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High-Profile Cases:

Are They More Than a Wrinkle in the Daily Routine?

Robert Alsdorf

In our daily work as judges every ruling is of critical importance to the immediate parties. Most escape notice by the media. But from time to time, we are presented with cases where press and public join the fray.

How do we address these cases? How should we address them? High-profile cases certainly appear to differ from the norm, if for no other reason than the extent of the pressures they clearly impose on us. But, at heart, do they really require us to change what we do?

I was presented with a high-profile case a little more than a decade ago, one that the court on which I served and I both chose to handle in a way that differed from our customary approach. Despite all the apparent or superficial differences, in the end I came to the conclusion that while a high-profile case unavoidably requires varying degrees of logistical adaptation, its substantive resolution is effective only if it is guided by the very same principles we apply to our daily practice of the judicial art.

This is my story.

In 1999, the State of Washington had long had a motor vehicle excise tax, the MVET, that provided the State with substantial revenue that it spread among a broad array of state programs, many of them entirely unrelated to motor vehicles. Given the size and duration of the tax, it was understandable that the public disliked the MVET. I was not immune to those feelings. Several years earlier, I had bought a used car and found to my frustration not only that the tax rate was high but also that the basis for my specific tax calculation was twice what I had actually paid for the vehicle. Even modest vehicles could bring with them a tax tab that would add up to thousands of dollars in just a few years. Despite repeated public demand, the legislature had not limited or revised this tax.

Enter the public's solution to the MVET problem. Like a good number of states, Washington has an initiative process by which citizens can gather signatures to place a draft law before the voters. In 1999, an initiative known by its number as I-695 was placed on the ballot. It was drafted to require a reduction of the MVET to a flat $30 per year per vehicle and, at least as important, to require that a public vote be scheduled and held before any governmental entity could increase *any* tax, fee, or charge.

I-695 passed with a substantial majority of the popular vote. The law's passage threatened significant cuts in public funding for numerous programs. Therefore, as soon as the vote count was finalized, the law was challenged by a number of public and private entities, several citizens, and a public union. Suits were filed in various counties around the state.

All of these cases were consolidated and then assigned to my court. I was not worried. It promised to be an extremely interesting case. The lawyers were excellent. I anticipated high quality research and briefing, accompanied by vigorous and articulate argument. From a judge's perspective, what could be better?

Moreover, because Washington caselaw directs that initiatives passed upon public vote are presumed to be constitutional and cannot be held unconstitutional unless clearly proved to be so "beyond a reasonable doubt," I had immediately assumed that I would be likely to uphold the initiative. That sanguine view, so reassuring on initial assignment, did not last. As briefing came in, and as I researched the law, I found the challengers' arguments increasingly persuasive that the initiative had transgressed clear constitutional limits.

Speaking personally, the prospect of holding a tax-cutting initiative unconstitutional was a matter for profound worry. Like most state judges, I was elected, and as a general-jurisdiction judge in Washington I was subject to open election contests every four years. Worse, 2000 was a judicial election year. Worse still, the parties' stipulated schedule called for me to issue my ruling in March 2000, a mere three months before anybody with a Washington law license could simply pay a modest filing fee, register his or her name with the State, and run against me.

More than one judicial colleague suggested that if I were about to find the law unconstitutional, I should arrange to have the case reassigned to a retiring judge, who would not be subject to an election challenge. As appealing as that proposition sounded on a personal level, I declined the invitation. I feared that to do so would legitimately be seen by the public as compromising the integrity of the judicial system. Citizens could perceive any reassignment as proof that the judiciary and other members of the government were trying only to protect themselves and their income, that they hadn't given and wouldn't give fair consideration to the public's concerns.

So, instead, I focused on the fact that I had already had a good ten years on the bench, and decided that if my career were to be threatened or even terminated by a controversial decision either way, I would redouble my efforts to make the ruling be as fair and as clear as I could.

