

State and Local Government Emergency Authority

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Senior Counsel

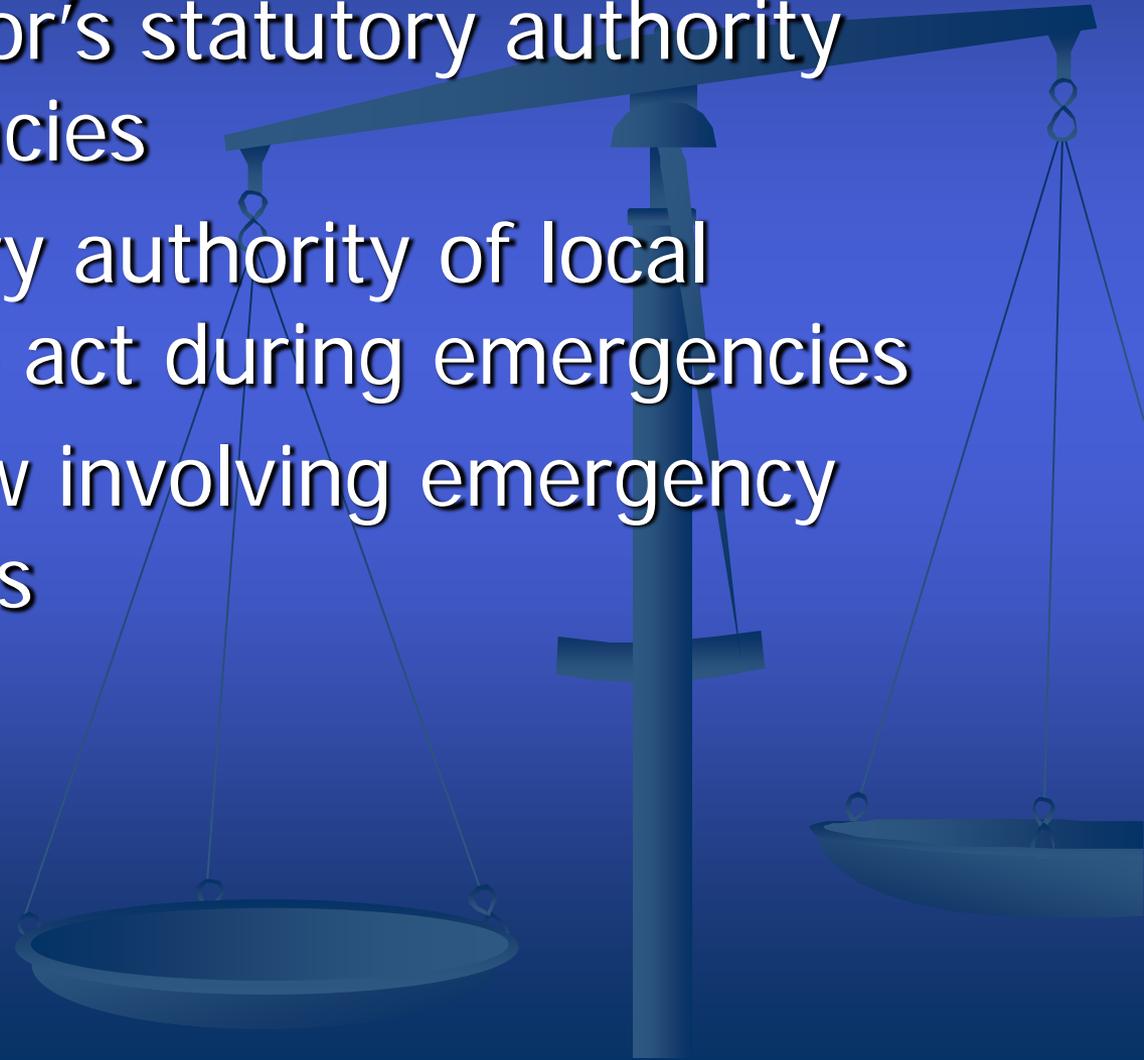
GLBA CLE, June 5, 2020

DISCLAIMER

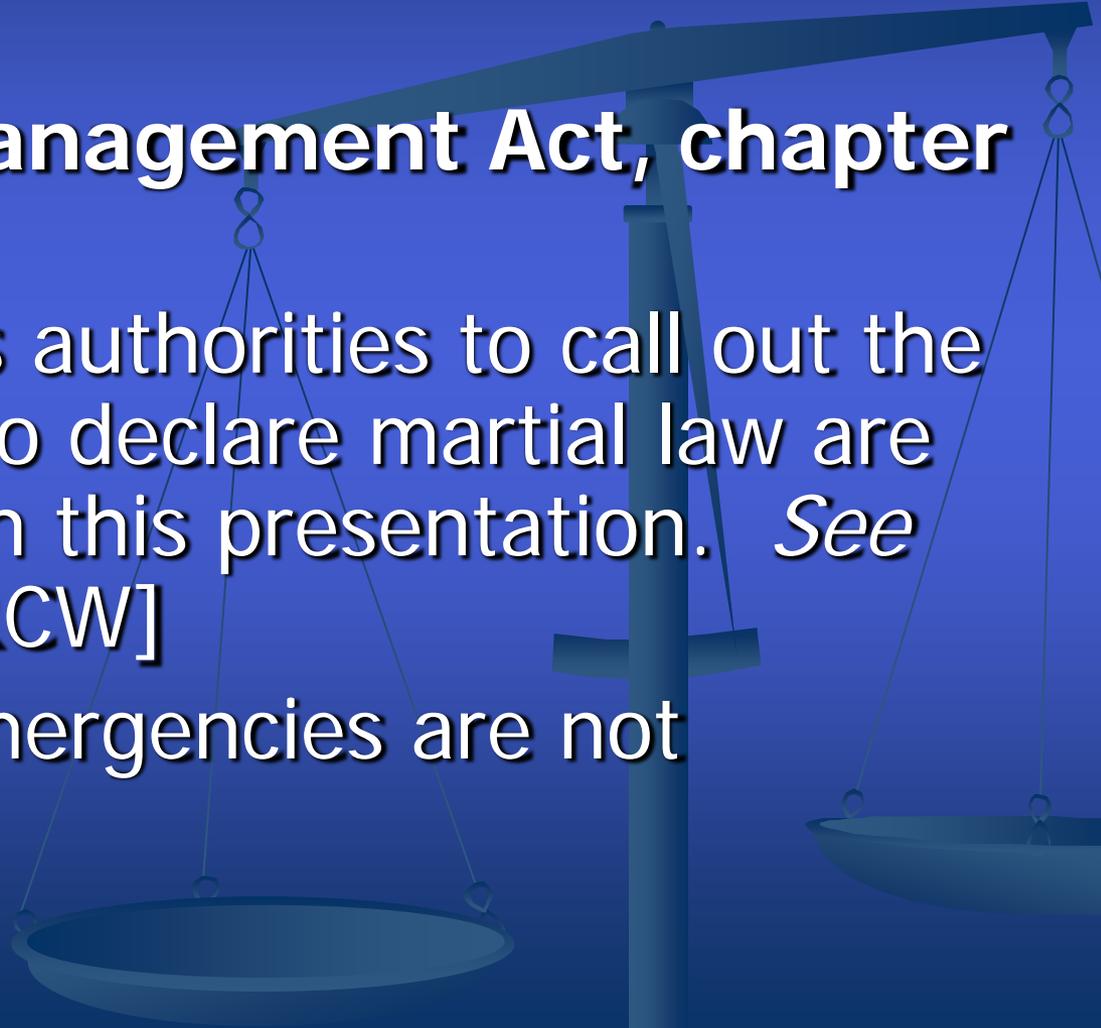
THE STATEMENTS AND OPINIONS CONTAINED IN THIS PRESENTATION
DO NOT CONSTITUTE LEGAL ADVICE NOR DO THEY REPRESENT THE
FORMAL OPINION OF THE ATTORNEY GENERAL'S OFFICE

Roadmap – Three Goals

- Discuss Governor's statutory authority during emergencies
- Discuss statutory authority of local governments to act during emergencies
- Look at case law involving emergency response actions



Main Statutory Sources of Authority

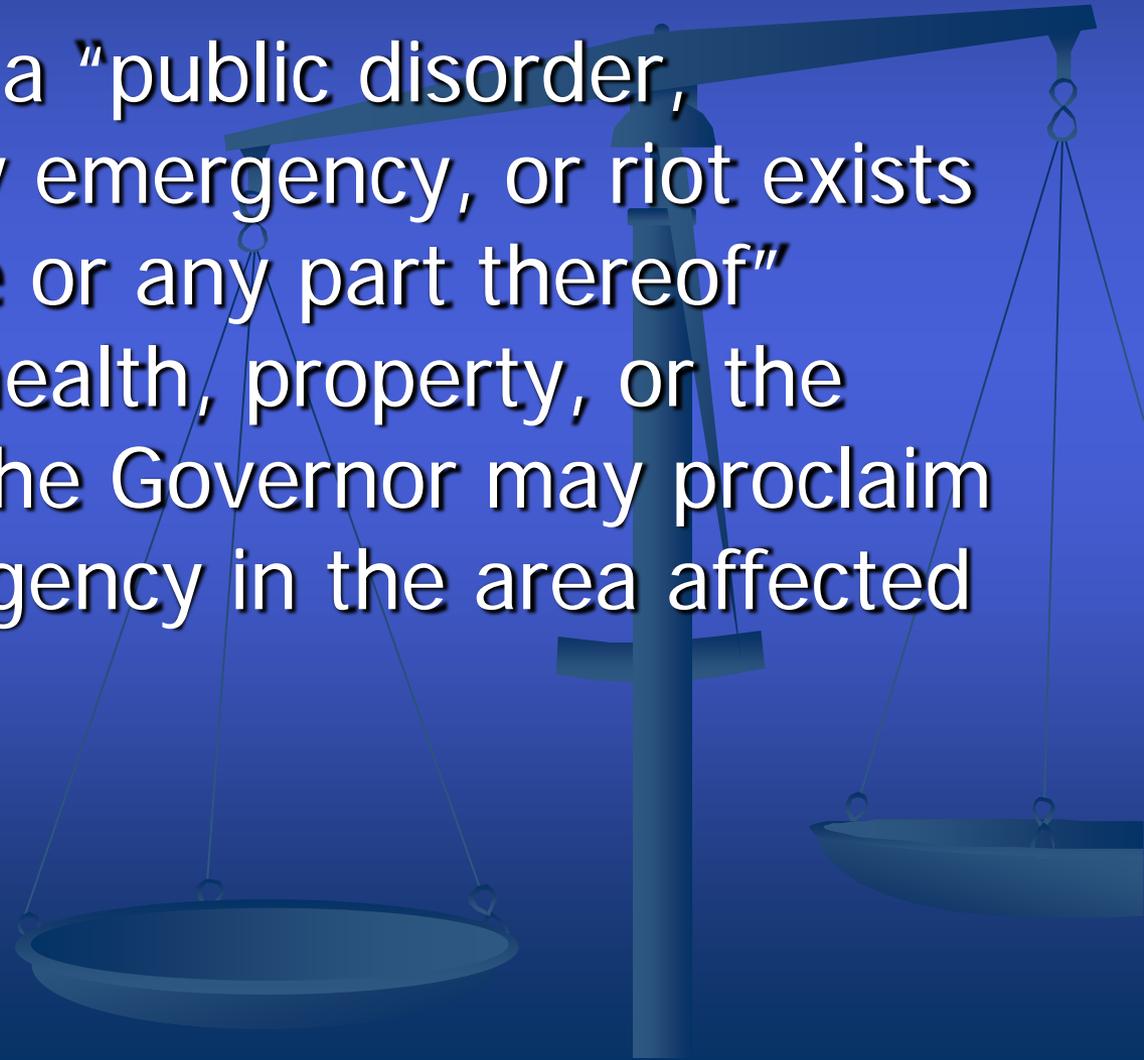
- **Governor's authorities in chapter 43.06 RCW**
 - **Emergency Management Act, chapter 38.52 RCW**
 - [The Governor's authorities to call out the state militia or to declare martial law are not addressed in this presentation. *See* chapter 38.08 RCW]
 - Public health emergencies are not addressed here
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Chapter 43.06 RCW

General Powers:

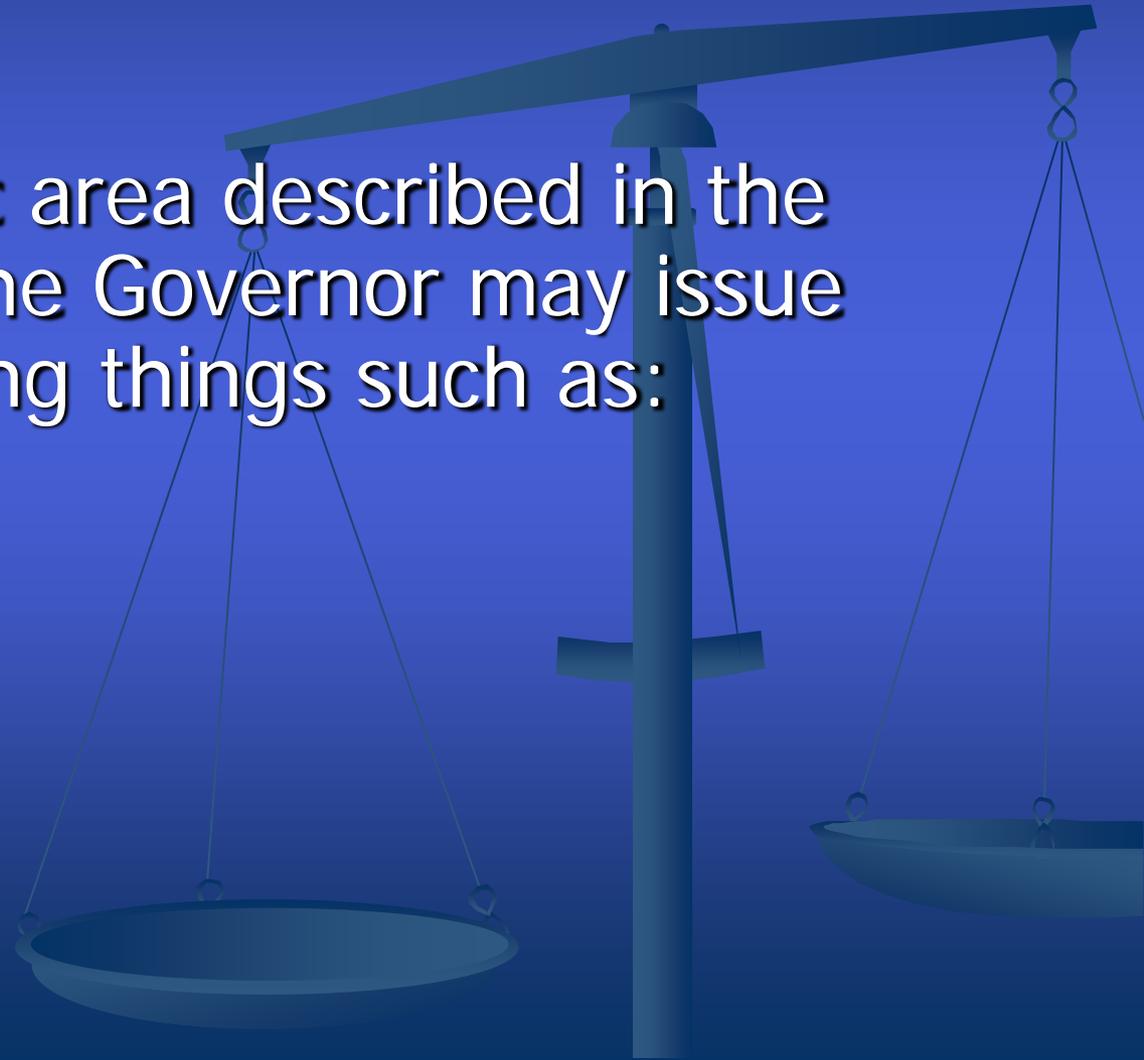
After finding that a "public disorder, disaster, energy emergency, or riot exists within this state or any part thereof" affecting "life, health, property, or the public peace," the Governor may proclaim a state of emergency in the area affected

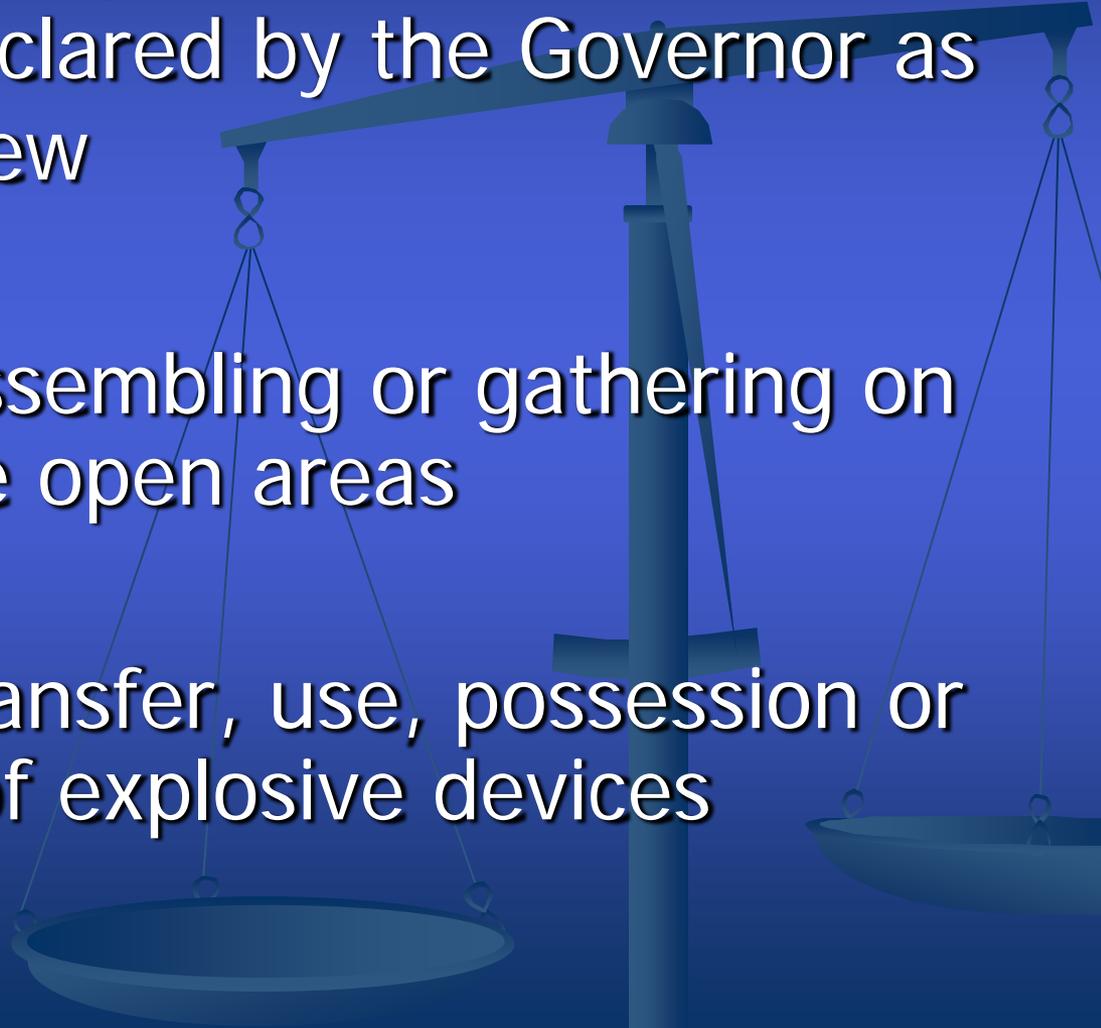
RCW 43.06.010



Governor's Powers When Emergency Proclaimed

In the geographic area described in the Proclamation, the Governor may issue orders prohibiting things such as:

