measures that did not make the ballot, thirty-one did not submit signatures, eight were withdrawn by the sponsor, two were submitted with insufficient signatures, two were blocked because of emergency clauses, one was filed prematurely, and one was blocked by a writ of prohibition.[60] Out of the referendum measures that successfully qualified for a spot on the ballot, the public overturned the Legislature thirty times and supported the Legislature seven times.[61]

B. Emergency Clauses

Beyond procedural hurdles such as the signature requirement, the only substantive limit on the right to referendum is the emergency exception outlined in article II, section 1(b). To take advantage of the emergency exception, the Legislature attaches to a bill an emergency clause containing article II, section 1(b) language. A valid emergency clause exempts the bill from a referendum.

Fifteen percent of bills enacted by the Legislature from 1997 until 2012 included emergency clauses.[62] The Legislature used those emergency clauses in a wide variety of bills, including bills providing funding for the Seattle Mariners's (a Major League Baseball team) stadium[63]; adopting California's vehicle standards[64]; requiring the use of apprentices on public

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57. WASH. CONST. art. II § 1 ("No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. Provided, that any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III of the Washington Constitution and no amendatory law adopted in accordance with this provision shall be subject to referendum.").

58. INITIATIVES & REFERENDA IN WASHINGTON, *supra* note 34, at 8.

59. *History of Referendum Measures*, WASH. SEC'Y OF STATE: ELECTIONS, https://www.sos.wa.gov/elections/initiatives/statistics_referendummeasures.aspx [https://perma.cc/Q2WN-5EPJ].

60. *Id.*

61. *Id.*

62. *Emergency Clause Reform Scheduled for Public Hearing*, *supra* note 28.

63. S.B. 6049, 54th Leg., 1st Spec. Sess. (Wash. 1995), http://lawfilesext.leg.wa.gov/biennium/1995-96/Pdf/Bills/Session%20Laws/Senate/6049-S.SL.pdf [https://perma.cc/DRC4-LKMU].

64. H.B. 1397, 59th Leg., Reg. Sess. (Wash. 2005), http://lawfilesext.leg.wa.gov/biennium/2005-

work projects[65]; establishing family and medical leave insurance[66]; and securitizing a portion of the state's revenue from a tobacco litigation settlement agreement.[67]

III. JUDICIAL REVIEW OF EMERGENCY CLAUSES

A. Standard of Review

Washington allows for judicial review of whether the Legislature appropriately used an emergency clause.[68] Although they have not always done so, the courts apply a deferential standard of review under which they will find that an emergency exists unless the Legislature's declaration of emergency is "obviously false and a palpable attempt at dissimulation."[69] More specifically, Washington courts consistently cite the following language:

> [S]uch legislative declaration of emergency and necessity for the enactment is conclusive and must be given effect, unless the declaration on its face is obviously false; and, in determining the truth or falsity of the legislative declaration, we will enter upon no inquiry as to the facts, but must consider the question from what appears upon the face of the act, aided by the court's judicial knowledge. We must give to the action of the legislature and its declaration of an emergency every favorable presumption.[70]

Put differently, the Washington State Supreme Court does not undertake its own factual inquiry but instead looks at the Legislature's act on its face, aided only by judicially noticeable facts.[71] Thus, the Court defers to the Legislature's declaration of an emergency unless it is obviously dubious, giving the Legislature "every favorable presumption."[72]

06/Pdf/Bills/Session%20Laws/House/1397-S.SL.pdf [https://perma.cc/X6J9-AFFU].

65. S.B. 5097, 59th Leg., Reg. Sess. (Wash. 2005), http://lawfilesext.leg.wa.gov/biennium/2005-06/Pdf/Bills/Session%20Laws/Senate/5097-S.SL.pdf [https://perma.cc/7G5E-8AH7].

66. S.B. 5659, 60th Leg., Reg. Sess. (Wash. 2007), http://lawfilesext.leg.wa.gov/biennium/2007-08/Pdf/Bills/Session%20Laws/Senate/5659-S2.SL.pdf [https://perma.cc/D6QR-SZ3F].

67. S.B. 6828, 57th Leg., Reg. Sess. (Wash. 2002), http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/Senate/6828.SL.pdf [https://perma.cc/R4HK-Y326].

68. Even, *supra* note 35, at 283.

69. *Id.*

70. *See* CLEAN v. State, 130 Wash. 2d 782, 807, 928 P.2d 1054, 1066 (1996); State *ex rel.* Hoppe v. Meyers, 58 Wash. 2d 320, 326, 363 P.2d 121, 125 (1961)).