MAKING THE DECISION ACCESSIBLE

With what I feared could be a premature end to my judicial career looming over me, I decided that the first step had to be giving the voters immediate and direct access to any ruling. I had to compose the ruling to allow non-lawyer voters, even those with no more than a high-school education, to have a reasonable chance of reading, considering, and then understanding my reasoning. I wanted to allow them not only to understand *what* I had ruled but to understand, and possibly even to appreciate, *why* I had issued that ruling. And of course, to do that, our court also had to find a way that the text could be made physically accessible to the public.

Composition

How to explain to the public why I had to strike down what they had voted for, if that indeed were my final ruling? That

would not be easy. In my experience, parties on both sides stop paying close attention to judicial reasoning as soon as they know who has "won" and who has "lost." Because justice suffers if losing parties believe they have not been heard, I had years before developed a practice when parties were present to hear an oral ruling to start by reciting and then addressing the losing party's strongest arguments in an affirmative way. I would try to acknowledge the strength of those arguments, particularly those that were most emotive. Only then would I give the explanation of why those arguments, as compelling as they might otherwise seem, were legally insufficient; and, finally, I would announce the specific ruling.

Simply put, my general practice was immediately and affirmatively to recognize the losing party (only rarely does a losing party deserve immediate harsh commentary) and show genuine respect for their position. Savvy court watchers came to realize that in my court the first party to receive favorable mention would often be the party who was about to lose on the central issue. But the simple fact was that starting with the positives for the losing party would mean that the losing party would still have been able to listen to much of my ruling, rather than feeling shut out from the start.

So I planned to start my written decision on I-695 with positive acknowledgment of the losing party's overall position. Nonetheless, however important it was to provide the losing party with affirmative recognition, I still had to face the question of how actually to write both the "what" and the "why" in plain English.

Drafting

As to the writing process, it was obvious that I should not compose the decision as if it were a law-review article or an appellate brief. As simple as that goal is to state, making that choice would require a change from our normal patterns. The style of legal writing that most of us have been taught, starting from our law school days, is rarely clear. Trained as lawyers to rely on precedent, we somehow seem to have become convinced that we cannot think a thought unless somebody else has thought it before. We preface each point with the citation of cases or quotations, many of which, viewed honestly, are not really on all fours with the point being argued. And as judges we all know that when attorneys compose the briefing that they submit to us at trial or on appeal, all too many of them are driven by the misguided notion that simply increasing the number of citations will impress us or a higher court to rule in their favor.

This prevailing style of legal writing interferes not only with the flow of reading but also with the flow of reason. But because it is what we are used to, we not only tolerate it, we fall into the same trap. I wanted out of that trap. As my first step, I adopted a practice already known to and used by many trial attorneys: writing and speaking as if I were explaining my legal point to an interested, but not legally educated, neighbor. It works for attorneys presenting to juries. It ought to work just as well for judges explaining a point to the broader public.

I then applied one more drafting technique. Once I had completed my research, heard all the arguments of counsel, outlined the issues, identified the principles compelling the decision, and reached my key legal conclusions, I sat down and wrote the decision straight through, in plain English, without turning back to my outline, and without any citations. I simply identified questions, principles and rulings, trying to do so as if I were talking with my neighbor. Only at the end of the drafting process, after I had summarized the arguments, my reasoning, and my rulings in what was as close as I could come to everyday English, did I go back to locate and insert the few necessary and central citations and quotes that I believed had required me to make the decision I had reached.

As a result, the text really did seem to flow much more readily. Interestingly, only weeks later, after I had completed and announced my ruling, whenever newspapers reprinted portions of the decision (one paper filled two full-sized pages with the entire text of my discussion from start to finish), case names and formal citation references were always eliminated. As a result, what remained on the newspaper page was in fact the very same wording I had started with, which I felt allowed my ruling to be more easily understood.

Distribution

While my first task was to make my ruling intellectually accessible, I knew that step alone would not be enough. I also had to make the decision actually and physically accessible to any person who was interested. Those of us who are trial judges know that that simple concept actually points up one major problem we all face: then, as now, trial court rulings were not generally published in books or made publicly available in advance sheets or other official reporters. And, although it was little more than a decade ago that I was preparing to issue this ruling, the internet at that time had barely been utilized in any meaningful or user-friendly way by most state courts. Very few trial courts then had a public web page. Our court was no exception. We had no system that permitted legal professionals, let alone ordinary citizens, any internet access to court filings and rulings.