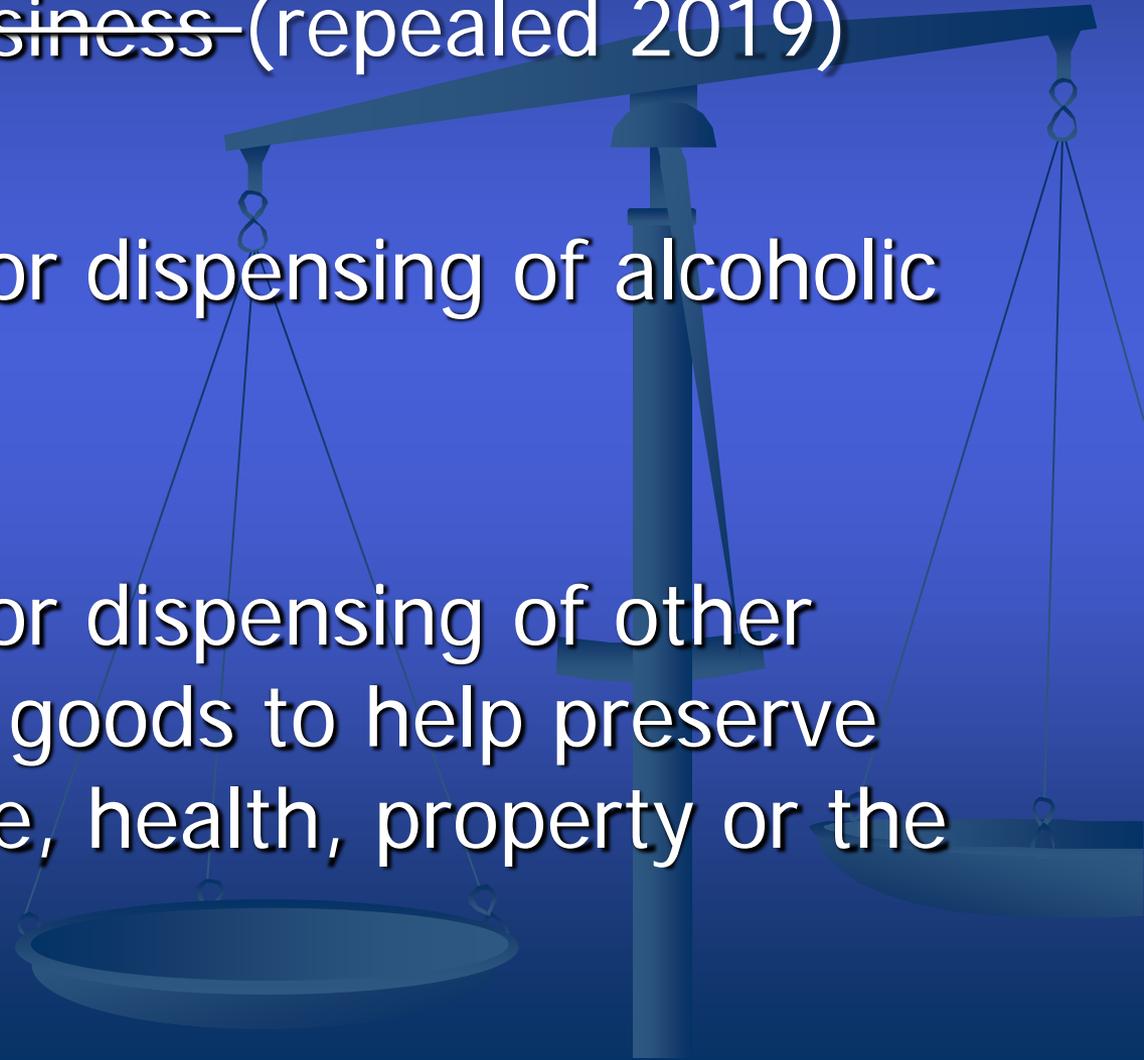


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- Persons from being in any public place during hours declared by the Governor as a period of curfew
 - Persons from assembling or gathering on public or private open areas
 - Manufacture, transfer, use, possession or transportation of explosive devices

■ ~~Possession of firearms or any other deadly weapon other than at a person's place of residence or business (repealed 2019)~~

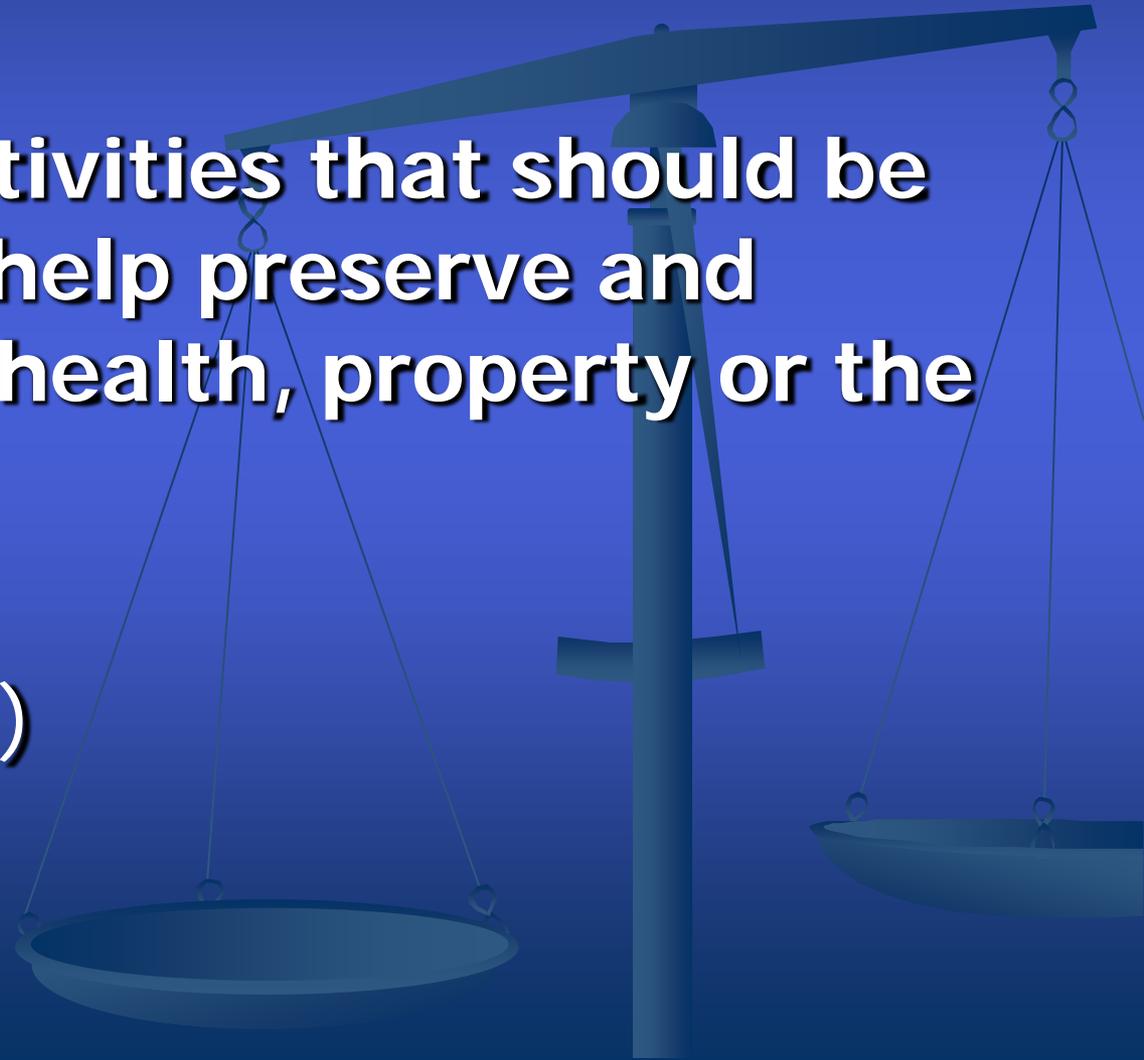
■ Sale, purchase or dispensing of alcoholic beverages

■ Sale, purchase or dispensing of other commodities or goods to help preserve and maintain life, health, property or the public peace



- Use of certain streets, highways or public ways by the public
- **Such other activities that should be prohibited to help preserve and maintain life, health, property or the public peace**

RCW 43.06.220(1)

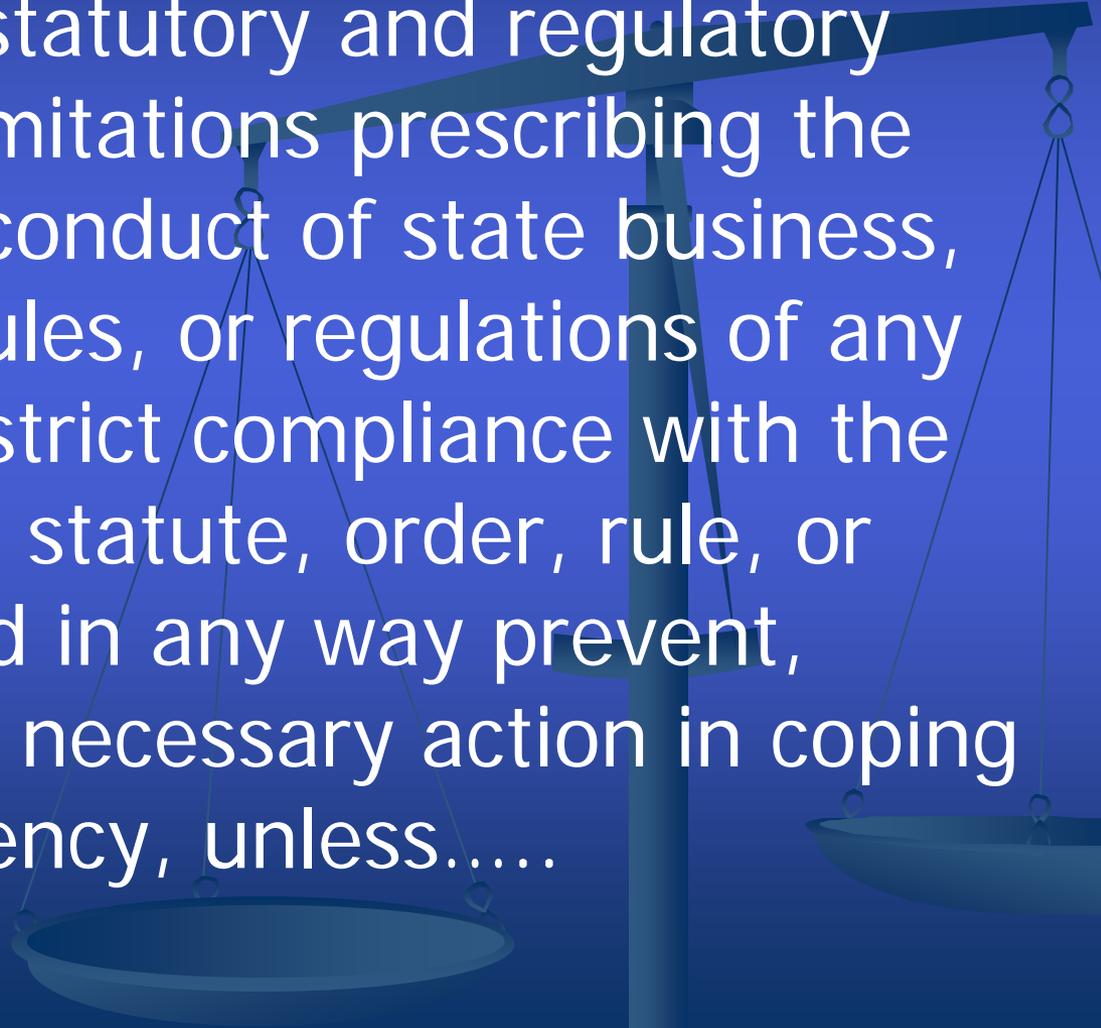


Governor's Powers When Emergency Proclaimed: 43.06.220(2)

After proclaiming an Emergency for a specified area, Governor can waive or suspend statutory obligations or limits in 6 specified subject areas:

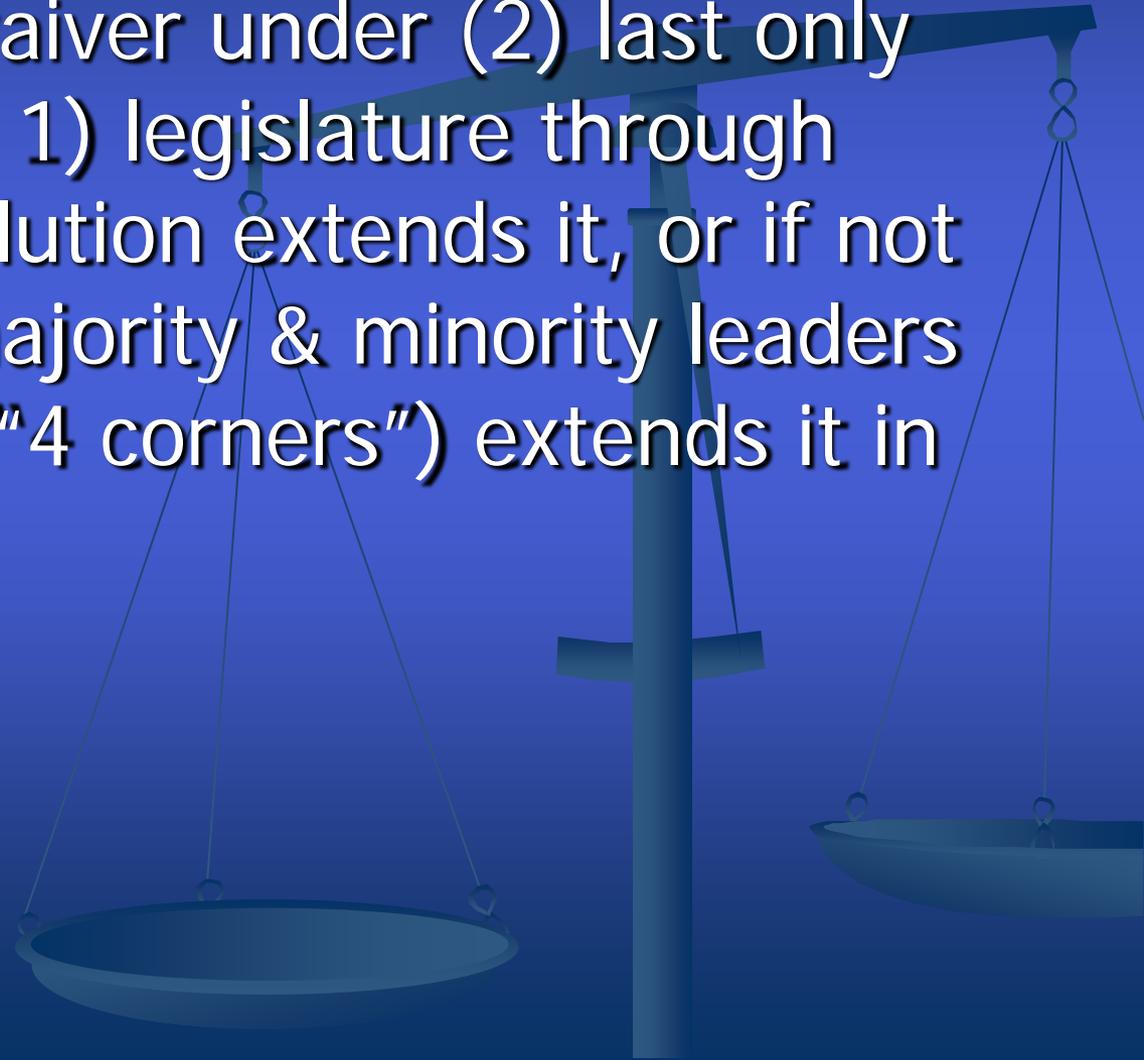
- L&I inspection fees
- DSHS family emergency assistance program
- UTC regulations tariffs & notice requirements
- Tax due dates and penalties
- Alcohol permits for industrial, business, or medical use
- Mutual aid agreements by Dept. of Commerce

43.06.220(2), 2019 adds this:

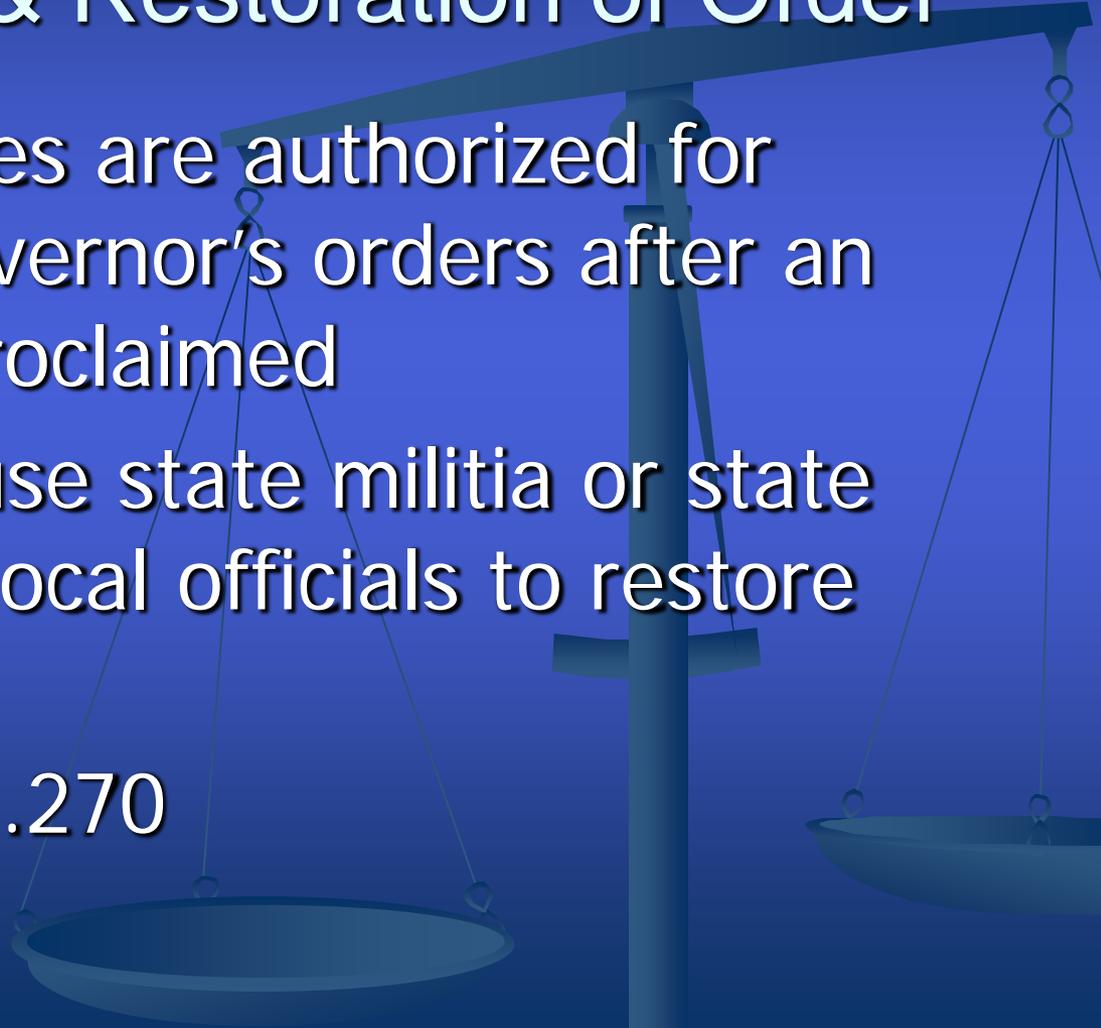
- (g) Such other statutory and regulatory obligations or limitations prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency if strict compliance with the provision of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency, unless.....
- 

43.06.220(4)

- Any statutory waiver under (2) last only 30 days unless: 1) legislature through concurrent resolution extends it, or if not in session, 2) majority & minority leaders of each house ("4 corners") extends it in writing.