71. Even, *supra* note 35, at 283–84.

72. *CLEAN*, 130 Wash. 2d at 807, 928 P.2d at 1066 (citing Humiston v. Meyers, 61 Wash. 2d 772, 778, 380 P.2d 735, 739 (1963)).

The Court, however, has not always applied such a deferential standard of review.[73] In some early cases, the Court treated the question of whether the emergency clause was properly used as a question of law.[74] In *State ex rel. Case v. Howell*,[75] a 1915 decision, the Court declined to defer to the Legislature's declaration of emergency: "[t]he said legislative declaration has no greater effect, and is no more binding upon the court, than if the Legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine."[76] Thus, the Court reviewed the matter de novo.[77] But in another 1915 case, the Court stated that "[i]f the act be doubtful, the question of emergency will be treated as a legislative question and the doubt resolved in favor of the declaration of emergency made by the legislative body."[78] Despite these early inconsistencies, courts appear to have adopted the deferential standard of review.[79]

B. History and Meaning of the Emergency Exception

Although the Court has settled on a standard of review, it has not clearly defined what constitutes an emergency. The Court has held that article II, section 1(b) contains two distinct exceptions to the right to referendum: the first being "such laws as may be necessary for the immediate preservation of the public peace, health or safety," and the second being laws for the "support of the state government and its existing public institutions."[80] The cases interpreting those exceptions are a story in contrast. The Court has offered a relatively clear definition of the support-of-the-state-government exception by looking to the history and policy reasoning behind Washington's referendum provision, but it has failed to do the same for the public safety exception. In Part V, this Comment

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73. *See* State *ex rel.* Case v. Howell, 85 Wash. 281, 147 P. 1162 (1915).

74. *See id.*

75. *Id.*

76. *Id.* at 287, 147 P. at 1164 (quoting State *ex rel.* Brislawn v. Meath, 84 Wash. 302, 316, 147 P. 11, 16 (1915) (quotation omitted)).

77. *See id.*

78. *Brislawn*, 84 Wash. at 318, 147 P. at 16.

79. *See* CLEAN v. State, 130 Wash. 2d 782, 807, 928 P.2d 1054, 1066 (1996); *see also* Wash. State Farm Bureau Fed'n v. Reed, 154 Wash. 2d 665, 675, 115 P.3d 301, 305 (2005).

80. Farris v. Munro, 99 Wash. 2d 326, 335, 662 P.2d 821, 827 (1983). Essentially, the court has read the language as excepting "such laws as may be necessary for the immediate preservation of the public peace, health or safety, [or] support of the state government . . . ." *Id.* (citation omitted) (citing State *ex rel.* Hoppe v. Meyers, 58 Wash. 2d 320, 326, 363 P.2d 121, 125 (1961)). Thus, the second exception—the support-of-the-state-government exception—does not require immediacy or emergency.

suggests that the court should clarify the public safety exception by drawing on this policy reasoning.

1. The Support-of-the-State-Government Exception

In *State ex rel. Blakeslee v. Clausen*,[81] a case decided soon after Washington adopted the referendum power, the Washington State Supreme Court had the opportunity to examine the support-of-the-state-government exception. To ascertain the purpose and limitations of the exception, Justice Chadwick looked to the legislative history behind the adoption of Washington's referendum power.[82] He determined that the drafters of Washington's initiative and referendum clause had looked to other states' mistakes and successes for guidance.[83] He therefore considered the history of other state's referendum provisions to discern the drafters' intent.[84]

In particular, Justice Chadwick focused on the history of Oregon's initiative and referendum provisions. Oregon adopted the initiative and referendum process years before Washington.[85] But unlike in Washington, Oregon's right to referendum was limited only in that it did not apply to "laws necessary for the immediate preservation of the public peace, health or safety"; it had no support-of-the-state-government exception.[86] Justice Chadwick explained that because of this "unbridled license to refer legislation," an Oregon state university's operations were threatened by a referendum.[87] Prior to the referendum, Oregon's legislature passed an appropriations bill that funded the university annually for two years.[88] The bill was subsequently blocked by a referendum petition, but the vote on the referendum measure was not scheduled to happen until almost a year-and-a-half later during the next general election.[89] This created a significant issue: without funding from the appropriations bill, the university would have had to shut down (it was able to stay open only because professors agreed to work without pay).[90]