Despite these limitations, I was determined to find a way to help the public and the media understand both the ruling and the court's assigned role. The parties had already stipulated that, whatever my ruling, it would bypass the court of appeals and be appealed directly to the Supreme Court of Washington. Our Supreme Court did have a web page at that time, so I contacted them. Because my ruling would be the very ruling that the Supreme Court would be reviewing, they considered it to be an essential element of the court's record and the court's business. Therefore, and particularly in light of the understandably great public interest in whatever the tax-related ruling would be, the Court agreed to have my ruling publicly posted on the Supreme Court's own website immediately upon issuance. We arranged that I would electronically transmit my decision to Supreme Court staff ten minutes before it was to be announced in my court, so that it could be entered onto their web page (not an instantaneous process in 2000) and public access be enabled as soon as I had finished delivering my ruling in open court.

I should add here that, given the positive reaction our court system ultimately received for establishing this sort of access to a high-profile decision, our trial court developed a publicly accessible web page within the following year. On that page, we chose to include links by which the public and press could

immediately access rulings in any and all civil and criminal cases decided in our court that had a significant degree of public interest. A decade later, we continue that practice.

Oral Delivery

Print and electronic media had been granted permission to be in the courtroom and to record and broadcast the delivery of the decision. Because we also expected large numbers of the public to attend, we scheduled the hearing in our presiding, and largest, courtroom.

The question of what words a judge should utter in open court is never a minor one and was doubly important in a case such as this. Among other things, the full decision was too long to be read out loud. In any event, delivering a lengthy ruling orally to the TV cameras could easily be viewed as grandstanding. On the other hand, entering the courtroom and simply handing out the decision, saying only, "This is the Court's ruling," and then departing, would present a different and twofold problem. It could be viewed either as imperious or, alternatively, as a sign that the court feared and was dodging public scrutiny. Further, were I to choose to speak briefly but extemporaneously about my ruling and its reasons, I could by a careless choice of words inadvertently and unnecessarily create an appealable issue. With the complexity and significance of the case, that was not an idle concern.

To address these problems, I decided simply to read the introductory text from the ruling, plus a summary paragraph from each section of the ruling, so that every single word I uttered in open court would match key portions of the text word-for-word. Then, to facilitate public access and understanding, I also had these orally delivered excerpts from the ruling printed up in advance, for delivery to the press and public in attendance at the hearing; in the footer on each page we printed in bold type the specific web address at which the full text could be accessed.

This planned public access went off without a hitch. When the hearing was over, both the electronic and print media repeatedly recited not only the key portions of the ruling, but placed the web link on the screen on TV news programs and on the page in print media. As a result, thousands upon thousands of copies of the decision were downloaded on the first day, and were thereby immediately available across the State.[1]

INITIAL PUBLIC REACTION

A ruling like this does not always face easy sailing. Not surprisingly, once I had issued the ruling striking down the public tax-cutting initiative, the initial response was outrage. It was public. It was immediate. It was vociferous. Within minutes of my departure from the bench, the charismatic sponsor of the initiative took the floor in the public section of the presiding courtroom and angrily denounced my ruling to the attendant television cameras as the action of a "king." Many members of the public slammed the decision. Many wrote angry letters to the press and complained on call-in shows. Others sent letters and emails to me, with one threatening, "In revolutions we hang people like you from the nearest lamppost." Another citizen called repeatedly over several weeks and left multiple messages on my court's answering machine, generally at 2:00 am, ranting about my decision and talking about how incompetent I was.

Although the tenor of public comment actually started to become more favorable in the weeks following the ruling, those initial responses were vehement. Stated in its most positive light, the thrust of the most obvious and vigorously argued objection was, given the fact that a majority of the public had voted in a particular manner, and that we had a democracy, "What is one man doing, overruling the vote of more than a million citizens?" That is a commonsense question, one that I had tried to address in the written ruling.