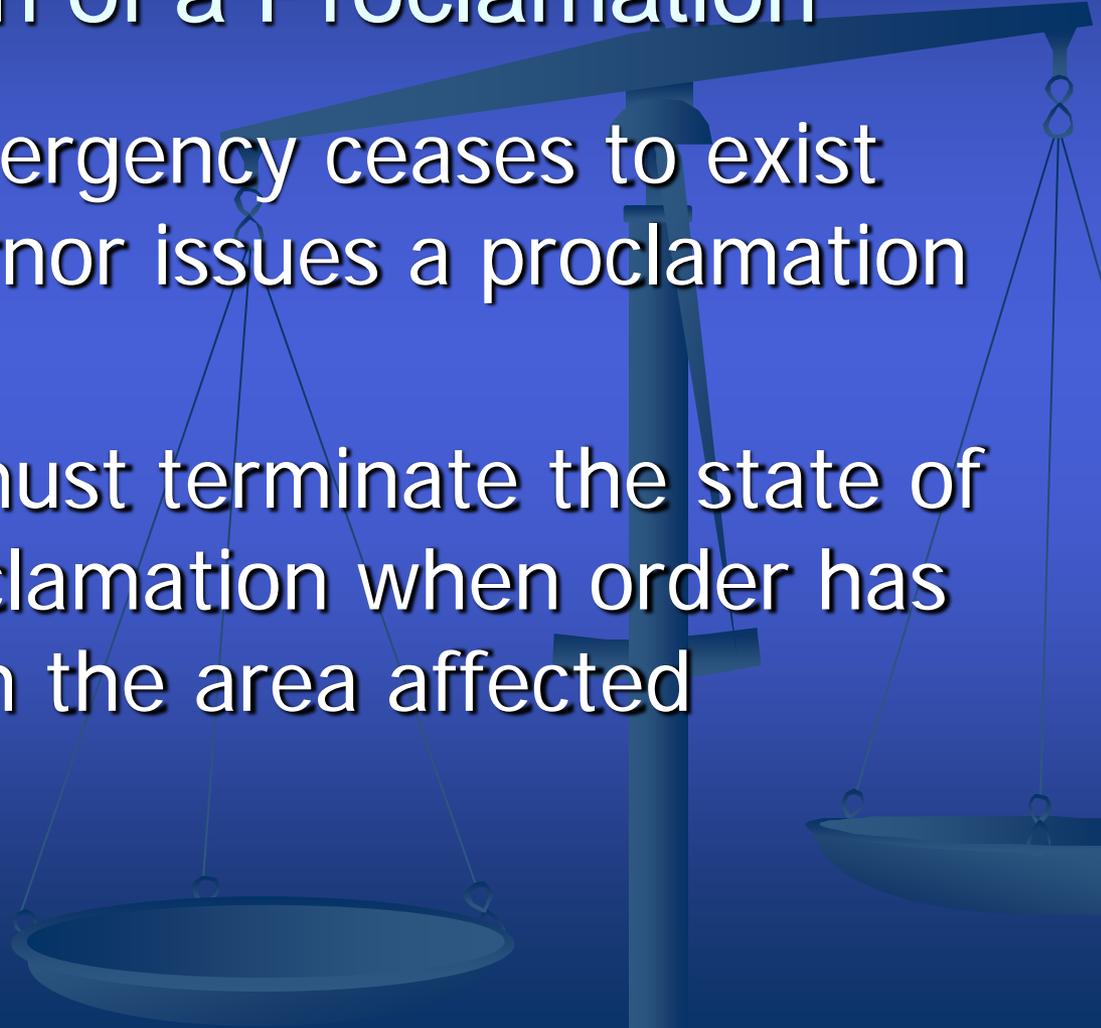
Enforcement & Restoration of Order



- Criminal penalties are authorized for violations of Governor's orders after an emergency is proclaimed
- Governor may use state militia or state patrol to assist local officials to restore order

RCW 43.06.230 - .270

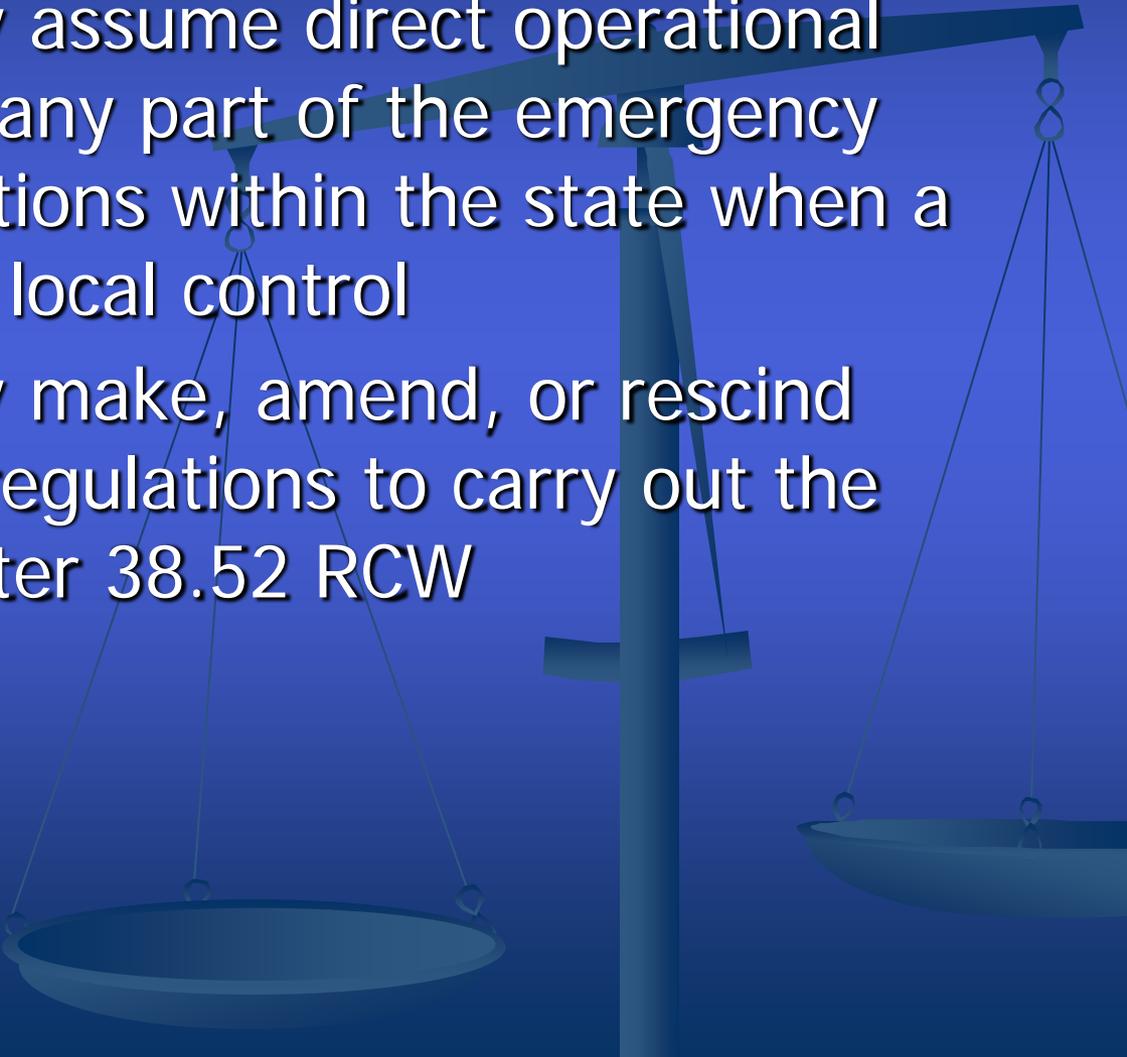
Termination of a Proclamation



- The state of emergency ceases to exist when the Governor issues a proclamation terminating it
- The Governor must terminate the state of emergency proclamation when order has been restored in the area affected

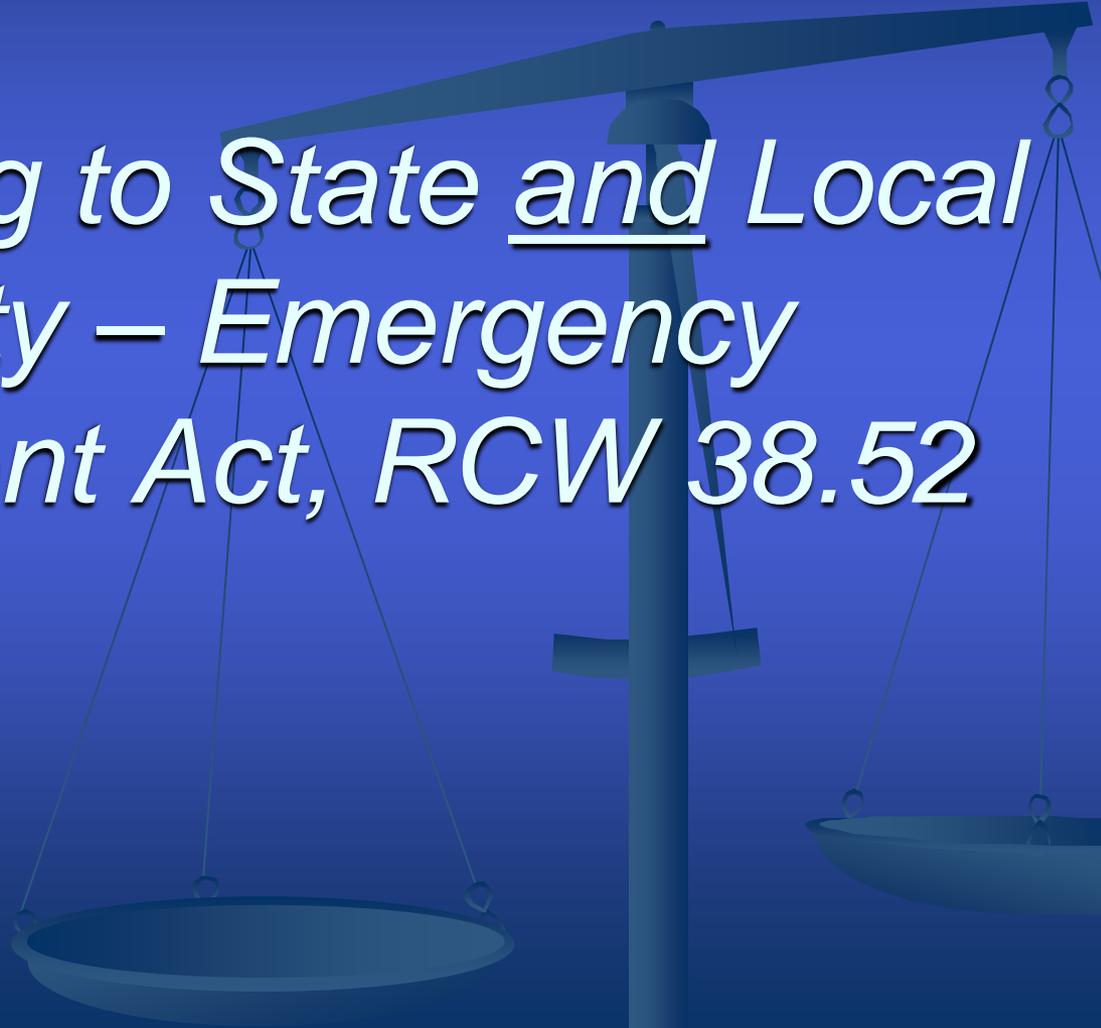
RCW 43.06.210

Emergency Management Act



- The Governor may assume direct operational control over all or any part of the emergency management functions within the state when a disaster is beyond local control
- The Governor may make, amend, or rescind orders, rules and regulations to carry out the provisions of chapter 38.52 RCW

RCW 38.52.050

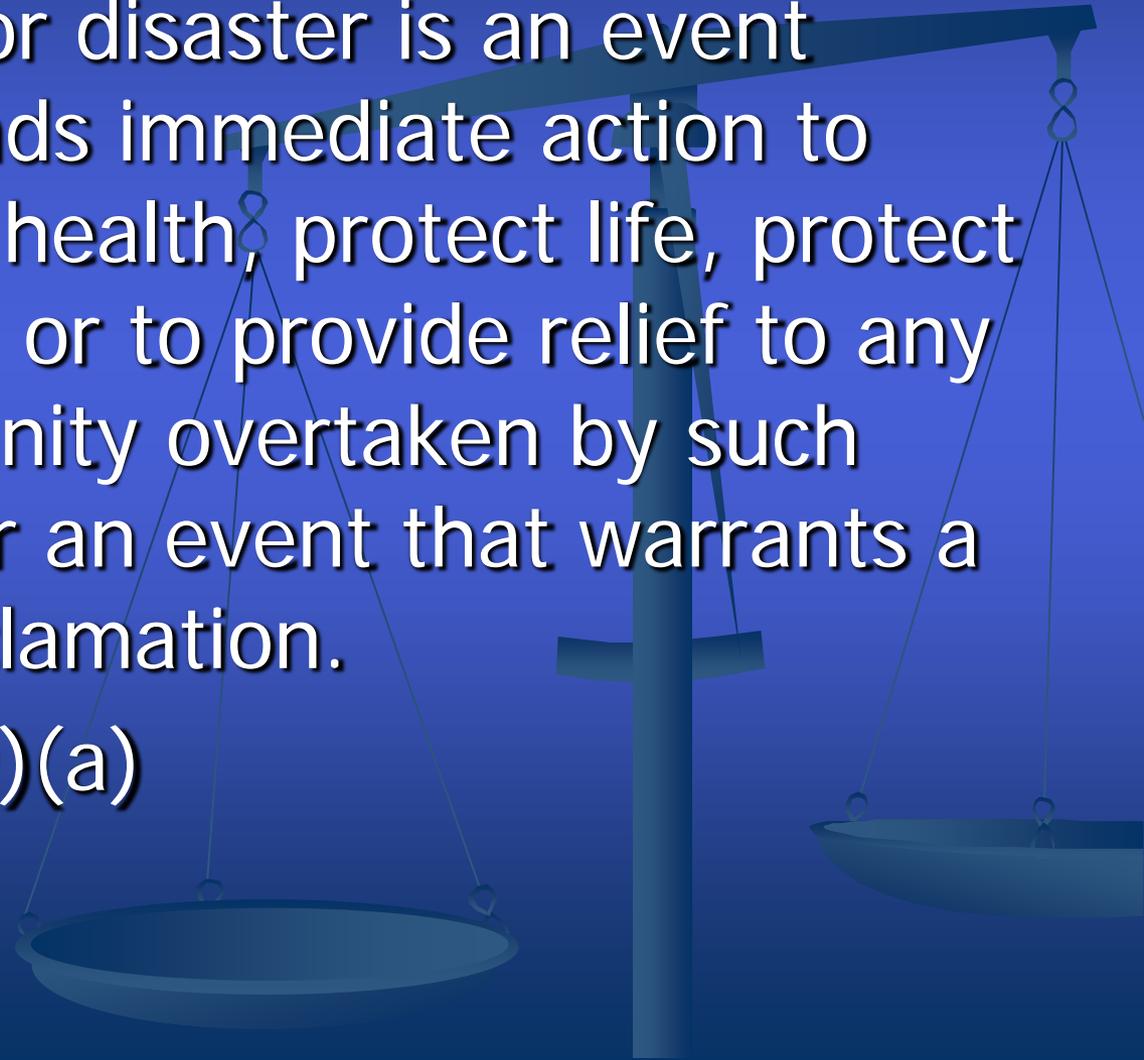


*Transitioning to State and Local
Authority – Emergency
Management Act, RCW 38.52*

Emergency Management Act

- An emergency or disaster is an event which "[d]emands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences," or an event that warrants a Governor's proclamation.