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81. State *ex rel.* Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28 (1915).
82. *Id.* at 264, 148 P. at 29–30.
83. *Id.* at 265, 148 P. at 30.
84. *Id.* at 270, 148 P. at 32.
85. *Id.* at 267, 148 P. at 30.
86. *Id.*
87. *Id.*
88. Even, *supra* note 35, at 281.
89. *Id.*
90. *Id.*

Critically, the delay caused by the referendum process effectively quashed the original appropriations bill even before the referendum measure was placed on the ballot.[91] Reasoning that the drafters intended to avoid such a situation,[92] the Court concluded that the drafters added the language "support of the state government"[93] to Washington's emergency exception to exempt from referendum acts "for the financial support of the government and the public institutions of the state; that is, appropriation bills."[94]

Since *Clausen*, the Court has construed the support-of-the-state-government exception to encompass more than appropriations measures.[95] According to the Court, "support" includes any act that generates revenue for the state.[96]

2. The Public Safety Exception

Compared to the support-of-the-state-government exception, whether the public safety exception validly exempts a bill from referendum is far less clear.

In *State ex rel. Brislawn v. Meath*,[97] a case decided in 1915, the Court construed the public safety exception narrowly. At issue was whether the Legislature could rely on the public safety exception to immediately enact a bill changing the composition of the Board of State Land Commissioners.[98] The bill's emergency clause had been vetoed by the Governor, but state legislators passed the bill over the Governor's veto.[99] Oddly, the plaintiffs were not seeking a referendum.[100] Rather, the

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91. *Id.*

92. *Clausen*, 85 Wash. at 267, 148 P. at 30.

93. WASH. CONST. art. II, § 1(b).

94. *Clausen*, 85 Wash. at 270, 148 P. at 31. The court summarized its position as follows:

> We may well assume that the people of this state had no intention of falling into the error that Oregon had made, and so framed their Constitution that our government and its institutions should not be put to the embarrassments that might follow an agitation which could be supported and a vote compelled by a number of the electors so small that it may be said to be merely nominal—6 per cent. of the vote cast at a previous election. It would seem that they could not have adopted plainer or simpler language than they did: 'Support of the state government and its existing institutions.'

Id. at 267, 148 P. at 31.

95. Farris v. Munro, 99 Wash. 2d 326, 336, 662 P.2d 821, 827 (1983).

96. *Id.* ("[S]upport is not limited to appropriation measures; if it generates revenue for the state it is deemed support.").

97. 84 Wash. 302, 147 P. 11 (1915).

98. *Id.* at 305, 147 P. at 12.

99. *Id.* at 304, 147 P. at 12.

100. *Id.* at 322, 147 P. at 18.

challenge came from board members whose positions were threatened; they argued that the act did not address an emergency and, therefore, could not take immediate effect.[101] The Court agreed, holding that the emergency clause was invalid.[102] The Court construed the public safety exception narrowly, stating that "[e]mergency, in the sense of the present Constitution, does not mean expediency, convenience, or best interest" and that "[t]here is no room for construction or speculation."[103] Looking to the bill, the court found that substituting certain state officers onto the board was hardly an emergency. [104] Further, the Court held that the functions of the State Land Commission would not be in any way interrupted by a vacancy in membership if the bill was not enacted immediately.[105] Therefore, the bill was not necessary for the "immediate preservation of the public peace, health or safety."[106] In fact, the Court explained that "it may be said that it can make no real difference whether this law goes into effect at the present time or 90 days after the close of the session."[107] Thus, in this seminal case interpreting the public safety exception, the issue was not a close one.[108]

CLEAN v. State was an entirely different story. In *CLEAN*, the Court evaluated whether the emergency clause in the 1995 Stadium Act, which imposed sales and use taxes to finance construction of a major league baseball stadium in Seattle, fit within the public safety exception.[109] By passing the Stadium Act, the Legislature hoped to persuade the Mariners (the local major league baseball team) to remain in Seattle.[110] Thus, the Court was asked to evaluate a bill that did not appear to fit within the narrow definition of the public safety exception adopted in *Brislawn*. Nevertheless, the Court held that the Stadium Act was properly exempt

101. *Id.* at 305, 147 P. at 12.

102. *Id.* at 323, 147 P. at 18.