POST-RULING PUBLICITY

Perhaps not too surprisingly, the written ruling had not fully satisfied those who asked that central question. In response to their continuing inquiries and emails, our court therefore also took a step that I would now either advise against or would modify in a significant manner. Because of the storm of immediate publicity, and the number of press requests for further information, the court leadership prevailed upon me to make myself available for press interviews.

Up to that time, I had never interacted with any media outside the courtroom about any of my rulings. Electronic and print media had long been free to attend in open court as long as their presence or conduct did not interfere with a fair hearing or trial, and they were always permitted to record and broadcast video of court proceedings. I had planned to continue this pattern here, and to let my words and actions in the courtroom speak for themselves, and not to speak with members of the press on any aspect of any ruling I either was contemplating or had made.

However, based on the canon of judicial ethics that encourages us to fulfill our duty as judges to educate the public about the law, I was asked by court leadership to meet with the press and fill them in on the judicial role in situations such as those presented by I-695. I agreed to meet with the press, but I also made it clear to them that I would answer questions about my training, and about the work of the courts and my work as a judge, but I would not respond to any questions about the substance of the ruling or make any comment that could otherwise relate to or affect the course of the appeal.

Of course I knew that, one way or another, if I met with the press, the central question about the judicial role in a democracy (the role of "one man") would likely be posed, directly or indirectly. I knew that if it were raised or even simply hinted at and I did not respond, or seemed to be dodging that question, it would hang over the interview, confirming the doubts of those who disagreed with my ruling and thought the ruling simply to be the political judgment of an "activist" judge.

After giving the matter careful thought, I felt I could address

1. As it turns out, given the significance of the case, Westlaw reported the full text of the decision online almost immediately; *see*, Amalgamated Transit Union v. State of Washington, 2000 WL 276126 (Wash. Super. Ct., Mar. 14, 2000).

THINKING LIKE A JUDGE: FIVE CHARACTERISTICS OF A JUDICIAL MINDSET

BY ROBERT ALSDORF

1. THE FUNDAMENTAL JUDICIAL MINDSET:

They don't pay me to be right; they pay me to be fair.

In virtually every case, all sides coming into a trial or a hearing think that they are right and are entitled to win. Their belief is often informed by and founded upon all manner of non-legal and non-judicial considerations.

When our first goal as judges is to be "right," we too are necessarily more likely to focus on the end result and do the same thing the parties do: that is, to apply goal-oriented measures, or a predetermined position on the law, or other preferences from outside the courtroom, and thereby advertently or inadvertently predetermine the "right" result.

When we try simply to be fair, then we have instead turned our focus to the process rather than the end result. Ironically, trying only to be fair causes us in the long run more likely truly to be right, at least in the eyes of the law, in large part because we are less likely to have closed our minds to a party's argument or otherwise prejudged a matter.

Adherence to process is at the core of the rule of law.

2. APPROACHING THE DECISION IN A GIVEN CASE:

The most important person in the courtroom is the loser.

The best judges are, in a very real sense, non-judgmental.

Our first job is not to decide; our first job is to listen. If we are careful to show the losing parties that they have been heard and direct our explanations to them, their attorneys and, in the long run, the parties themselves, will more easily accept our decisions.

The fairness of a legal system is probably best judged by the respect that a losing party has for the process and for the decision.

3. MAKING THAT DECISION:

Neutral questions and standards are essential to the process.

Pollsters know how to phrase a question to push the responder to a desired result. Likewise, attorneys know that if they succeed in posing the key question for the court, they are much more likely to win their case.

A judge's duty is different. How do we, as judges, pose a question that does not consciously or unconsciously predetermine the outcome? Can we ask a question in the manner of a truly neutral pollster? On the other hand, when the mere choice among several possible questions does effectively determine the result, how do we select which question to ask? What is the neutral principle of choice that we can identify for the parties as explaining and justifying our choice between or among competing questions? As judges, we should take the time to explain to the parties how and why we selected a particular question.