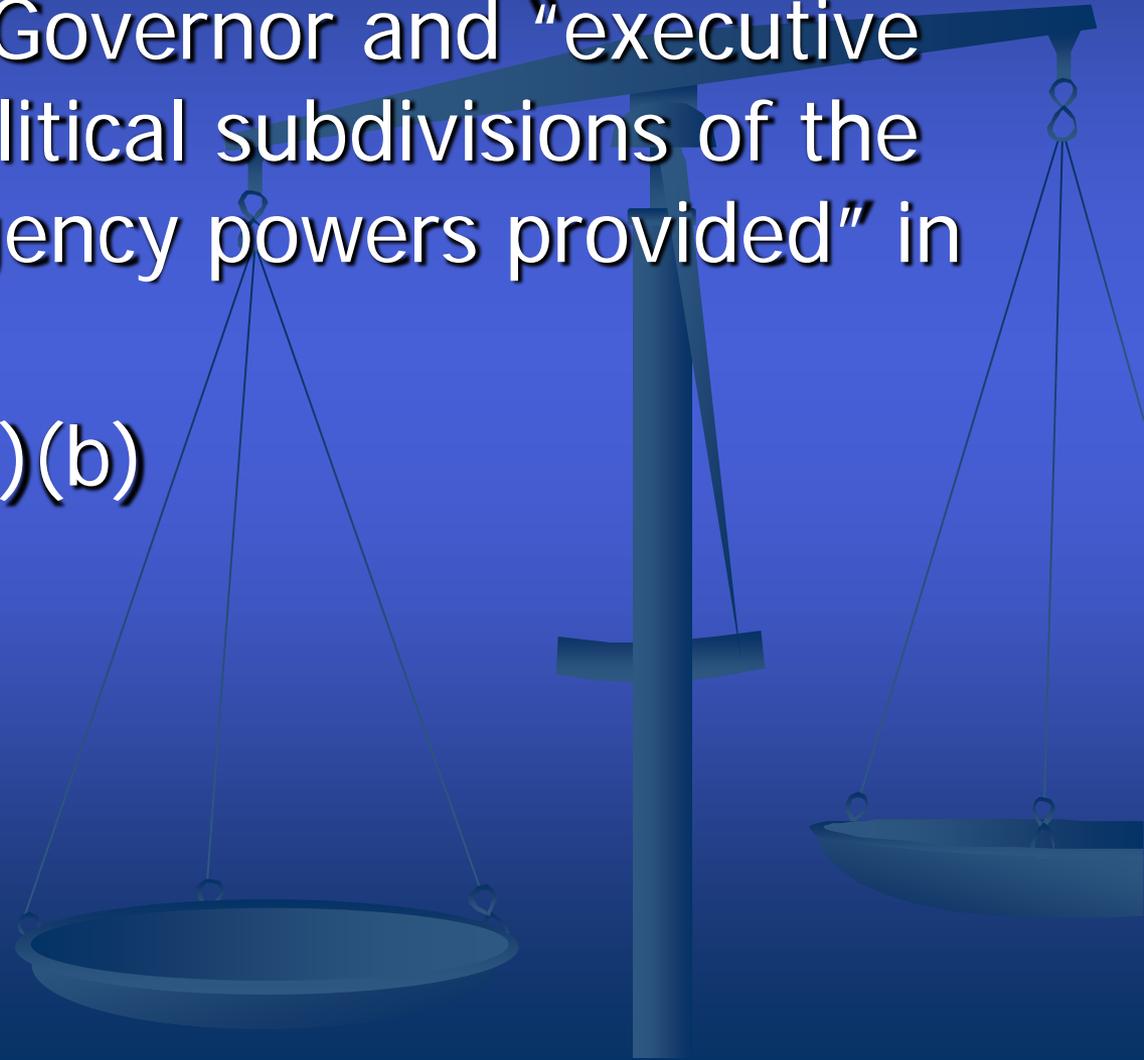
RCW 38.52.010(9)(a)



Emergency Management Act

- Confers on the Governor and "executive heads of the political subdivisions of the state the emergency powers provided" in this Act

RCW 38.52.020(1)(b)



Use of Public Services, Equipment, Supplies and Facilities

In carrying out emergency management authority:

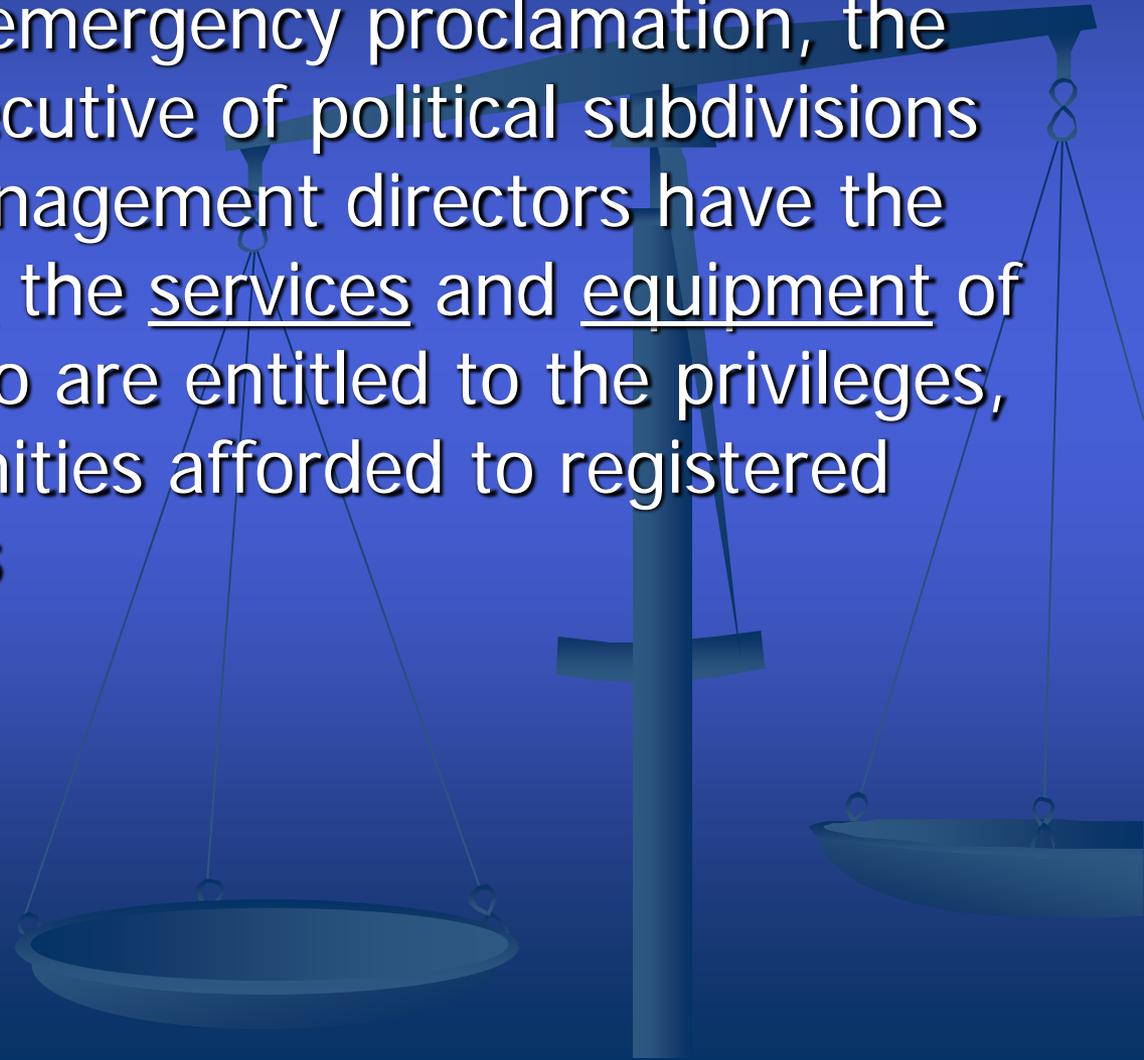
- Governor and the executive heads of political subdivisions may request the services, equipment, supplies and facilities of state and local governments, including quasi-municipal corporations
- Agencies receiving the request are directed to cooperate, notwithstanding any other provision of law

RCW 38.52.110(1)

Services and Equipment of Private Citizens

- After a Governor's emergency proclamation, the Governor, chief executive of political subdivisions and emergency management directors have the power to command the services and equipment of private citizens, who are entitled to the privileges, benefits and immunities afforded to registered emergency workers

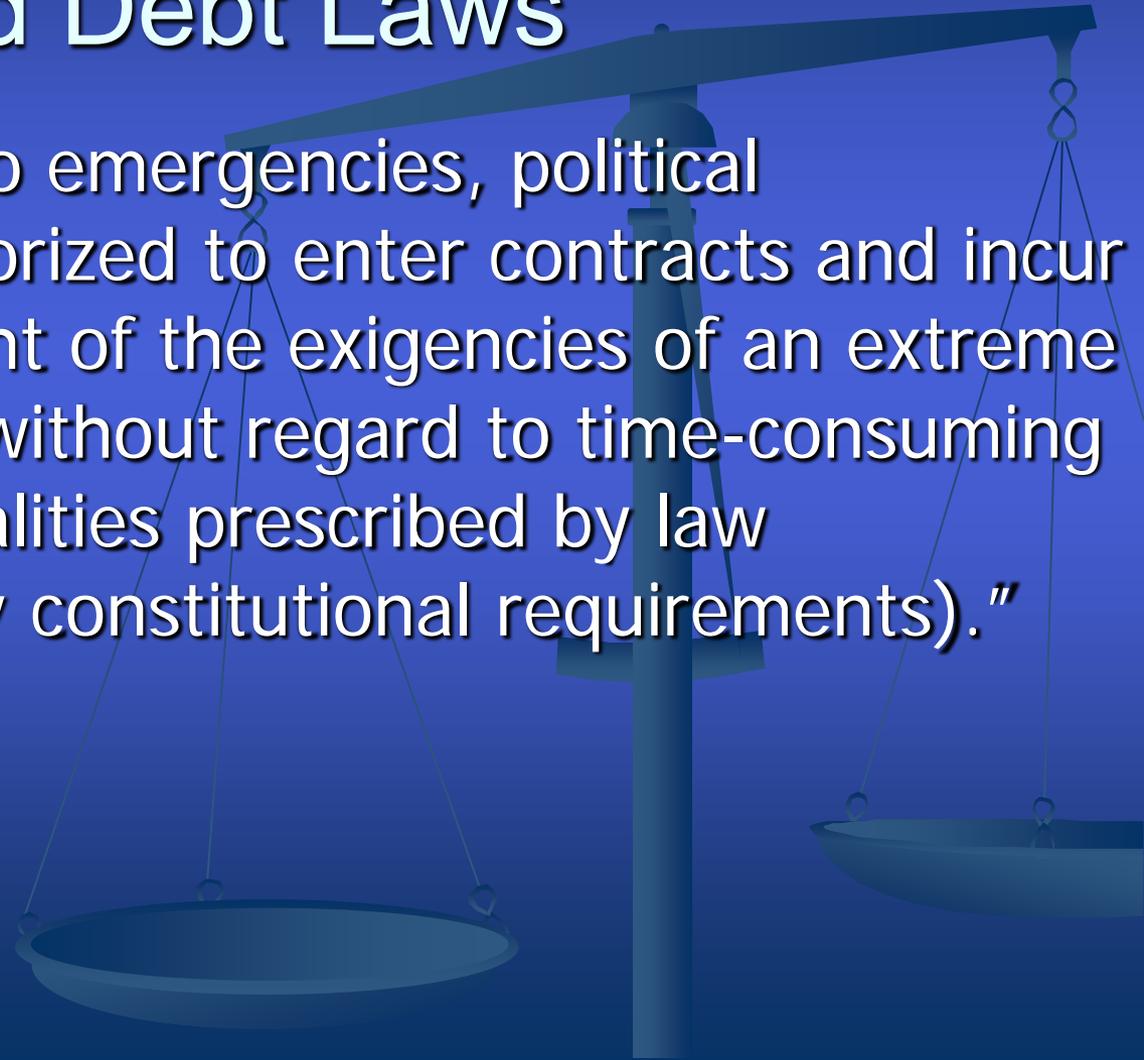
RCW 38.52.110(2)



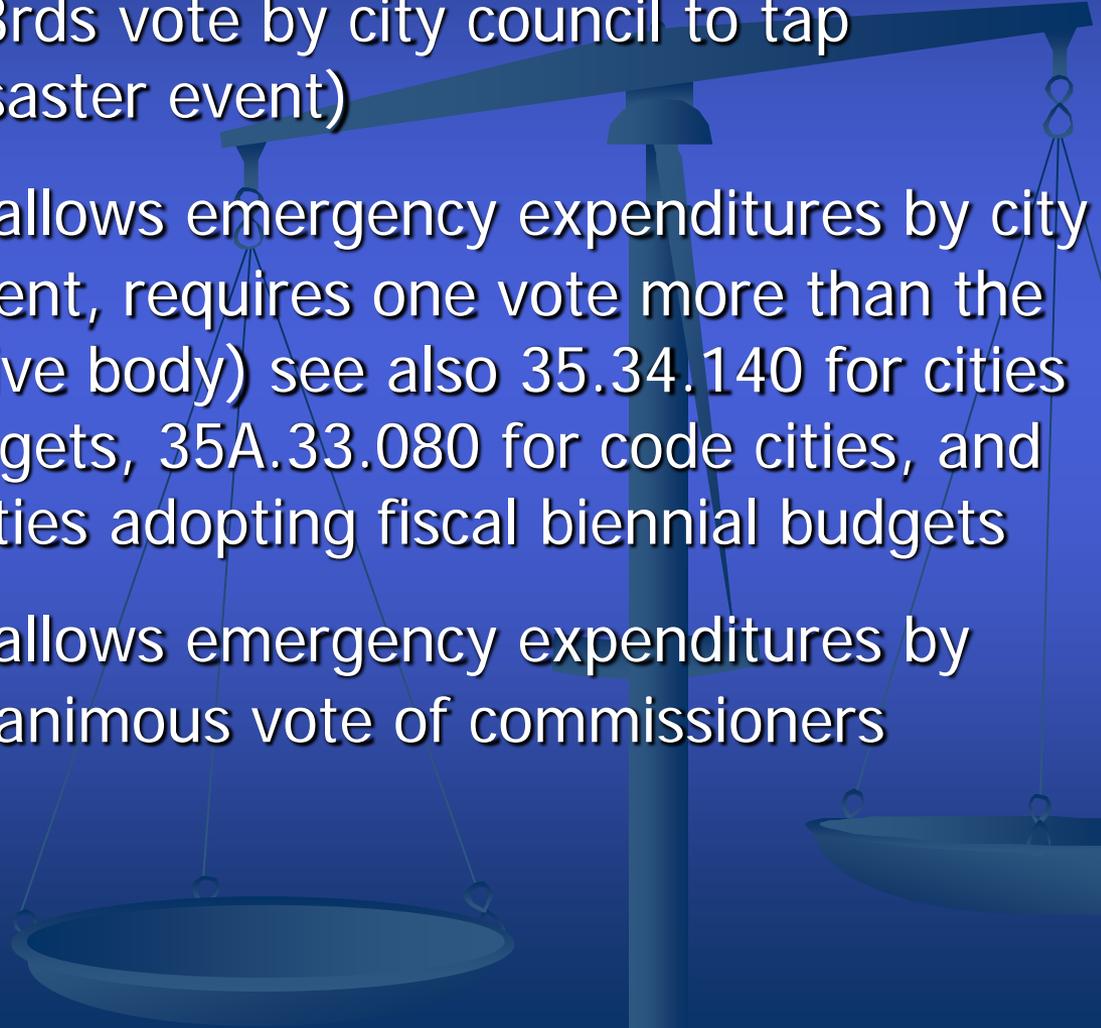
Local Governments' Limited Authority to Ignore Contracting and Debt Laws

- In responding to emergencies, political subdivisions are authorized to enter contracts and incur obligations "in the light of the exigencies of an extreme emergency situation without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory constitutional requirements)."

RCW 38.52.070(2)



Other Debt Limit Waivers

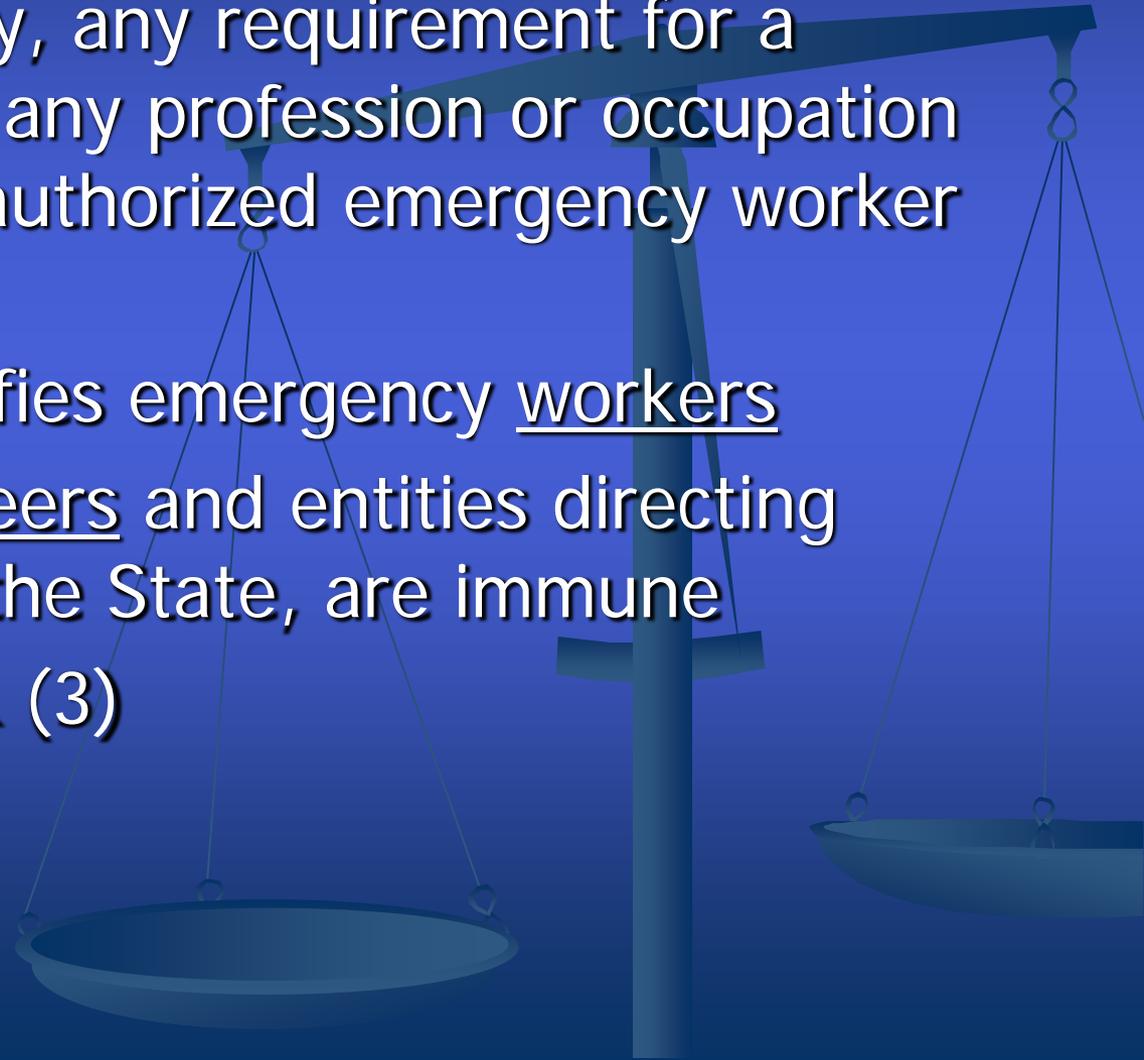


- **RCW 35.32A.060** (emergency fund of cities over 300,000 -- requires 2/3rds vote by city council to tap emergency fund for disaster event)
- **RCW 35.33.081** (allows emergency expenditures by city or town for disaster event, requires one vote more than the majority of the legislative body) see also 35.34.140 for cities with fiscal biennial budgets, 35A.33.080 for code cities, and 35A.34.140 for code cities adopting fiscal biennial budgets
- **RCW 36.40.180** (allows emergency expenditures by county but requires unanimous vote of commissioners present)