103. *Id.* at 318, 147 P. at 16–17. The court also stated that "the Constitution does not take into account convenience or necessity, except in so far as it touches the peace, health, and safety of the state." *Id.* at 321, 147 P. at 17.

104. *Id.* at 323, 147 P. at 18.

105. *Id.* at 320, 147 P. at 17.

106. *Id.* at 318, 147 P. at 16–17.

107. *Id.* at 322, 147 P. at 18.

108. There was a lack of consensus on the court; however, the point of disagreement was about whether judicial review was appropriate. The dissent argued that it was not for the court to decide whether the bill was emergency legislation because such a determination depends "entirely upon conditions, and facts considered by the Legislature, of which, in the very nature of things, we have no knowledge." *Id.* at 323, 147 P. at 18 (Mount, J., dissenting).

109. CLEAN v. State, 130 Wash. 2d 782, 803, 928 P.2d 1054, 1064 (1996).

110. *Id.* at 809, 928 P.2d at 1067.

from a referendum.[111] Writing for the majority, Justice Alexander identified the emergency as a "clear and present danger" that the Seattle Mariners "would depart this state if prompt action was not taken to assure that a new publicly owned stadium would be developed in King County."[112]

In upholding the emergency clause, the majority rejected a narrow construction of the public safety exception. While acknowledging that the constitution does not define the terms "public peace, health or safety," Justice Alexander began by asserting that "those terms have, however, been interpreted . . . as being synonymous with the exercise of the State's 'police power.'"[113] The opinion then adopted a broad definition of police power,[114] noting that such power is limited only in that it "must reasonably tend to promote some interest of the State" and may not violate the constitution.[115] However, an act is not exempt from a referendum simply because the Legislature properly exercised its police power; rather, "it is only a combination of the Legislature's exercise of its police power and an emergency that cancels that right."[116] Therefore, the Court reasoned that an emergency clause is valid where (1) the act falls within the Legislature's police power and (2) an emergency requires immediate action.[117]

Although the Stadium Act did not respond to a traditional emergency, Justice Alexander nevertheless held that the bill addressed an emergency requiring immediate action.[118] Justice Alexander described the issue of whether an emergency required immediate action as a "knotty question" and hedged his analysis by asserting that the Court gives the Legislature substantial deference when reviewing declarations of emergency.[119] The Court then walked through the State's argument that "an emergency existed because in the absence of prompt legislative action a valuable

111. *Id.* at 782, 928 P.2d at 1054.

112. *Id.* at 808–09, 928 P.2d at 1067.

113. *Id.* at 804, 928 P.2d at 1065.

114. Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 506 (2000) (noting that *CLEAN*'s "broad definition of the police power appears overinclusive and thus not analytically useful").

115. *CLEAN*, 130 Wash. 2d at 805, 928 P.2d at 1065.

116. *Id.* at 805, 928 P.2d at 1065.

117. *Id.*

118. *Id.* at 812, 928 P.2d at 1068.

119. As discussed in Part III(A), the standard of review in *CLEAN* required that the legislature's declaration of emergency be conclusive "'unless the declaration on its face is obviously false.'" *Id.* at 807, 928 P.2d at 1066 (quoting State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 778, 380 P.2d 772, 735 (1963)).

community asset would be lost."[120] Acknowledging the plaintiffs' contention that the lack of a baseball stadium could "hardly be equated with an immediate threat to the populace," the Court agreed that the situation was not an emergency of "apocalyptic dimensions."[121] However, the absence of a traditional emergency was not dispositive. Importantly, the majority explained that "the Legislature was faced with a real emergency in the sense that the public purpose they sought to achieve by passing the Stadium Act would be unattainable" if the team was sold before the Legislature could assure the owners that a new stadium would be developed.[122] Accordingly, the Court stated, "[i]n short, the Legislature was justified in concluding that quick action was needed to preserve the baseball franchise for the state of Washington and that any delay would lead to the sale of the Mariners, *thereby defeating the purpose of the legislation*."[123] The majority was therefore satisfied that the circumstances constituted an emergency for the purposes of article II, section 1(b).[124]

Justice Guy, dissenting in part, did not agree that the Stadium Act qualified as emergency legislation.[125] Although he agreed with the majority's characterization of the exception itself, he took issue with the boilerplate emergency clause language used in the Stadium Act. He reasoned that the Legislature had failed to articulate the emergency in the act itself.[126] He explained, "I will defer to the judgement of the Legislature whenever an 'emergency' situation, such as an immediately effective consequence, is explained in the preamble of an act or in the emergency clause itself, or is apparent from the nature of the act."[127] In other words, Justice Guy would require the Legislature to explain the need for immediate action somewhere in the act unless the emergency is "apparent."[128]

In a separate dissent, Justice Sanders argued for a narrower public safety exception and against the majority's deferential approach.[129]

120. *Id.*

121. *Id.* at 809, 928 P.2d at 1067.