But first, we can set the stage during oral argument by telling the attorneys that when we ask a question in court, we want one of two things: either a direct answer to the question, or an explanation of why they believe our question misses the mark.

Finally, when trying to resolve difficult evidentiary issues that underlie a particular question of law, we can make a proper decision even when we haven't been able to figure out the answer to the question of whom to believe or what facts to rely on. We can resolve factual disputes as a matter of law: when we have tried our best and remain unsure of the facts, or determine that the evidence is evenly balanced, the party having the burden of proof on that issue loses. I have found that parties readily understand, and can even come to fully accept, that concept.

4. CORRECTING FOR AND EXCISING BIAS BEFORE FINALIZING A DECISION:

How do we minimize personal pre-judgments and predilections?

Writing and then issuing a decision is the final step. But even a fair decision may fall short in the parties' eyes if we have not demonstrated fairness in our conduct in the courtroom, and even in our body language. Moreover, all of us can be affected by human factors: e.g., studies demonstrate that good-looking witnesses are generally deemed more credible than average-looking witnesses. We must ask ourselves and be prepared to explain, why do we believe witness A but not witness B? Have we really listened carefully to both sides?

And when we believe we have reached a decision in a hotly contested case, but before we have announced it, it is often helpful to identify an emotive factor that may relate to or be affected by a key issue in the case, and then figure out a way to flip it—e.g., the gender of respective spouses in a parenting decision, the ethnicity of alleged actor and victim in cases involving race, the parties' religious affiliations in a case involving the establishment of free-exercise clauses.

If we would still make the same decision after flipping that factor, we are probably on solid ground. However, if our decision would change, we'd better figure out why and either modify our decision or prepare to explain why that emotive factor makes a difference on the merits.

5. THE COURT IN A DEMOCRACY:

The spirit of liberty is that spirit which is not too sure that it is right.

We should set aside any personal preferences or initial reactions we may have to a given dispute and try to embody the philosophy of Learned Hand: ***"The spirit of liberty is the spirit which is not too sure that it is right."***[1]

It is not enough to "know" that we have reached the "right" decision. If we are too confident of the rightness of our own ideas or decisions, we are much more likely to be dismissive of, and not to listen to, those who appear to differ from us.

When ruling on a private dispute, we must be able to explain our decisions in a way that brings the affected persons along with us. And when ruling on a dispute that raises larger public or political issues, we must take care to explain not only the substance of our decision but also why it is the court rather than the legislature or other governmental body that properly decides the issue in that case or, alternatively, why the court is not empowered to make the requested ruling because it is required to defer to a legislative, executive, or administrative body's prior determination.

Genuinely exercising and expressing a degree of humility can actually enhance respect for the court's actions and rulings.

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1. Learned Hand, J., The Spirit of Liberty, Address, (May 21, 1944), *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND (Irving Dillard ed., 1953), at 144.

the question without talking about the substance of my particular decision but instead talking about the nature of the judicial role. This was the exchange I had in a television interview when the predictable central issue of a judge's role in a democracy was broached:

> ***Question:*** Because of your ruling, some people have said that their vote doesn't count. Do you feel like you were in a no-win situation?
> ***Answer:*** Not at all. I mean, this is a very reasonable question for people to ask: "What is one man doing? We had a million people vote in the following fashion…"
>
> I think the best way to explain that is to say that if I am doing my job right, I'm not the voice of one man. When I do a case like this, I study the Constitution, I study a hundred years of decisions by our elected Supreme Court Justices. So I think, properly viewed, my decision is not *my* decision. This is not the voice of a man speaking, but really if I have done my job right, it is the voice of the law developed over a hundred years.

The press on that occasion did not try to ask further questions about the substantive basis for my ruling. Nonetheless, given the pressures on media representatives, we all know that that will not always be the case.

