THE DUE PROCESS PROJECT

A CONSTITUTIONAL BRIEFING

Restoring Constitutional Balance in Washington's Judicial System

A legislative opportunity to strengthen oversight and protect families

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WA State Basic Constitutional Design: Separation of Powers

I Legislative

Enacts laws

Wash. Const. art. II

II Executive

Administers and enforces laws

Wash. Const. art. III

III Judicial

Interprets and applies laws

Wash. Const. art. IV

Branches operate independently but subject to the oversight of the others.

Its purpose: prevent the concentration of power in one branch, safeguarding democratic accountability and individual civil liberties.

Six Structural Trends in Washington's Judiciary

1 Rulemaking concentrated

In 1925 the Legislature delegated procedural rulemaking to the Supreme Court (RCW 2.04.190); those rules override conflicting statutes (RCW 2.04.200). Under GR 9, the Court sets its own rulemaking process, and may adopt or amend any rule "without following the procedures set forth in this rule" (GR 9(j)(1)).

2 Oversight internalized

Every CJC member is appointed by the judiciary, the bar, or the Governor; through the discipline process, only the Supreme Court can suspend or remove a judge.

3 Immunity extended

Taggart v. State (1992) extended absolute quasi-judicial immunity to non-judges performing judicial functions.

4 Appointments and elections insulated

Midterm judicial vacancies are filled by gubernatorial appointment, and the appointee then runs at the next general election as the incumbent (Wash. Const. art. IV, §§ 3, 5).

5 Delegation without accountability

RCW 26.12 delegates family court services to counties, Judiciary confirms State's position of non-responsibility upon delegation. Federal courts treat counties as independent entities for liability purposes, creating an accountability gap when judicial functions are delegated.

6 Discretion expanding

HB 1620 (2025) was advanced on the premise that "[d]iscretion is needed"; CrR 8.3 (amended 2025) broadens dismissal discretion, expanding judicial override of prosecutorial decisions.

Judicial Power in Washington: A Timeline

Period	Development	Authority	Impact
1925	Legislature delegates procedural rulemaking to the Supreme Court; those rules override conflicting statutes	RCW 2.04.190; RCW 2.04.200 (1925 ex.s. c 118)	Court rules displace statutes without legislative review
1957	Administrative Office of the Courts established under the Chief Justice	RCW 2.56.030 (1957 c 259)	Court administration, data, training, and budget estimates run through the judiciary
1973	CrR 8.3 adopted; its comment states it "Supersedes RCW 10.46.090"	CrR 8.3	A court rule expressly displaces a statute
1980	Judicial Qualifications Commission created by constitutional amendment; renamed Commission on Judicial Conduct in 1986	Wash. Const. art. IV, § 31 (amends. 71, 77); RCW 2.64 (1981 c 268)	"An independent agency of the judicial branch"; all members appointed; with independent budget and no oversight or appeal process
1982	GR 9 adopted; the Court writes its own rulemaking process and may bypass it	GR 9; GR 9(j)(1)	The Court governs its own rulemaking
1992	Absolute quasi-judicial immunity extended to non-judges performing judicial functions	*Taggart v. State*, 118 Wn.2d 195	Functional test widens who is shielded from liability
2025	ESHB 1620 rewrites parenting-plan limitations, advanced on the premise that "[d]iscretion is needed"; CrR 8.3 amended to broaden dismissal discretion	Laws of 2025, ch. 166; CrR 8.3 (eff. Sept. 1, 2025)	Discretion over fundamental rights grows without matching due-process safeguards
Ongoing	Family court services delegated to counties	RCW 26.12	State disclaims responsibility; immunity shields court-appointed actors

Rulemaking Without Review: Courts as Lawmakers

1925: The Legislature authorized the Supreme Court to "regulate and prescribe by rule … the entire pleading, practice and procedure" in Washington courts (RCW 2.04.190).

Same act: once rules are promulgated, "all laws in conflict therewith shall be and become of no further force or effect" (RCW 2.04.200).

Internal process: the Supreme Court reviews and adopts its own rules under GR 9. The rule is reviewed by the WSBA, the Superior Court Judges Association, the District and Municipal Court Judges Association, and the Chief Presiding Judge of the Court of Appeals for comment before the public ever sees it (GR 9(f)(2)), and there is no legislative review or veto.

Rule over statute: CrR 8.3's own comment states it "Supersedes RCW 10.46.090." A court rule displaced a law the Legislature enacted.

Self-governing actors: court rules (e.g., GALR) govern court-appointed actors, who then claim the judiciary's quasi-judicial immunity.

This concentration of rulemaking authority raises significant separation-of-powers concerns.

No Independent Oversight, No Public Recourse

WHO SITS ON THE CJC

3	2	6
Judges chosen by judges	**Lawyers** chosen by the bar	**Non-lawyers** chosen by the Governor

Commission on Judicial Conduct, 11 members (Wash. Const. art. IV, § 31; RCW 2.64.020): all appointed to the Commission, none chosen for it by voters.