122. *Id.*

123. *Id.* (emphasis added).

124. *Id.* at 810, 928 P.2d at 1068. Justice Talmage concurred, deferring to the legislature's declaration of emergency. He argued that "the most troublesome aspect of the dissent's analysis . . . is the notion a legislative declaration of fact, such as an emergency, is subject to intrusive judicial review." *Id.* at 815, 928 P.2d at 1070 (Tamalge J., concurring).

125. *Id.* at 820, 928 P.2d at 1072.

126. *Id.* at 821, 928 P.2d at 1073.

127. *Id.*

128. *Id.*

129. *Id.* at 825, 928 P.2d at 1075.

According to Justice Sanders, a statute must meet three conditions to qualify for the public safety exception: "(1) the necessity must be immediate; (2) the statute must be necessary to solve the problem; and (3) the problem must be of a particular kind, i.e. a disruption of the 'public peace,' 'health,' or 'safety.'"[130] This test better adhered to precedent, Justice Sanders argued, because "[c]ontrary to the majority's claims, [the Court had] consistently held that the emergency exception is much narrower than the police power."[131] Moreover, Justice Sanders believed that courts must evaluate an emergency declaration without deferring to the Legislature on the issue of emergency (he acknowledged that the courts defer to the Legislature's factual findings).[132] Applying these principles, Justice Sanders would have declared the emergency clause unconstitutional.[133]

In evaluating the public safety exception, the Court has oscillated between a narrow interpretation of the language and a standard that gives the Legislature more flexibility to declare that a bill addresses an emergency. In *CLEAN*, the Court's most recent in-depth look at the public safety exception, Justice Alexander adopted a broad standard that does not confine the exception to bills addressing traditional emergencies. Part V of this Comment argues that the essence of that holding is correct. Unfortunately, the Court's opaque reasoning left the majority's opinion vulnerable to criticism.

IV. CRITICISM OF THE LEGISLATURE'S USE OF EMERGENCY CLAUSES AND THE DEBATE OVER PROCEDURAL CHANGES TO ENSURE THE PEOPLE'S RIGHT TO REFERENDUM

The Legislature's use of emergency clauses has been frequently criticized as encroaching on the people's right to referendum.[134] Some

130. *Id.*

131. *Id.* at 831, 928 P.2d at 1078.

132. *Id.* at 834–35, 928 P.2d at 1080 ("When faced with an emergency clause, the court must independently determine whether an emergency actually exists and whether the challenged statute actually addresses it."); *id.* at 837, 928 P.2d at 1081 ("[T]he Legislature's declaration of emergency goes not to legislative discretion, but to its constitutional power—the Legislature may circumvent the people's right of referendum only if an emergency of a particular kind truly exists.").

133. Oddly, Justice Sanders was unconvinced that the Stadium Act was immediately necessary to keep the Mariners in Seattle. He appeared to miss the point that the promise to fund a stadium (not the actual construction) was the incentive necessary to persuade the team to stay. Rather, he argued that although the act-imposed taxes for the purpose of funding a stadium, it did "nothing to mandate construction of a stadium or keep a baseball team." *Id.* at 823, 928 P.2d at 1074.

134. *See, e.g.*, S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013),

argue that any attempt to weaken the right to referendum should be thwarted.[135] These advocates have pushed for procedural changes (requiring a supermajority to approve emergency legislation, for example) to strengthen the right to referendum and to weaken the Legislature's ability to attach emergency clauses to bills.[136] Before discussing these suggested procedural changes, however, it is vital to reiterate the purpose of the referendum itself.

A. The Purpose of the Referendum

The benefits of the referendum power typically fall into three categories. First, the referendum functions as a check on government by enabling the people to overturn legislative acts that they do not support.[137] In this way, the people are viewed as a "fourth branch" of government, offering a "valuable safety valve" to regulate the political system.[138] Moreover, the threat of referendum puts pressure on the Legislature to consider how the people will react to its actions.[139] Second, the referendum diminishes the influence of political parties over government.[140] Third, direct democracy—including referendum power—encourages public involvement in government.[141] The opportunity for involvement in the political process increases political awareness and public participation.[142] The increase in awareness and participation is achieved by public discussion and debate over referendum measures and may result in a more politically informed, and less apathetic, electorate.[143]

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http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP]; Page, *supra* note 20, at 223; Sharkansky, *supra* note 3.