I have therefore thought long and hard about how we can in the future deal with inquiries that are fairly crafted, thereby assisting in public education, but still manage to avoid the risk of the ruling judge somehow tainting his or her ruling or the judicial process. There are in fact several possible, and less risky, alternatives that a court has other than allowing the judge who issued the ruling to be directly interviewed—alternatives that will still provide assistance to public understanding.

We tried one such method in our court in a high-profile case that occurred only a few years later. When a trial was being conducted of a serial killer with nearly 50 murders to his name, and lurid coverage was to be expected, we arranged for a judge who had had no contact with that trial and who would be walled off from any such contact (so that no inside information would even inadvertently be shared) to be made available to the press to discuss general court procedures and processes. And, in order not to transgress the ethical limitation on judges making any comments in a way that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing, all such communications were agreed to be off the record.

The process seemed to work well in that case, but there is an additional and likely even better alternative: given the occasionally difficult interaction of public officials and the press, it may make the most sense for a court not to have a judge perform such a task but to arrange to have one or more legal experts fulfill that educational role. It may be a court PR officer, if a given state's funding is adequate to allow it, or it may be a professor, a litigator, a former prosecutor or defender, or some other experienced and reliable legal professional.

Whoever the chosen person may be, it is appropriate that we carefully consider how to fulfill our duty to help educate the general public about the role of and limitations on the courts. That is, it is important that we not only identify what our rulings are, but also explain why we can or can't perform certain tasks or undertake certain actions that the members of the public may wish us to take, or why we are required to take other actions that members of the public may oppose, and why a court's role in any given matter differs substantially from that of a legislature or other policy-making body.

FINAL THOUGHTS

After only a few months, the initial ruckus had died down. The public's reaction, editorial pages, and letters to editors had all become significantly more positive. Of course, it probably also helped that the state legislature had by then finally taken action relating to the MVET. And in that more peaceful time, I received another telephone call from the man who had earlier left his repeated and hostile 2:00 am messages on my court answering machine. His new message was short and sweet. He actually apologized for the tenor of his earlier messages, and then said, "I still think you are wrong, but I have decided that you were doing the best that you could do."

What more can we ask for as judges, that a citizen who honestly and genuinely believes that we are in error actually also believes that we acted in good faith and were trying to be fair?

On the personal front, nobody filed against me, and near the end of that year, the Supreme Court of Washington affirmed my ruling by an 8-1 vote.[2] I retained my position on the trial court through 2004, after which I did choose to retire from the bench.

What did I learn from all this? Like the great majority of state court judges, I had held an elected position and had been subject to open public contests on a regular basis. That level of scrutiny can be a bad thing if it makes us fearful of public reaction, and it can be even worse if it makes us pander to vocal opposition or causes us to deliver the popular decision rather than the decision that is required by law. But, in a closely related phenomenon, and in what is barely the flip side of the coin, I found that being subjected to elections can actually be a good thing if it makes us more attentive to how we explain our rulings to the parties and to interested citizens.

Robert Alsdorf served as a superior court judge in Seattle, Washington, from 1990 until 2005. He now arbitrates and mediates cases in private practice and serves as a distinguished jurist in residence at Seattle University School of Law. In the past 15 years, he has worked nationally and internationally in various judicial and legal educational programs, traveling to locations as disparate as the Congo (DRC), Ethiopia, Kazakhstan, Liberia, Malaysia, Nicaragua, and Uganda. He has led the American Bar Association's efforts to help Sierra Leone rebuild its court system following a 12-year civil war there.

2. The Supreme Court's ruling is reported at Amalgamated Transit Union v. State of Washington, 142 Wn.2d 183, 11 P.3d 762 (2000).

EXCERPTS FROM JUDGE ALSDORF'S RULING IN AMALGAMATED TRANSIT UNION V. STATE OF WASHINGTON

Initiative 695 was affirmed in 1999 by a significant margin of the direct popular vote in virtually all areas of the State of Washington.

Its constitutional validity and its reach are now being vigorously questioned. These legal challenges, which raise questions fundamental to a democracy, were filed in several counties by citizens and by public and private entities alike. They have been consolidated in this Court for resolution.