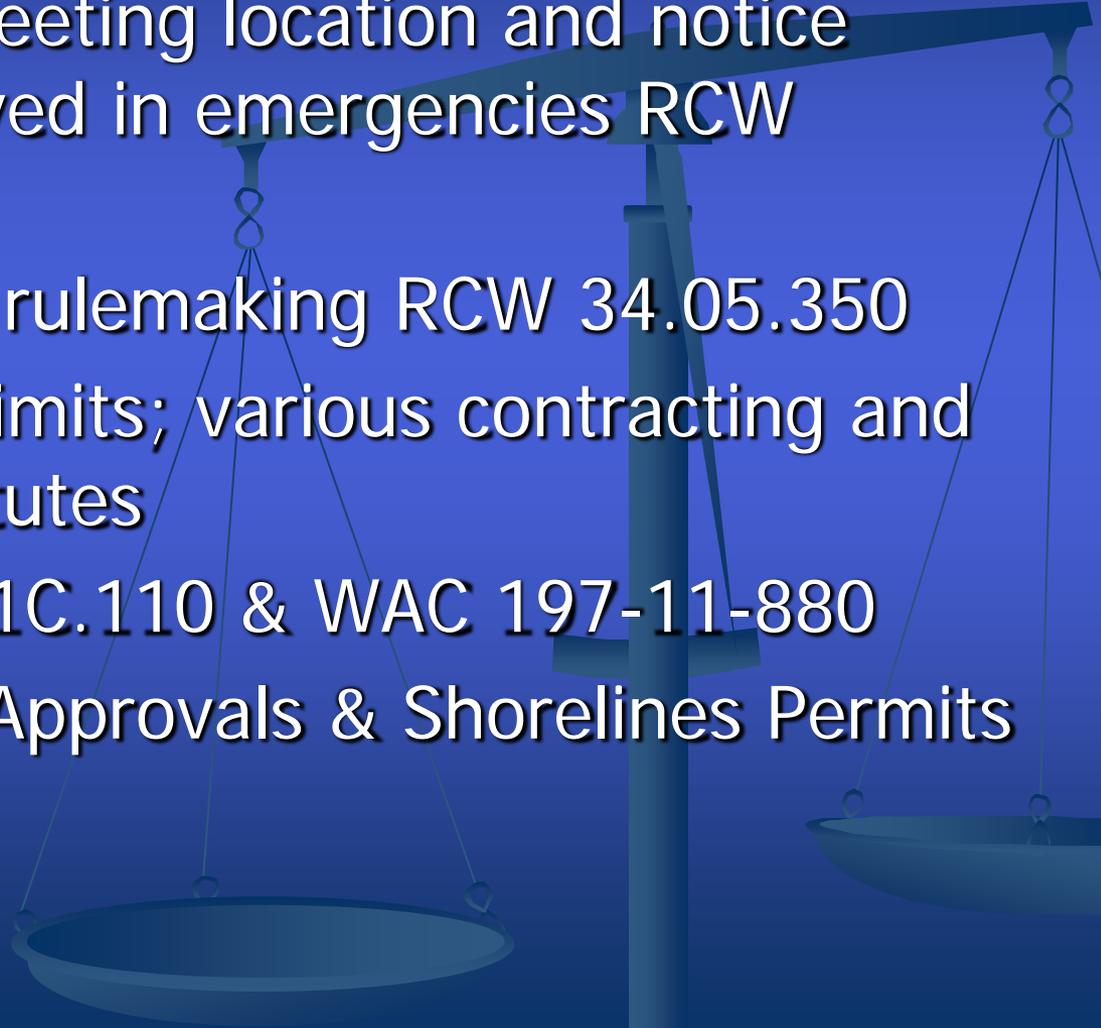
Waiver of Licensing Laws and Liability Protection for Emergency Personnel

During an emergency, any requirement for a license to practice any profession or occupation is waived for any authorized emergency worker
RCW 38.52.180(6)

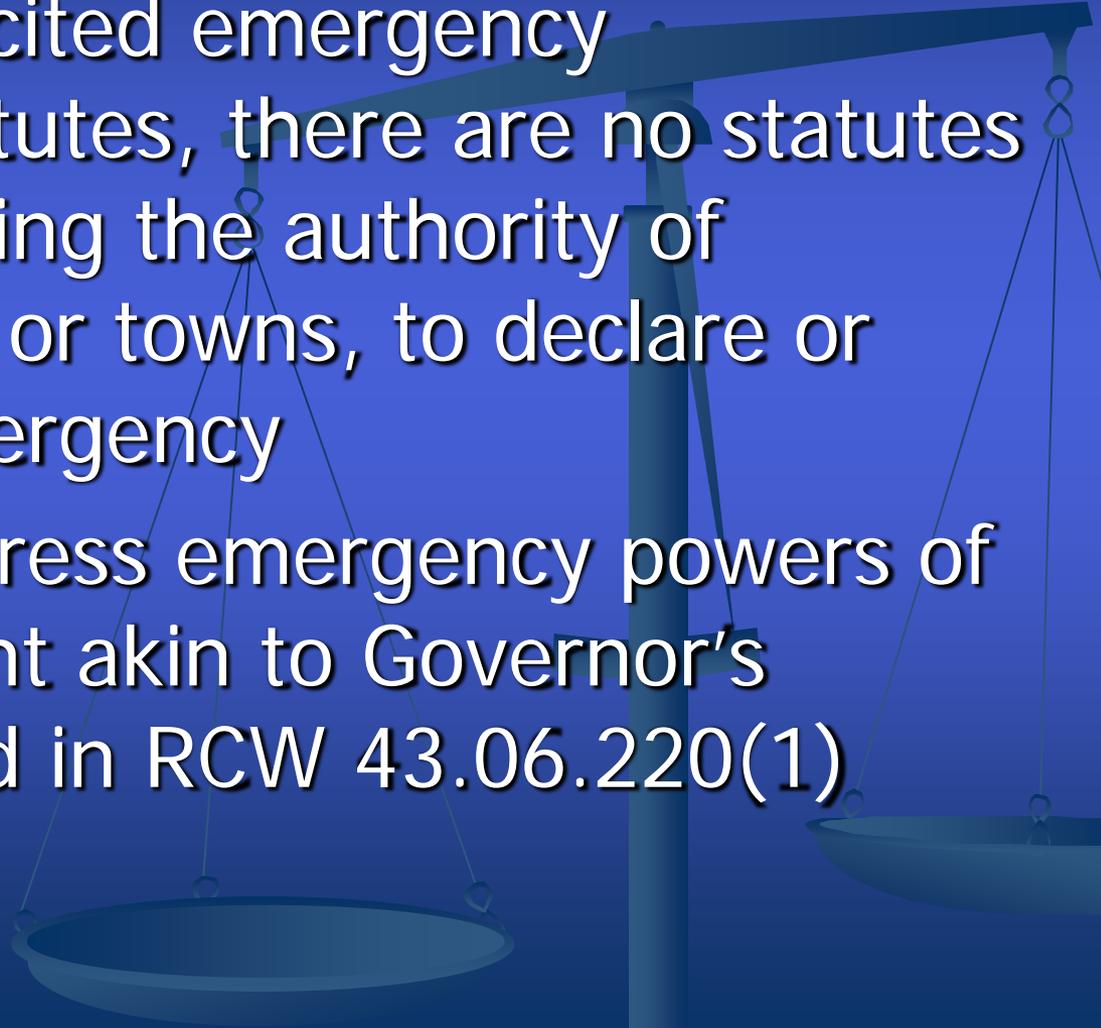
- The State indemnifies emergency workers
 - Emergency volunteers and entities directing their efforts, incl. the State, are immune
- RCW 38.52.180(2) & (3)



Some Other Statutory Exemptions

- OPMA – certain meeting location and notice requirements waived in emergencies RCW 42.30.070 & .080
 - APA – emergency rulemaking RCW 34.05.350
 - Budget and debt limits; various contracting and public bidding statutes
 - SEPA – RCW 43.21C.110 & WAC 197-11-880
 - Hydraulic Project Approvals & Shorelines Permits
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What is Missing?

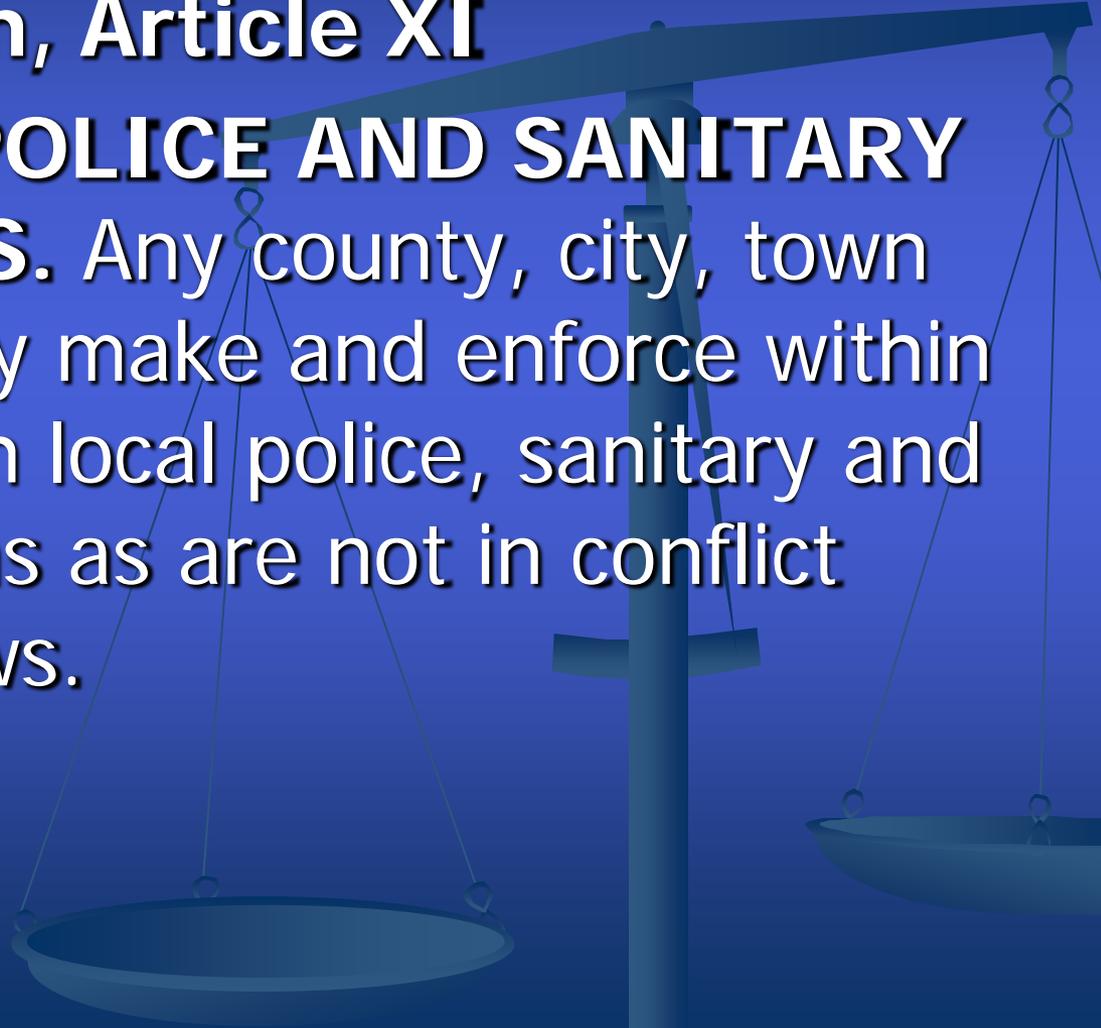


- Other than the cited emergency expenditure statutes, there are no statutes directly addressing the authority of counties, cities, or towns, to declare or proclaim an emergency
- No statutes address emergency powers of local government akin to Governor's authorities listed in RCW 43.06.220(1)

Source of Local Authority – Police Power

WA Constitution, Article XI

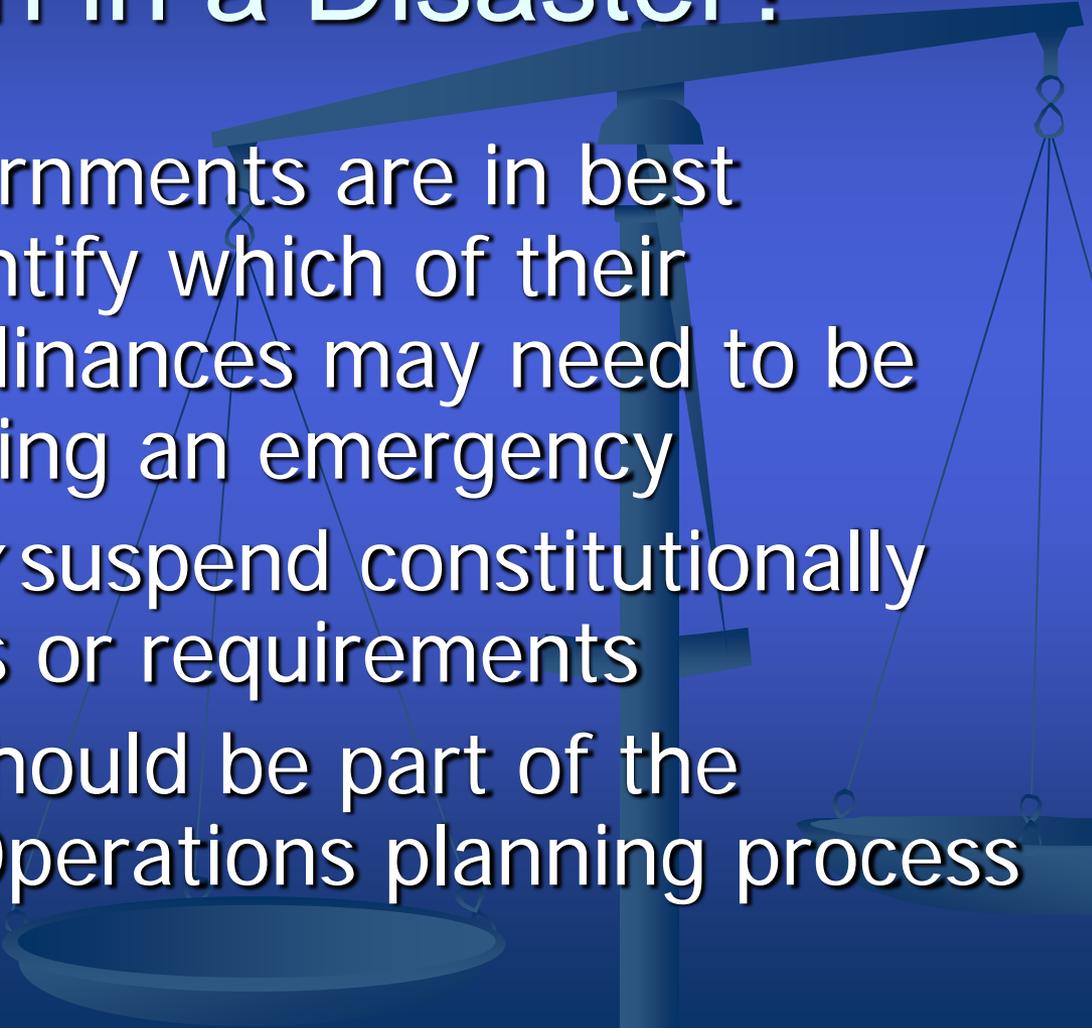
SECTION 11 POLICE AND SANITARY REGULATIONS. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.



Should Laws be Suspended During the Emergency?

- Some laws provide for the automatic grant of a permit or rate-change if no action is taken within a prescribed time period
- The Public Disclosure Act requires a five day response letter to public records requests
- Should permitting requirements remain in place when responding to an emergency, e.g. preparing an evacuation staging area?

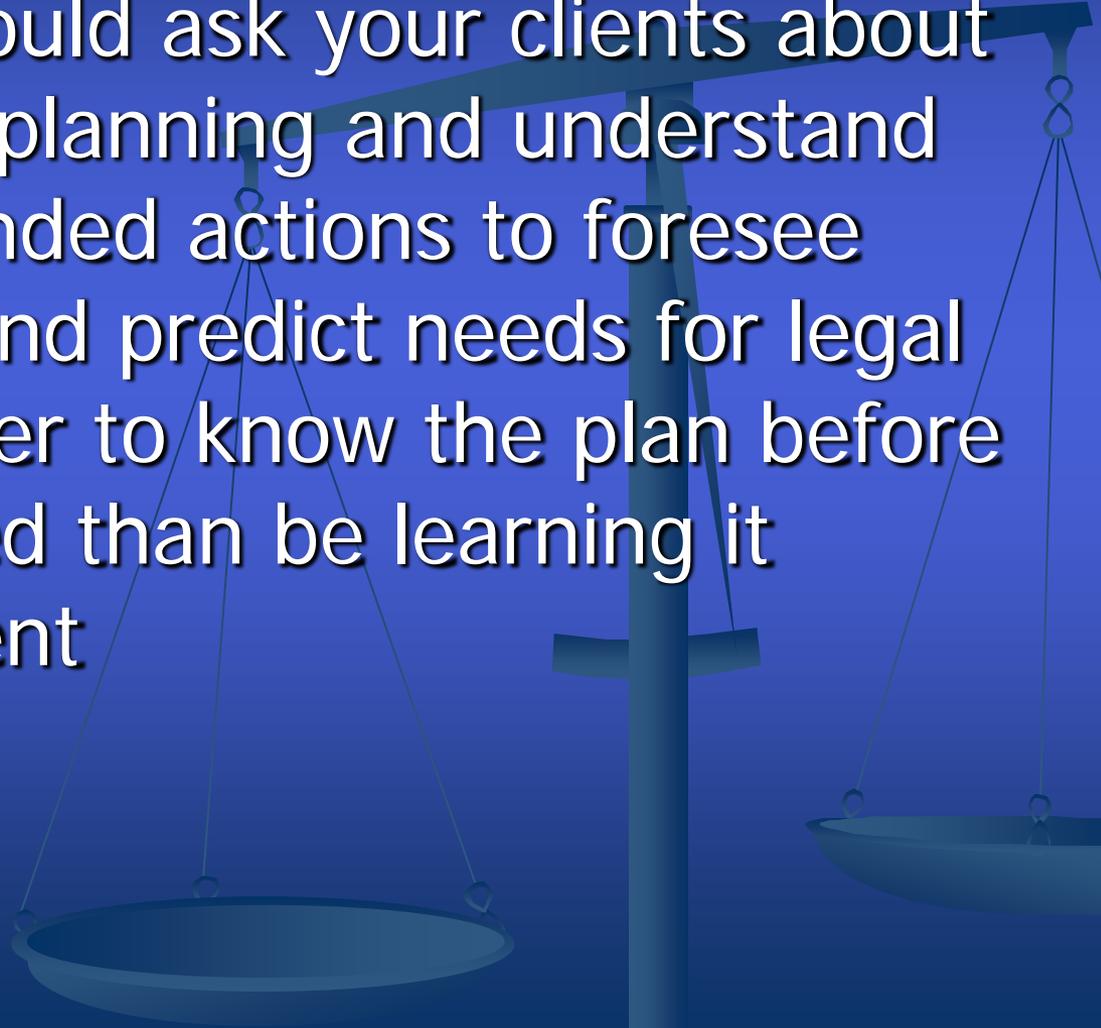
Can Laws Impede Government Function in a Disaster?