135. Page, *supra* note 20, at 223.

136. *Id.* ("[A]ny attempts to weaken the referendum process should be rejected, and steps should be taken to prevent the unwarranted intrusion upon the people's right to referendum.").

137. *Id.* at 234.

138. *Id.*

139. *Id.*

140. *Id.* at 235.

141. *Id.* at 237.

142. *Id.* at 234.

143. *Id.* at 237.

B. Attempts at Regulating the Washington Legislature's Use of Emergency Clauses

Relying on these benefits, proponents of the right to referendum argue that the Legislature's power to exempt bills should be checked.[144] Many argue this check could be achieved by adding procedural hurdles to dissuade the Legislature from attaching an emergency clause to a bill.[145] Recommended procedural hurdles include adding a supermajority voting requirement to bills with emergency clauses, implementing more stringent judicial review, and requiring the Legislature to articulate facts supporting its finding of emergency.[146]

Attempts to reform the Washington Legislature's use of emergency clauses have come in the same form. For example, an unsuccessful Senate bill in 2013 proposed amending the Constitution to allow emergency clauses only as amendments to a bill and to require that such clauses be approved by 60% of each house of the Legislature.[147] This bill died in the Senate Rules Committee and never made it to a vote on the senate floor.[148]

V. A WORKABLE STANDARD TO EVALUATE EMERGENCY CLAUSES

Aside from required procedural hurdles (gathering signatures, for example), the emergency exception is the sole limit on the people's right to referendum. Yet, the Washington Constitution does not explain when an act is "necessary for the immediate preservation of the public peace, health or safety."[149] Moreover, despite allowing for judicial review of the Legislature's use of an emergency clause, the definition of emergency has not been coherently resolved by the courts. The deferential standard of review in such cases contributes to a lack of clarity regarding when an emergency clause validly exempts a bill from referendum. This Comment

144. *Id.* at 271–79.

145. *Id.*; S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

146. Page, *supra* note 20, at 271–79; S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

147. S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

148. The bill was moved to the "X" file on March 3rd during the 2014 regular session. *SJR 8206 - 2013-14*, *Bill History: 2013 Regular Session*, WASHINGTON STATE LEGISLATURE, https://app.leg.wa.gov/billsummary?BillNumber=8206&Year=2013 [https://perma.cc/7SJ7-B7G2].

149. WASH. CONST. art. II, § 1(b).

proposes a definition for the public safety exception to referendum in Washington.

An appropriate definition of emergency legislation should be consistent with the policy reasoning behind the emergency exception. As discussed in *Clausen*, the drafters of Washington's initiative and referendum provision intended to strike a balance between supporting direct democracy and allowing the Legislature to act quickly where swift action is warranted.[150] On the one hand, the referendum process allows a small percentage of citizens who sign a petition to "circumvent the judgement of the elected body charged with representing all of the public."[151] On the other hand, the emergency exception prevents that small minority (now 4% of voters)[152] from undermining the ability of a majority of elected representatives to fulfill their legislative duty.[153] This balance is intentional: as the *Clausen* Court explained, the emergency exception was designed to avoid circumstances where a small minority entirely nullifies the purpose of an act even before it is pushed to a popular vote.[154] The Court applied this reasoning to the support-of-the-state-government exception,[155] but the policy reasoning applies to the public safety exception as well.[156]

Washington's current case law examining the scope of the public safety exception also defines emergencies in relation to a bill's purpose. In other words, the Court has recognized that an emergency may exist if enacting a bill immediately is necessary to achieve the purpose behind the piece of legislation. Indeed, this understanding of emergency is, in essence, where the Court was heading in *CLEAN*.[157] Although he failed to clearly articulate this standard, Justice Alexander saw that a real emergency was present, even in the absence of a traditional crisis, because allowing a referendum would completely and permanently destroy the purpose of the bill. As he stated in *CLEAN*, the Stadium Act responded to a "real emergency in the sense that the public purpose [that the Legislature] sought to achieve by passing the Stadium Act would be unattainable" if a

150. State *ex rel.* Blakeslee v. Clausen, 85 Wash. 260, 148 P. 28 (1915).

151. Lowe, *supra* note 14, at 631.

152. WASH. CONST. art. II, § 1(b).

153. *Id.*

154. *Clausen*, 85 Wash. at 267, 148 P. at 30.