NATURE OF THIS DECISION

The United States and its individual states have long been guided by the adage that we citizens have a government of laws and not of men. In accordance with this cherished principle, court rulings must be made by reference to law and not upon personal whim. A judicial ruling on the validity and reach of a legislative act passed by an elected legislature, or of an initiative or referendum passed directly by the citizenry, is controlled by constitutional law.

Wherever we citizens fall on the political spectrum and whatever our ideas on any given issue, we all agree that the touchstone is the Constitution. For example, one citizen may challenge a particular act or law on the grounds that it violates his or her right to bear arms under the Second Amendment. Another citizen may contest yet another act or law on the grounds that it violates his or her free speech rights under the First Amendment. As citizens, we may and frequently do disagree on specific policies. Nonetheless, our agreement as citizens on a single point of reference, the Constitution, keeps American democracy healthy and viable.

Depending upon the issue involved, courts are required to refer either to the United States Constitution or to the Constitution of their particular state, or to both.

Because this set of cases involved the structure of the democracy established in the State of Washington, the questions presented for decision today are governed by our State Constitution.

The Constitution of the State of Washington was drafted in keeping with the legal traditions of the United States, which find many of their origins in the American Revolution. One of the central cries leading to the American Revolution was "No taxation without representation!" Echoes of that revolutionary spirit are found in the passage of Initiative 695. However, there is a vital distinction which commands brief discussion. The early revolutionary slogan expressed the sentiment that citizens wanted no taxation unless they were *represented* in the body that imposed the taxes. That is, we were establishing a *representative* democracy. In a representative democracy, citizens delegate authority to their elected representatives—legislative, executive and judicial—to decide certain questions on behalf of the citizenry. A representative democracy does not contemplate, let alone necessitate, a direct vote of the citizens on every act of the government, whether it be an act imposing, enforcing or collecting a tax, or some other governmental act.

In contrast to the representative democracies established after the Revolution, a *direct* democracy is one whose structure not only permits but requires a direct vote of the citizenry on every act of its government. No state has such a government in its purest form. However, in the early 1900's there was a strong populist movement in Washington and in other states which sought to permit direct participation in the government when a sufficient number of citizens wanted such participation. These populist movements established the right of the citizenry in more than twenty states to more direct participation by passing constitutional amendments that permitted citizens to file and vote on initiatives and referenda. The State of Washington is one of those states. As a result, the State of Washington now has a democracy whose structure has both representative and direct elements. Both elements of our democracy, direct and representative, are established by and are subject to the terms of our State Constitution.

The government of the State of Washington remains primarily *representative*. The *direct* participation of citizens in legislative activity is contemplated on those occasions when the citizenry affirmatively so chooses, in keeping with either the Constitution's initiative process or its referendum process.

In order to deal properly with the constitutional challenges raised to Initiative 695, one must keep in mind the distinctions between the representative and the direct elements of our democracy, and the manner in which these two elements interact under our State Constitution.

Each of these constitutional challenges will be addressed in turn below.

* * *

Arguments may be made that we have a runaway tax-and-spend government and that we need radical systemic change in taxation or in other areas in order to make our governmental entities responsive to the needs and the will of the citizens. Some citizens will agree. Some will not. Whatever the wisdom of a particular proposed fiscal policy, the fundamental structure or system of our government can be changed only by constitutional amendment.

* * *

Because the timely filing of a referendum with a sufficient number of signatures immediately suspends the operation of the challenged act or law, the Constitution exempts from the power of referenda all laws which are necessary to protect public health and safety (i.e., the police power) and those which are necessary for the support of the State and its existing public institutions.

The purpose of this portion of the Constitution is to assure that the government can continue functioning despite political differences of opinion. The reason for this limitation is rooted in history.

* * *

If the Court redrafted Initiative 695 to require local referenda but prohibit State referenda, as both [proponents of the initiative] have urged, the Court would have rewritten the Initiative and caused it to address a topic narrower than and distinct from the loss of statewide MVET funding. That sort of redrafting would be a legislative act, and not a proper judicial function.