The Constitution makes the CJC "an independent agency of the **judicial branch**" (art. IV, § 31). It may admonish, reprimand, or censure; through the discipline process, only the **Supreme Court** can suspend or remove a judge.

By its own description, the CJC process is "separate from the judicial appeals system." It **cannot correct a ruling.**

Removing a judge takes impeachment or a three-fourths vote of both houses (Wash. Const. art. V, § 2; art. IV, § 9); holding one liable is all but foreclosed by absolute immunity.

Immunity Doctrine Expanded

Judges: absolute immunity for judicial acts, even when performed improperly.

Taggart v. State, 118 Wn.2d 195 (1992): **absolute quasi-judicial immunity extends beyond judges to non-judicial officials performing judicial functions.**

The functional test: immunity follows the function, not the office, so GALs, court investigators, and special masters claim quasi-judicial immunity.

The result: litigants are left without civil remedies for many constitutional harms, and often without meaningful hearings, cross-examination, or a way to challenge adverse findings.

Due process, equal protection, and the right to petition are guaranteed (U.S. Const. amends. I, XIV), but **for those harmed by immune actors, the remedy is foreclosed.**

Immunity bars accountability, maintains the status quo, and compounds the accumulation of judicial power.

Insulated Power: Appointments and Elections

APPOINTMENTS VETTED BY INSIDERS

- Midterm judicial vacancies are filled by gubernatorial appointment
- No public transparency in selection or vetting process
- The Legislature has no role in judicial selection

ELECTIONS ARE FUNCTIONALLY NONCOMPETITIVE

- Appointees stand for election as incumbents
- Judicial incumbents retain office without meaningful public scrutiny

Lawyers become the GALs, coordinators, and court officers. Judges appoint the commissioners. Only lawyers can become judges. The profession governs itself, top to bottom.

TREND 5 OF 6

Delegation Absent Accountability

Case study, family court: *RCW 26.12 delegates family court services to the counties.*

DELEGATED

- Counties administer GAL programs, evaluations, and supervised visitation
- Superior courts appoint and direct these actors
- No statewide standards, oversight, or public accountability

STATE DISCLAIMS LIABILITY

- Litigants harmed by GALs or evaluators are told the State is not responsible
- No statutory damages remedy for violations of the Washington Constitution
- Raises significant nondelegation concerns: core state functions cannot be outsourced without accountability

IMPLICATIONS

- The State cannot delegate judicial power and simultaneously disclaim responsibility, but it does
- Citizens are left without recourse against actors who wield state authority
- Courts direct non-judicial actors, then extend them quasi-judicial immunity

Layers of delegation and immunity shield the system from outside scrutiny and accountability.

TREND 6 OF 6

Amassed Judicial Power

JUDICIARY POWER COMPLETE

Judges are legally immune for judicial acts and are predominantly elevated through internal professional networks.

Rules over statutes: once the Court's rules are promulgated, conflicting laws "shall be and become of no further force or effect" (RCW 2.04.200).

Judicial discretion over fundamental rights: in 2025, RCW 26.09.191 codified the inversion. By statute, it is now easier for the State to restrict a parent than for the parent to escape the restriction, and rulings that follow it become harder to challenge.

CrR 8.3 (amended Sept. 1, 2025): widens judicial discretion to dismiss State prosecutions, even where misconduct does not affect the fairness of the trial.

Statutes yield to court rules. Charging decisions yield to court discretion. Every road runs to the bench.

THE ASK · RESTORE CONSTITUTIONAL BALANCE

The Legislature Must Act

1. Create a neutral, independent oversight body with investigatory and disciplinary authority over the judiciary, by statute or constitutional amendment
2. Legislate a heightened standard of review and expanded appellate opportunity where fundamental rights are at stake
3. Reassert legislative review of court rules that displace statutes (RCW 2.04.200)
4. Legislate for appropriate oversight and appellate access and opportunity
5. Legislate transparency in judicial review and disposition

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Index of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const. arts. I, II, III
U.S. Const. amend. I
U.S. Const. amend. XIV
Wash. Const. arts. II, III, IV
Wash. Const. art. IV, §§ 3, 5, 9, 31
Wash. Const. art. V, § 2

CASES

Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992)

STATUTES

RCW 2.04.190; RCW 2.04.200
RCW 2.56.030
RCW 2.64.020
RCW 26.09.191
RCW 26.12
Laws of 2025, ch. 166 (ESHB 1620)

COURT RULES

GR 9 (Supreme Court Rulemaking)
GALR (Guardian ad Litem Rules)
CrR 8.3 (Dismissal)

LEGISLATIVE AND OTHER SOURCES

House Bill Report, HB 1620 (2025)
Wash. Comm'n on Judicial Conduct, "What We Do"

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