155. *Id.*

156. Lowe, *supra* note 14, at 595 ("In those jurisdictions where deferred laws are suspended until approved by the voters, the permissive referendum can nullify vital measures whose importance to society depends upon the certainty of timely enforcement.").

157. CLEAN v. State, 130 Wash. 2d 782, 928 P.2d 1054 (1996).

referendum was allowed.[158] According to the Court, "the emergency that faced the Legislature was that the Seattle Mariners would be put up for sale on October 30 unless, prior to that date, the Legislature enacted [a bill assuring] the development of a new . . . baseball stadium in King County."[159] The Legislature reasonably believed that losing the Mariners would result in lost jobs, tax revenue, and recreational opportunities.[160] Therefore, the Court was persuaded that the threat of the Mariners leaving Seattle required immediate action. Because it faced a deadline, the Legislature's ability to address the issue would have been entirely destroyed had the Legislature been unable to act immediately. Thus, for reasons consistent with the legislative intent behind the emergency exception, Justice Alexander found that a referendum would have inappropriately encroached on the Legislature's ability to do its job.[161]

Unfortunately, Justice Alexander's opaque and hesitant reasoning left the majority's opinion vulnerable to criticism.[162] Despite departing from *Brislawn*'s narrow construction of the public safety exception, the majority did not acknowledge that it intended to craft a new standard. Nor did the opinion clearly outline the policy reasons supporting a broader standard. Given these omissions, it is unsurprising that critics found Justice Sanders' dissent compelling—the majority failed to persuasively explain that the public safety exception should not be confined to the traditional emergencies relied upon in earlier cases such as *Brislawn*.[163] This Comment makes that argument clear.

A. A Viable Standard for the Public Safety Exception

This Comment suggests that the public safety exception should exempt a bill from a referendum if the bill accomplishes a public purpose that would be substantially thwarted if the Legislature was unable to act immediately. This definition covers a narrow set of circumstances where the Legislature's objective would be irretrievably destroyed if a bill were referred to a public vote. It specifically encompasses two scenarios requiring prompt action: (1) cases where the harm is so severe that an

158. *Id.* at 809, 928 P.2d at 1067.

159. *Id.* at 812, 928 P.2d at 1068.

160. *Id.* at 809, 928 P.2d at 1067.

161. *See id.*

162. *See* Page, *supra* note 20, at 248 (criticizing Justice Alexander's opinion in *CLEAN* and arguing that "[n]o effort was made to explain how a publicly funded stadium preserves the 'public peace, health or safety' . . . or how it fits into traditional police powers").

163. *See id.*

immediate response is necessary to mitigate ongoing damage, and (2) instances where the law's purpose would be irreparably undermined if the effective date was delayed pending referral.[164] The first scenario covers traditional emergencies (an ongoing public health crisis, for example),[165] whereas the second scenario is about immediacy rather than severity. The second scenario would cover the situation in *CLEAN v. State* where immediate action was necessary to accomplish the act's intended purpose—to persuade the Mariners to stay in Seattle.[166]

B. Procedural Reforms to the Right to Referendum Are Inconsistent with the Emergency Exception's Policy Objectives

This Comment's proposed standard aligns with the policy reasoning behind the emergency exception and is, therefore, a more appropriate solution than proposed procedural reforms. Advocates of such reforms argue that the Legislature's power to exempt bills should be checked.[167] Some argue this check could be achieved by adding procedures to dissuade the Legislature from using emergency clauses (for example, a supermajority voting requirement), by implementing more stringent judicial review, or by requiring the Legislature to articulate facts supporting its finding of emergency.[168] This section will address each of these suggestions.

Procedural reforms aimed at dissuading the Legislature from using an emergency clause do not get to the heart of the matter: that the Legislature lacks direction about when the public safety exception should apply. Instead of giving direction to the Legislature, procedural solutions arbitrarily alter the referendum process in an attempt to prevent the Legislature from "misusing" the emergency exception. However, the Legislature cannot avoid misusing the exception without understanding its intended purpose. For example, rather than clarifying what an emergency should entail, a supermajority voting requirement would simply deter the Legislature from including an emergency clause in a bill

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164. These scenarios are derived partially by the balancing test recommended by Lowe. Lowe, *supra* note 14, at 633.