- Agencies/Governments are in best position to identify which of their laws/codes/ordinances may need to be suspended during an emergency
- Cannot *usually* suspend constitutionally mandated laws or requirements
- This analysis should be part of the Continuity of Operations planning process

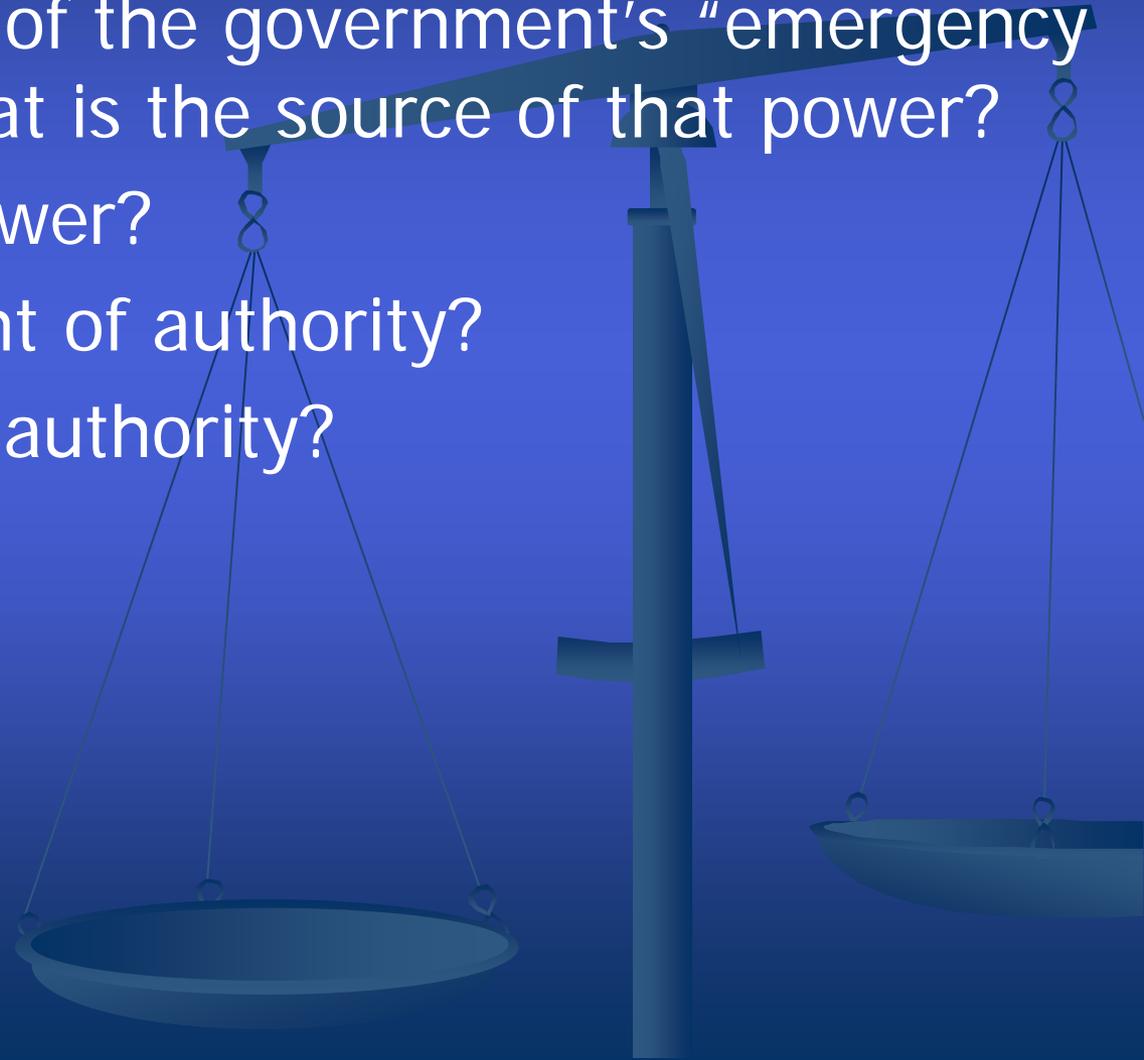
A Suggestion

Public lawyers should ask your clients about their continuity planning and understand the client's intended actions to foresee potential risks and predict needs for legal assistance. Better to know the plan before it is implemented than be learning it during an incident



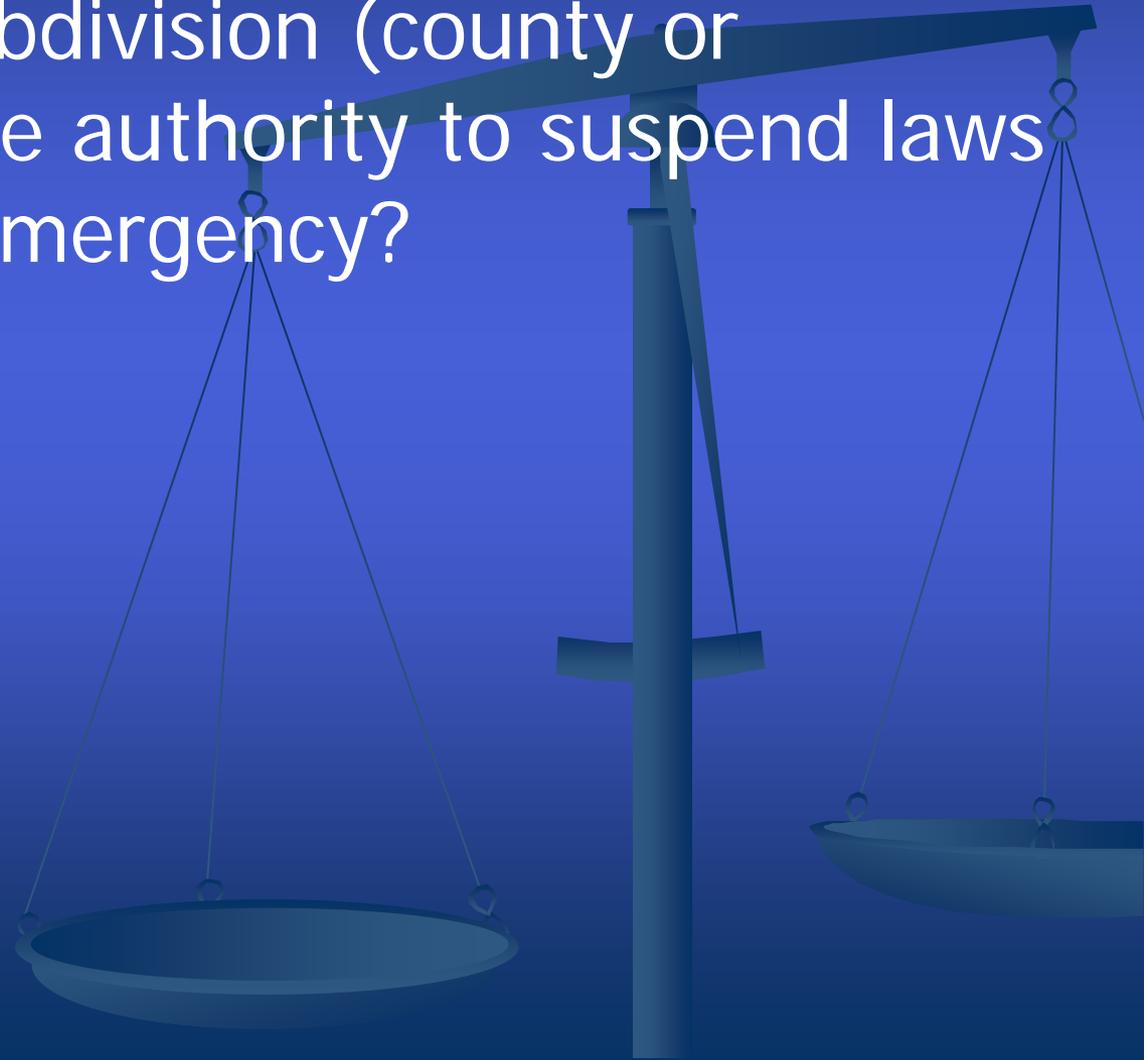
Questions to think about:

- What is the scope of the government's "emergency authority" and what is the source of that power?
- Inherent police power?
- Constitutional grant of authority?
- Statutory grant of authority?



Suspension of Laws by Locals?

- Does a political subdivision (county or city/town) have the authority to suspend laws in the face of an emergency?
- Local laws?
- State laws?

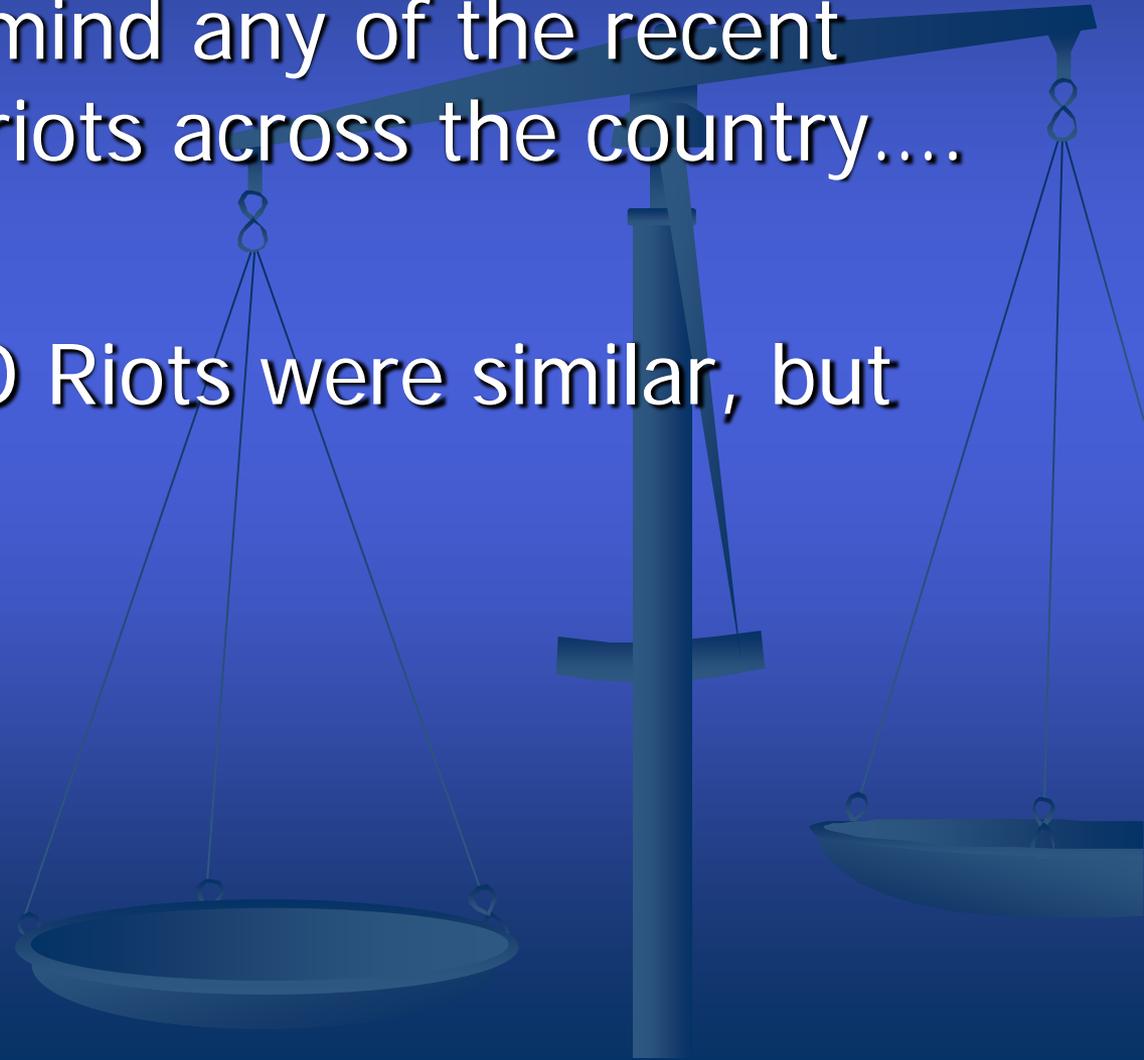


Turning to case law



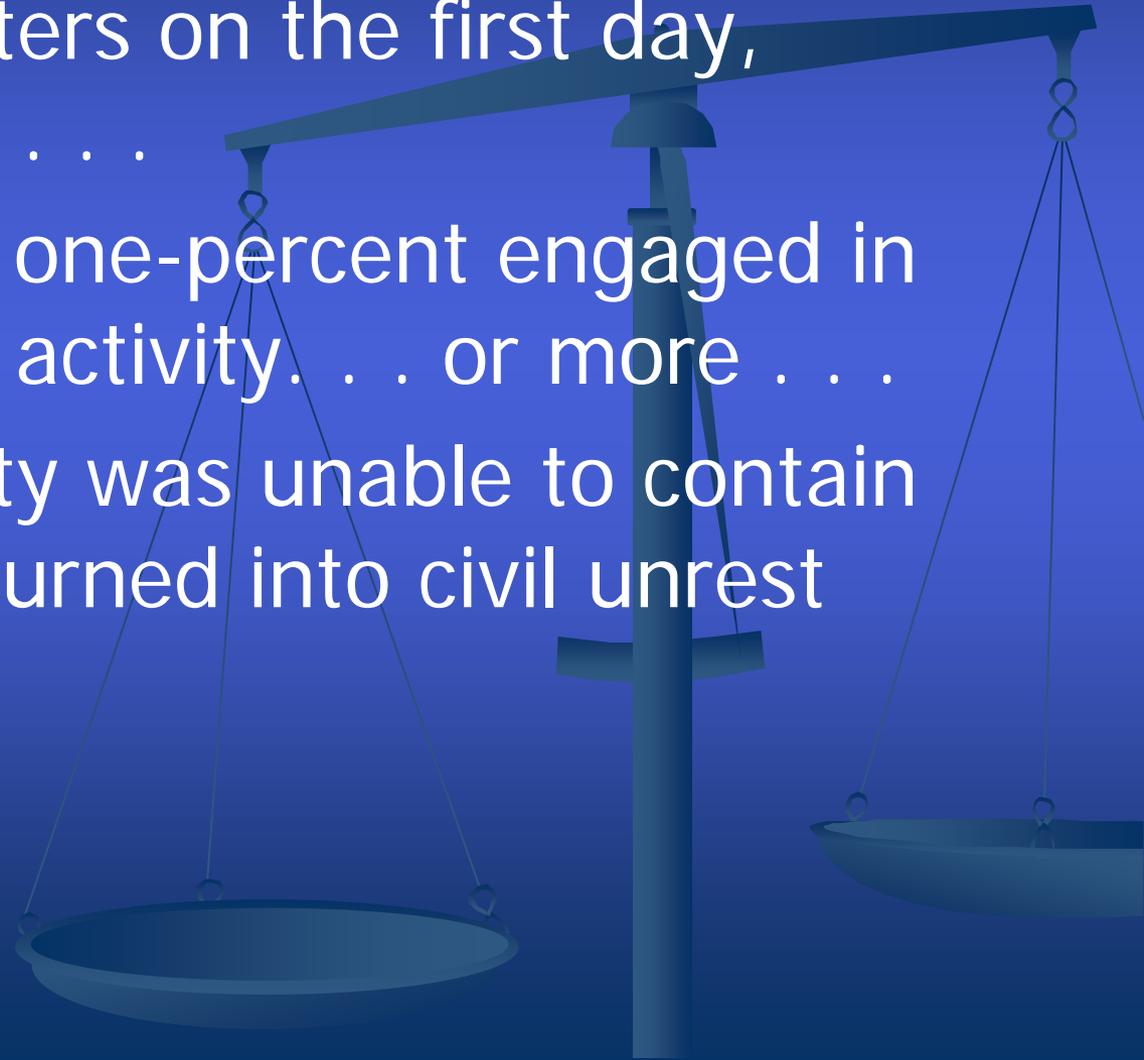
- Picture in your mind any of the recent news media of riots across the country....

1999 Seattle WTO Riots were similar, but larger.



1999 Seattle WTO Riots

- 40,000+ protesters on the first day, mostly peaceful . . .
- and maybe just one-percent engaged in serious criminal activity. . . or more . . .
- but civil authority was unable to contain the situation – turned into civil unrest



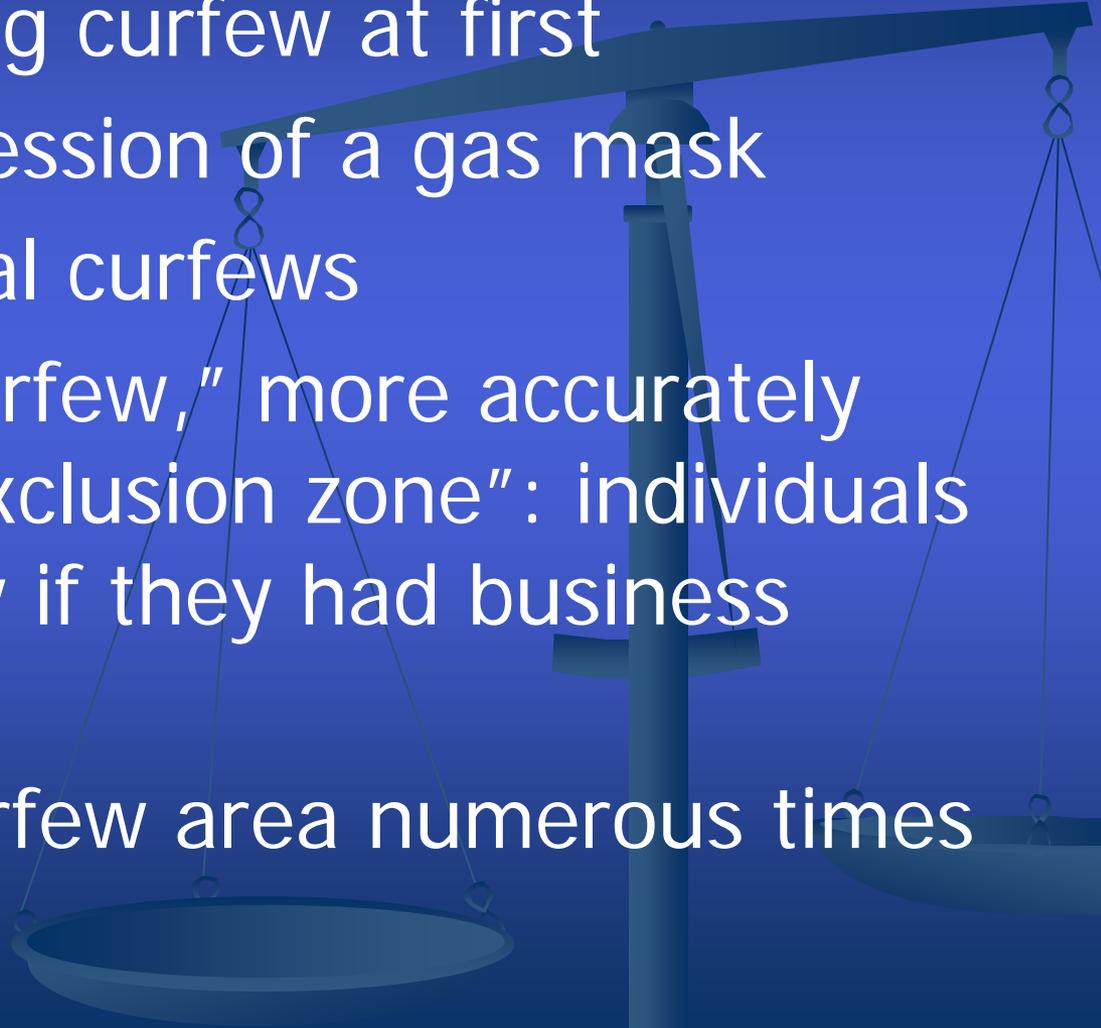
Emergency Orders

According to WTO Commission study:

- Governor issued State level Emergency Proclamation November 30th at 3:00pm
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- City Mayor signed declaration of emergency near the same time
- Mayor then issued numerous proclamations over the next 72 hours