165. *Id.* at 595 n.21 ("[A] legislative act creating a remedy for victims of toxic chemicals or establishing a task force to develop a cure for AIDS will be of little value to the public if it is suspended pending the next general election.").

166. *CLEAN*, 130 Wash. 2d 782, 928 P.2d 1054.

167. *See supra* section IV.B.

168. Page, *supra* note 20, at 271–79; S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

regardless of the circumstances.[169] While this requirement—which the Legislature has already rejected[170]—may "guard against the possibility that the legislature may attach an emergency clause to a bill solely to exempt it from referendum,"[171] it does not solve the issue in a meaningful way. Essentially, this solution suggests that an emergency is what more legislators believe it is.[172] But because the supermajority requirement does not provide an intelligible definition of emergency, there is no guarantee that this solution is consistent with the emergency exception's policy objectives.

By the same token, implementing strict judicial review or requiring the Legislature to articulate facts supporting a declaration of emergency are unconstructive solutions absent a workable definition of emergency. For example, even with stricter review, the courts cannot determine whether an emergency exists without understanding what *should* constitute an emergency. Unless, and until, the Court adopts a viable definition of emergency, these reforms will lead to arbitrary results.

This Comment's proposed standard provides the definition of emergency that procedural reforms lack. Instead of arbitrarily deterring the Legislature from using an emergency clause, the proposed standard would ensure that the Legislature exempts only bills that *should* take immediate effect. In this way, the proposed standard would better ensure that the Legislature's use of an emergency clause is consistent with the intent behind Washington's emergency exception. This Comment's proposed standard also directly addresses the criticism that the Legislature uses sham emergency clauses simply to avoid referendum. By providing a clear definition of emergency, the proposed standard would (1) dissuade the Legislature from using sham emergency clauses and (2) enable the courts to identify when the Legislature has misused the public safety exception.

This is not to say that procedural reforms have no place in improving Washington's referendum process. To further ensure transparency and reviewability, the Legislature should include facts that support its declaration of emergency in the act itself.[173] As Justice Guy identified in

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169. Page, *supra* note 20, at 279.

170. S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

171. Page, *supra* note 20, at 280; S.J. Res. 8206, 63rd Leg., Reg. Sess. (Wash. 2013), http://lawfilesext.leg.wa.gov/biennium/2013-14/Pdf/Bills/Senate%20Joint%20Resolutions/8206.pdf [https://perma.cc/NZC5-RVGP].

172. Page, *supra* note 20, at 279.

173. *Id.*

his dissent in *CLEAN*, unless the emergency is apparent from the nature of the act itself, judicial review will be ineffective if the Legislature does not explain the emergency situation in the act.[174] Requiring such an explanation will help ensure that the Legislature is held accountable and that courts can coherently evaluate whether the standard is met.

CONCLUSION

To strike the right balance between the people's right to referendum and the Legislature's need to effectuate certain laws immediately, the Court should reexamine the purpose of the emergency exception to the right to referendum in Washington. Without added transparency, the perception of improper legislative use of emergency clauses will continue. For this perception to change, the Legislature needs clear guidance to determine when a bill addressing a non-traditional emergency is properly exempt from a referendum. A viable standard must also prevent the Legislature from abusing the emergency clause to circumvent the people when immediate action is not actually necessary. This Comment argues that the public safety exception should exempt a bill from a referendum when the bill accomplishes a public purpose, where the purpose is explicitly stated in the legislation, and where that purpose would be substantially thwarted if the Legislature was unable to act immediately. In addition to traditional public health and disaster situations, this proposed standard covers a narrow set of circumstances where the Legislature's ability to act on an issue would be destroyed if a bill were referred to a public vote. The recommended exception encompasses two scenarios requiring immediate action: (1) cases where the harm is so severe that immediate action is necessary to mitigate ongoing damage, and (2) cases where the law's purpose would be irreparably undermined if the effective date were delayed pending referral. This understanding of emergency is consistent with Washington's current case law examining the scope of the public safety exception and with the policy reasoning behind the Court's interpretation of the support-of-the-state-government exception. Ultimately, this standard would provide a less unwieldy and more transparent method for courts to achieve the right result.

174. CLEAN v. State, 130 Wash. 2d 782, 821, 928 P.2d 1054, 1073 (1996).