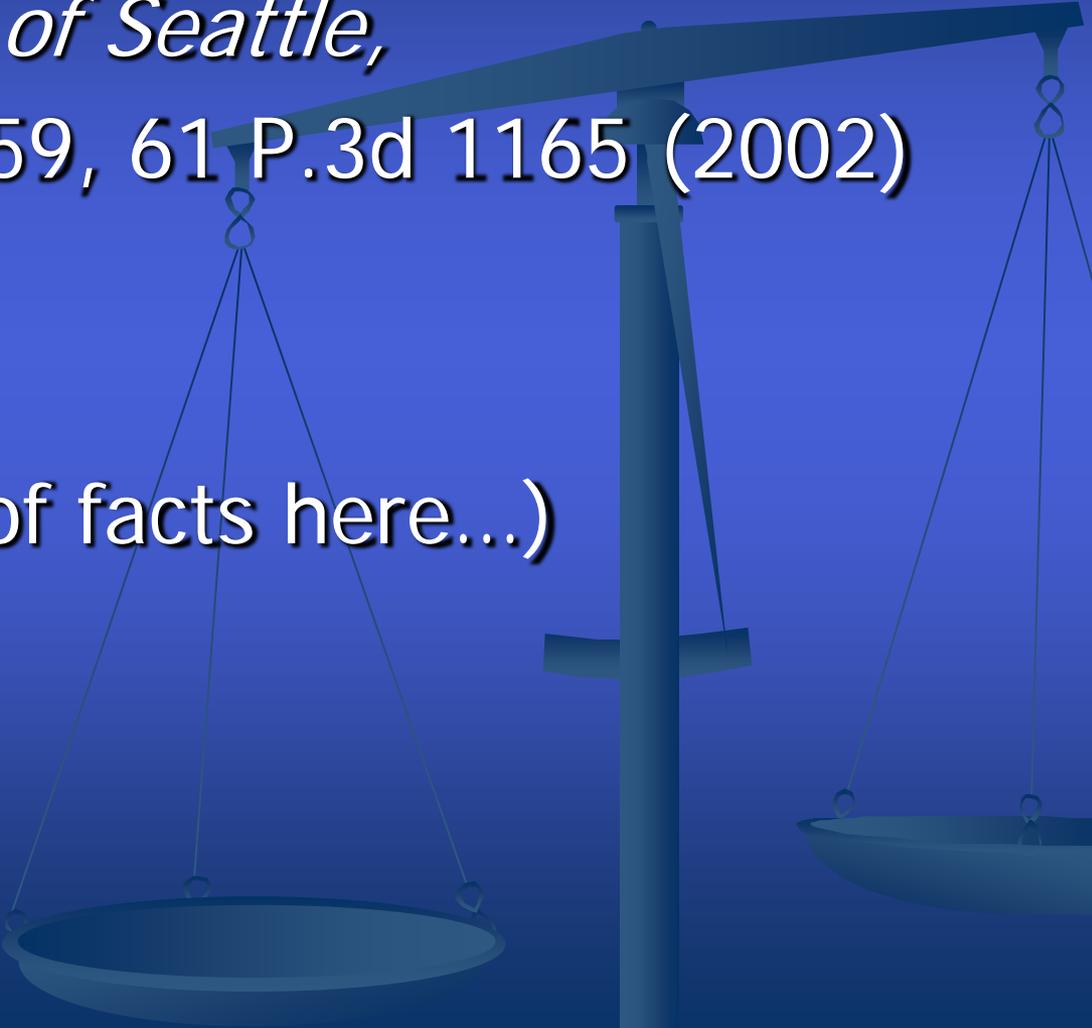


Proclamations



- Imposed evening curfew at first
- Prohibited possession of a gas mask
- Issued additional curfews
- Then issued “curfew,” more accurately described as “exclusion zone”: individuals could enter only if they had business within the zone
- Modified the curfew area numerous times

Published Cases



John Citoli v. City of Seattle,

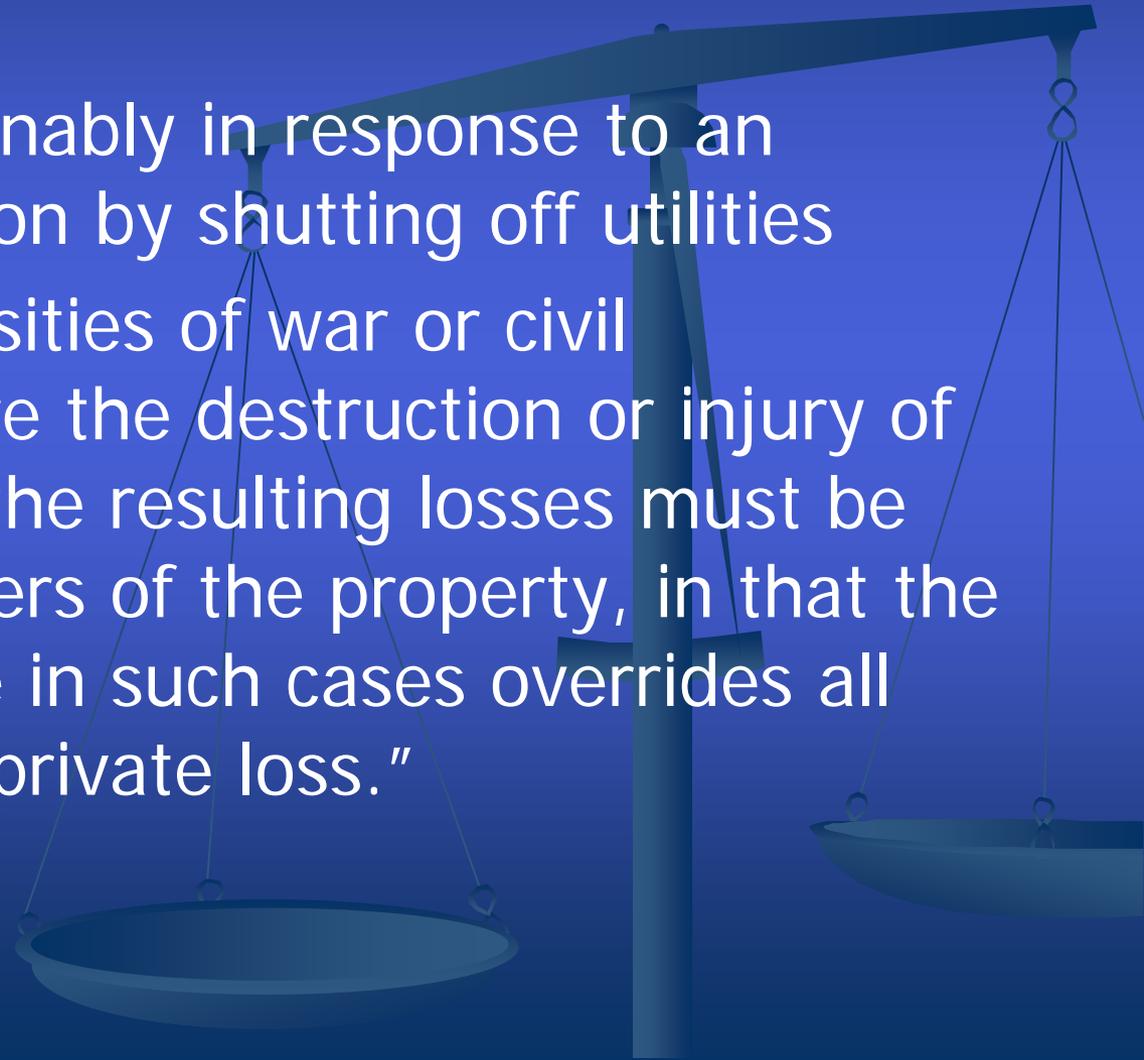
115 Wn. App. 459, 61 P.3d 1165 (2002)

(brief explication of facts here...)

WTO Cases

Citoli Holdings:

- Police acted reasonably in response to an emergency situation by shutting off utilities
- “Where the necessities of war or civil disturbance require the destruction or injury of private property, the resulting losses must be borne by the owners of the property, in that the safety of the state in such cases overrides all considerations of private loss.”



WTO Cases

Citoli discussion:

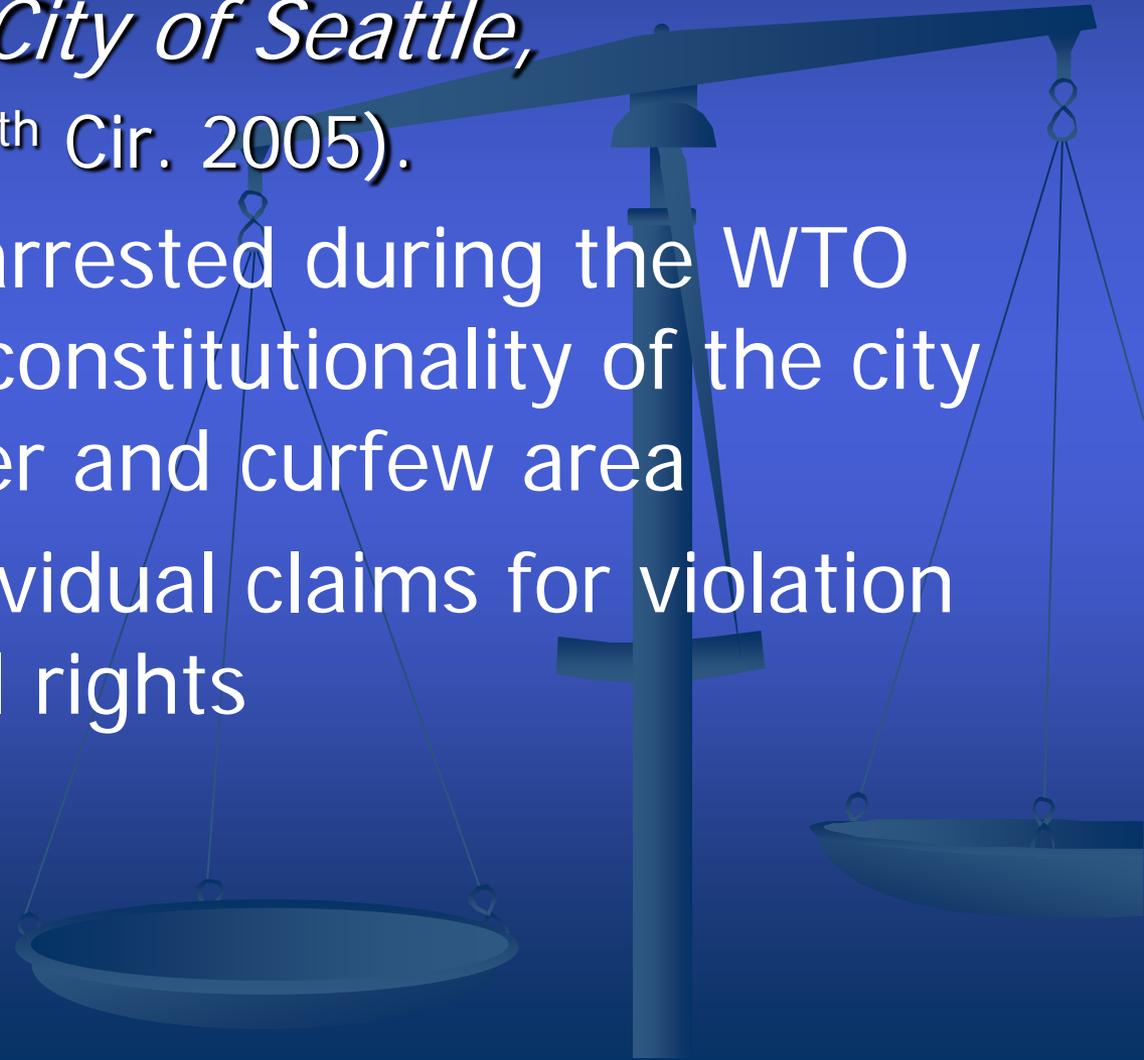
- No discussion of the origin or the source of the city police power to take all necessary actions to protect the public
- Note that the police actions here commenced before any official emergency proclamation had been issued
- Relies on case involving Governor's emergency authority: *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982)

WTO Cases

Victor Menotti v. City of Seattle,
409 F.3d 1113 (9th Cir. 2005).

Group of people arrested during the WTO riots challenge constitutionality of the city emergency order and curfew area

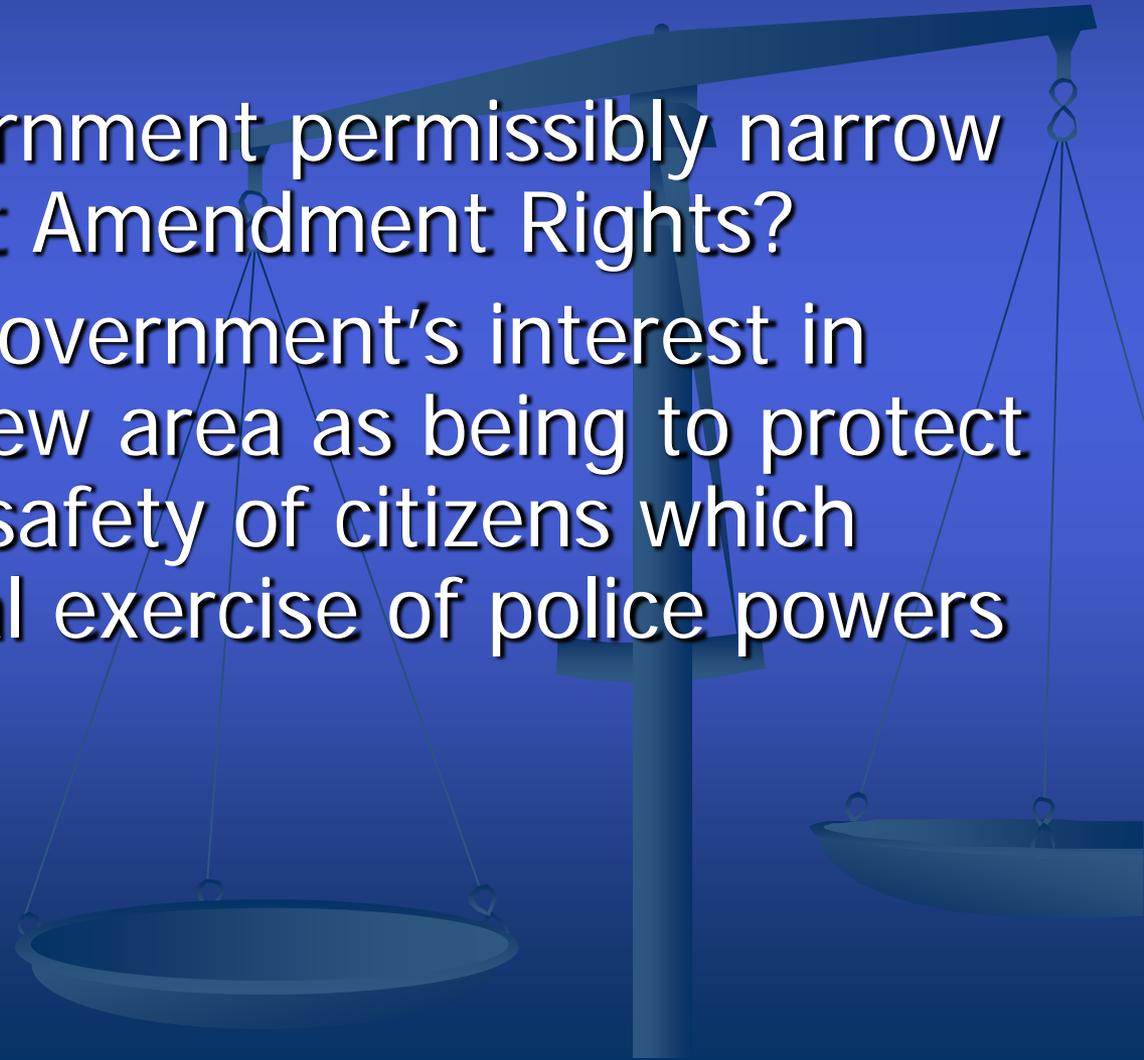
Some bring individual claims for violation of constitutional rights



WTO Cases

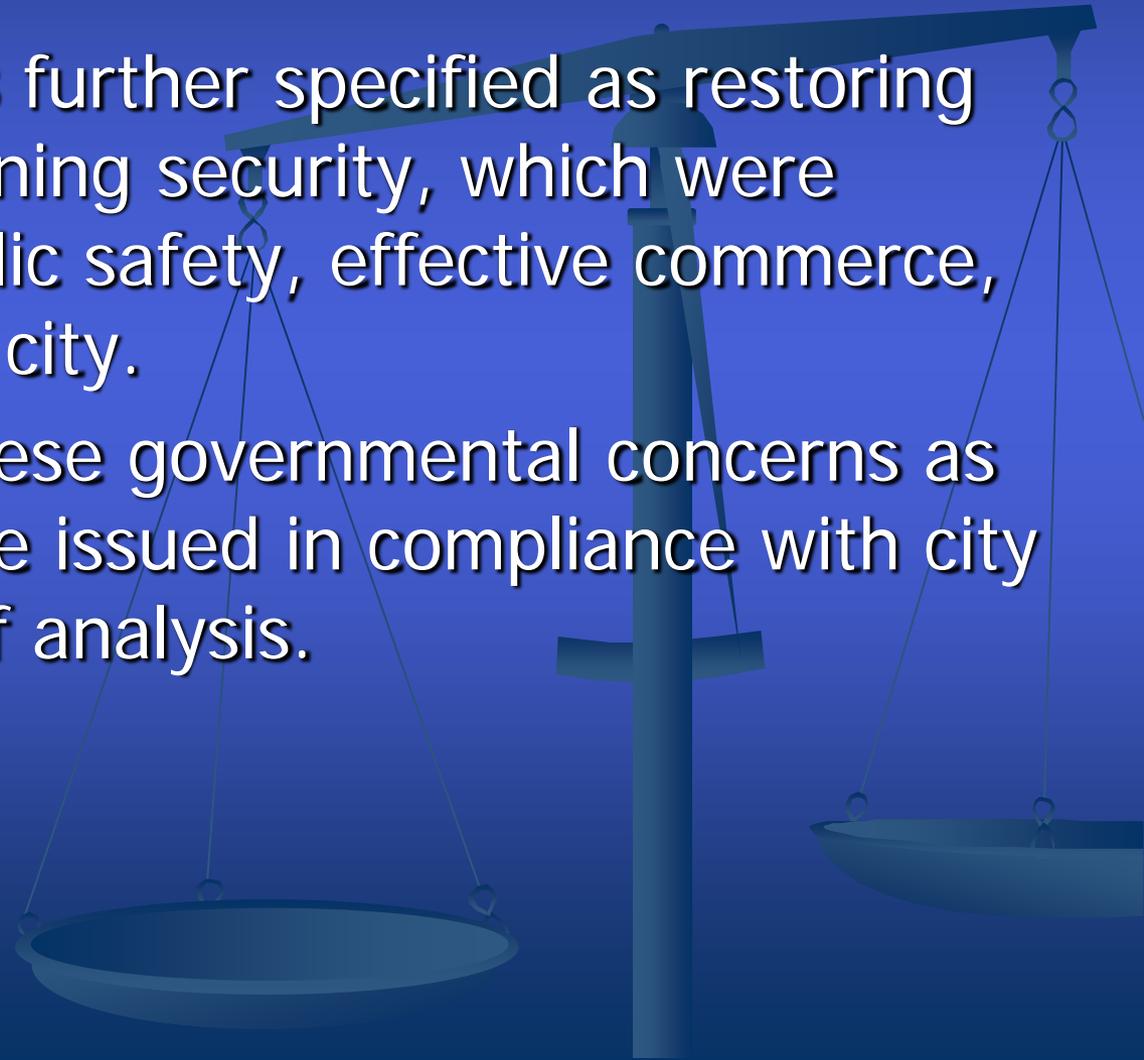
Menotti:

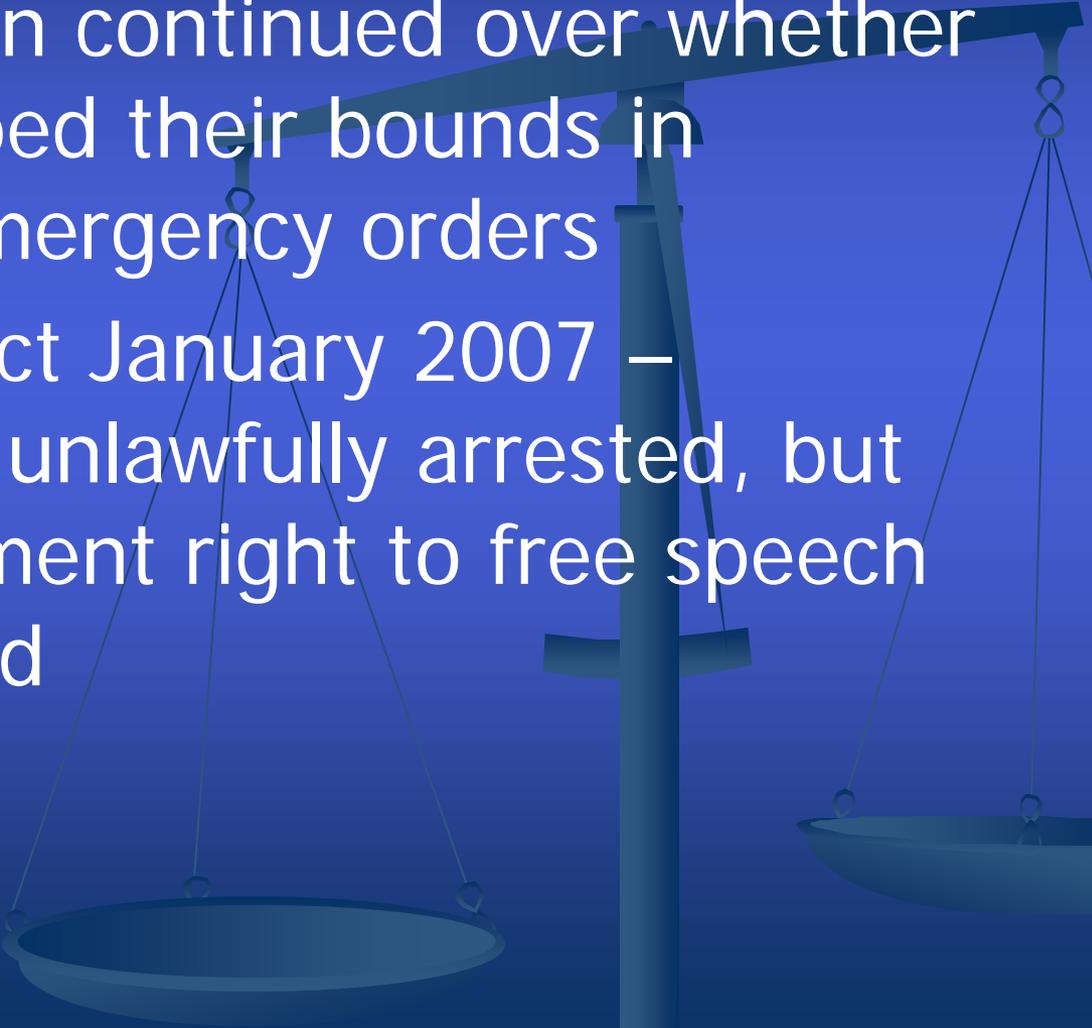
- When can government permissibly narrow individuals' First Amendment Rights?
- Described the government's interest in issuing the curfew area as being to protect the health and safety of citizens which was a traditional exercise of police powers



Menotti:

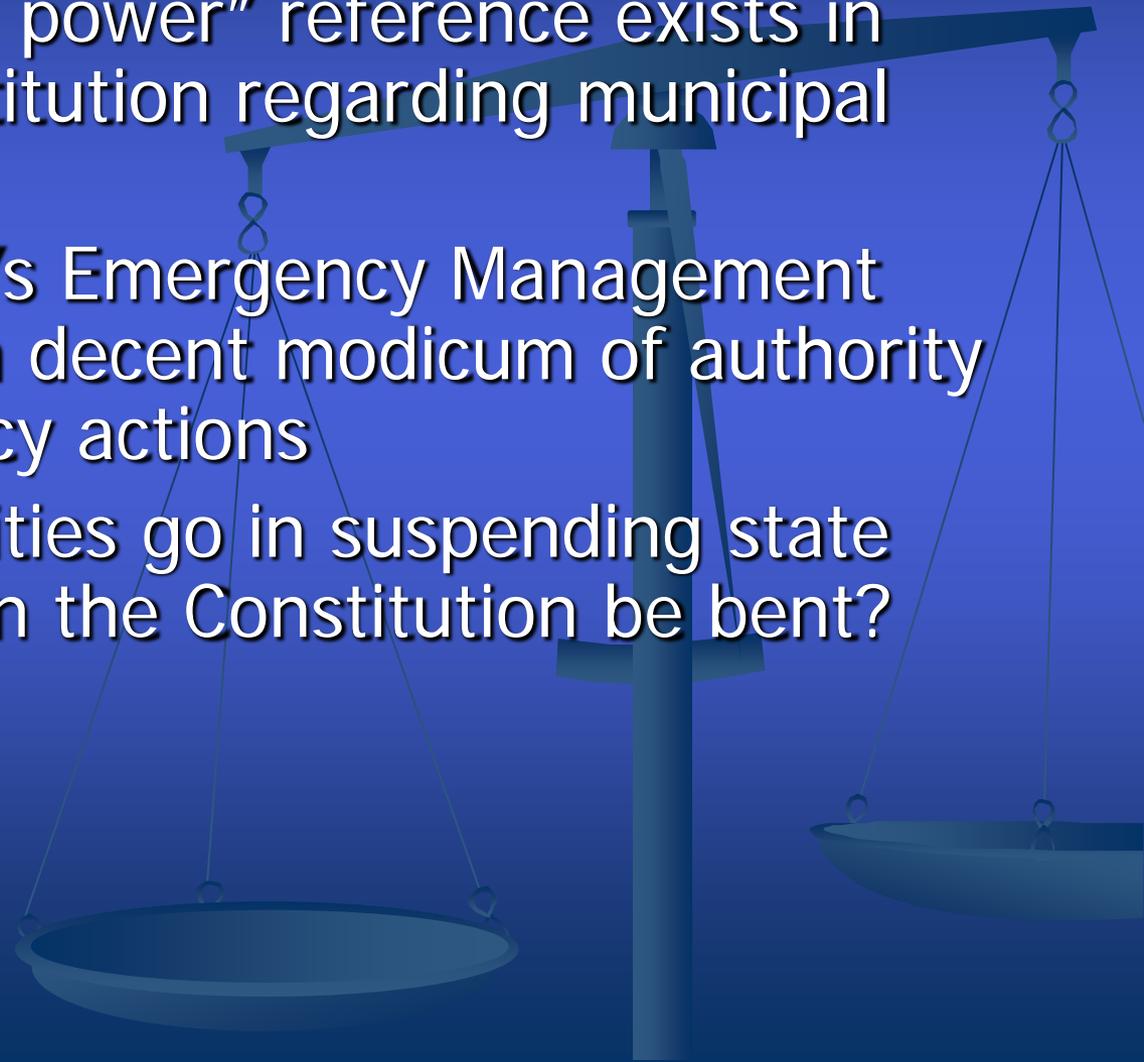
- City's interest was further specified as restoring order and maintaining security, which were necessary for public safety, effective commerce, and vitality of the city.
- Court accepted these governmental concerns as valid. Orders were issued in compliance with city ordinance. End of analysis.



- 
- *Menotti* litigation continued over whether police overstepped their bounds in enforcing the emergency orders
 - Mixed jury verdict January 2007 – protesters were unlawfully arrested, but their 1st amendment right to free speech was not infringed

Conclusion on local powers to suspend laws

- Traditional "police power" reference exists in Washington Constitution regarding municipal authority
- Washington State's Emergency Management Statutes provide a decent modicum of authority for local emergency actions
- But how far can cities go in suspending state laws? How far can the Constitution be bent?



Shifting focus to a state-level
event and response:



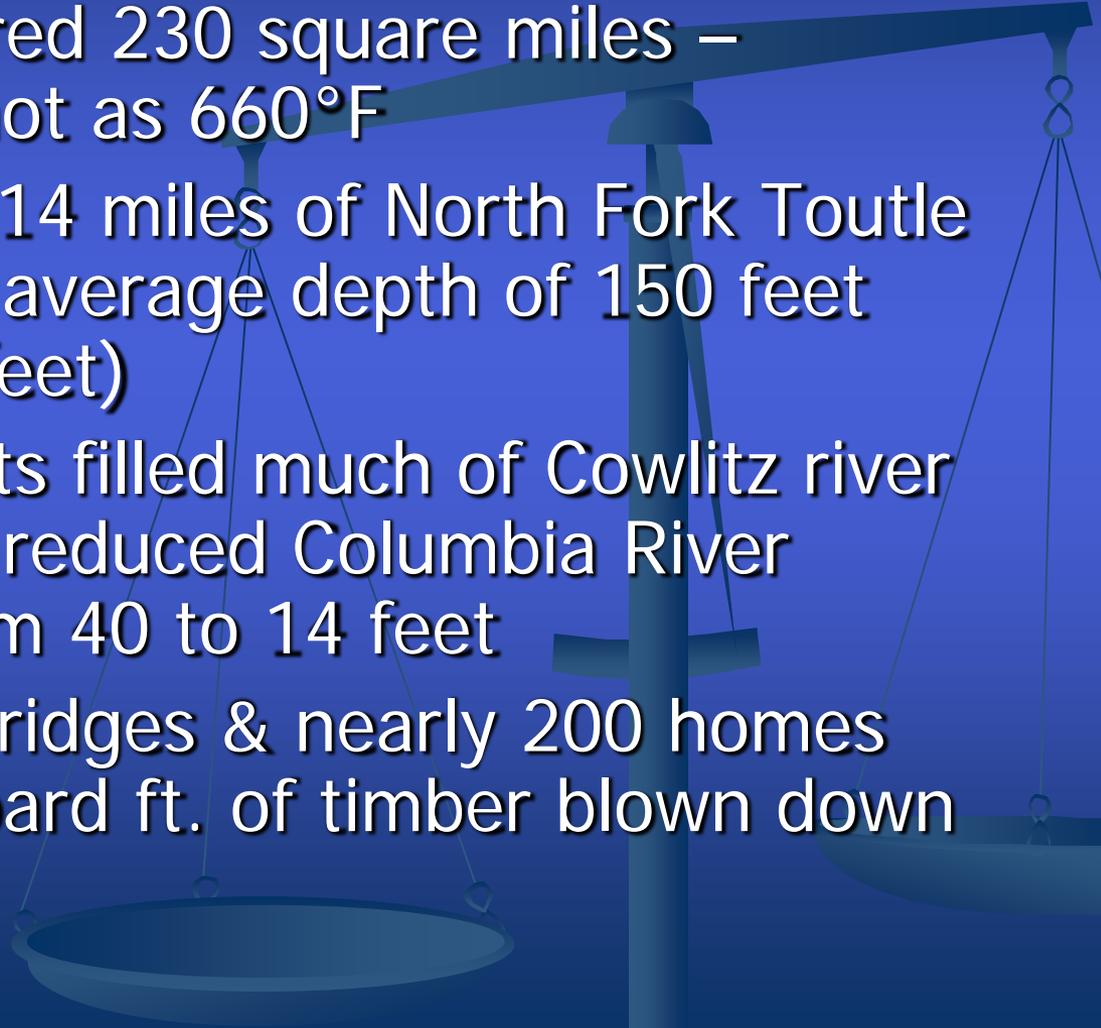
Mount Saint Helens

- March 16, 1980 – Earthquakes begin
- March 27 – Crater dome breaks through ice cap with steam eruptions
 - Counties incur high costs in keeping sightseers away from the mountain & they request State assistance
 - April 3 -- Governor issues emergency proclamation. State Patrol & National Guard assist with road blocks
 - April 25 – Forest Service implements “Red Zone” & “Blue Zone” around the mountain
 - April 30 – Governor issues order mirroring Forest Service zones
- By May 17 –bulge in north flank has grown 450'

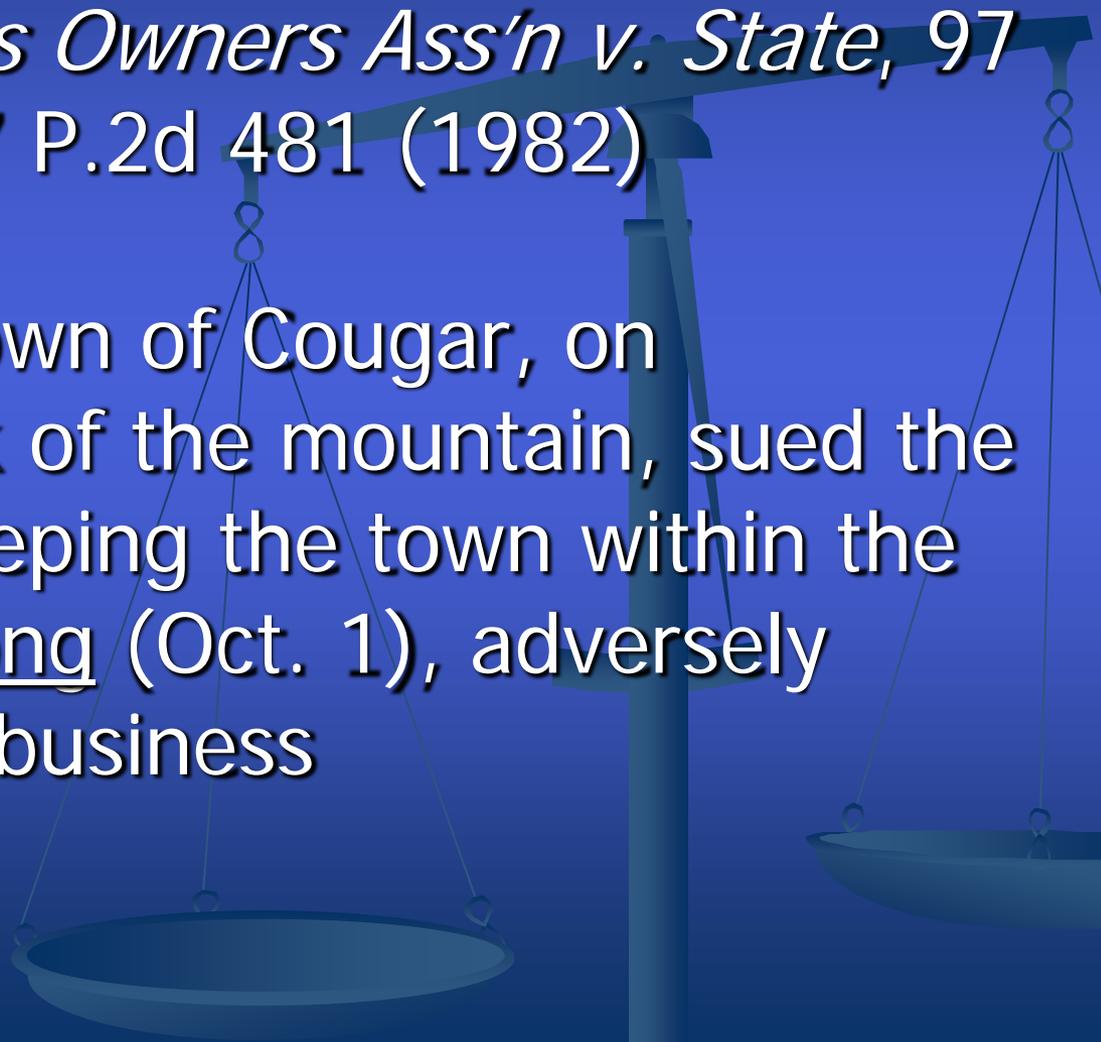
May 18, 1980



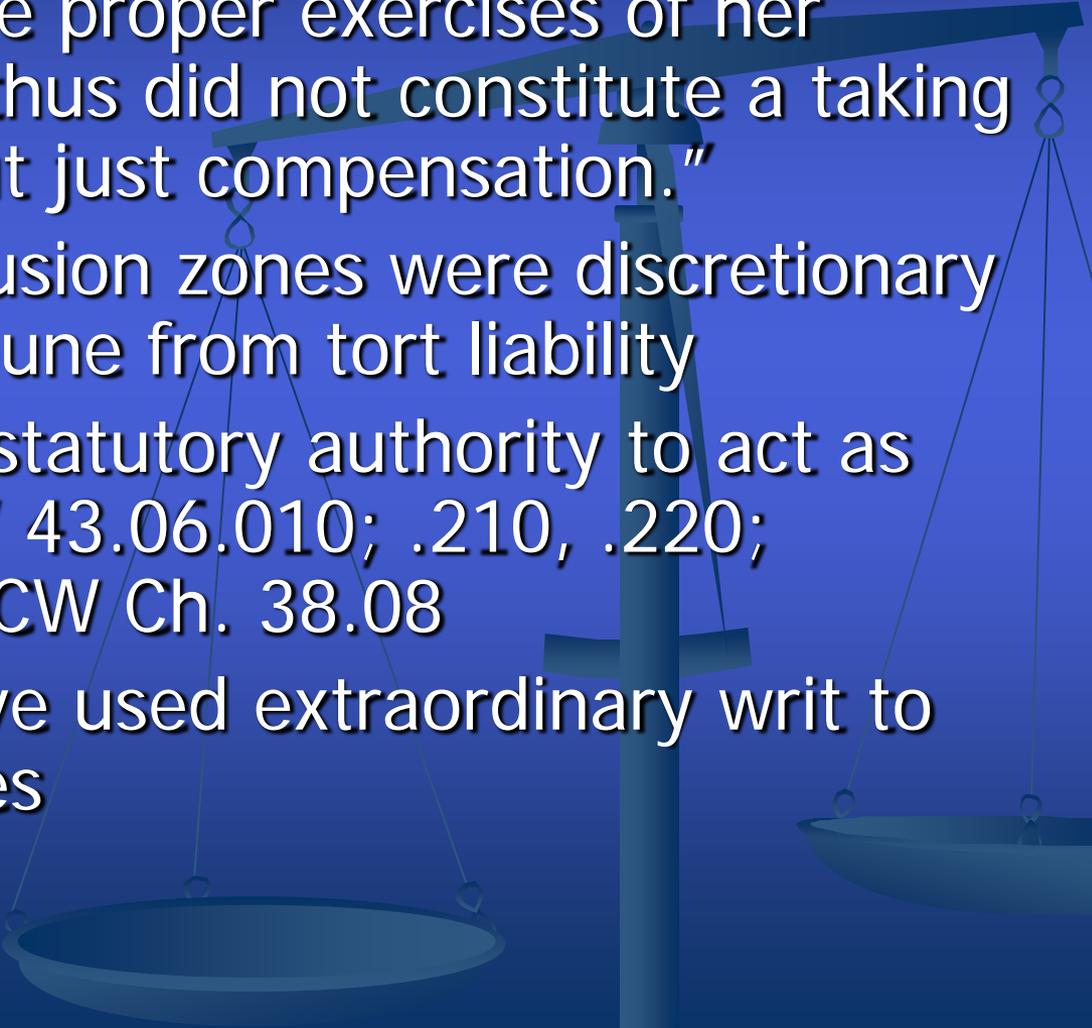
Photo by Robert Krimmel, USGS

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- 1,314 feet blown off the top
 - Pyroclastic flows covered 6 square miles – temperatures as hot as 1300°F
 - Lateral blast covered 230 square miles – temperatures as hot as 660°F
 - Landslides buried 14 miles of North Fork Toutle River Valley to an average depth of 150 feet (max. depth 600 feet)
 - Lahars & sediments filled much of Cowlitz river carrying capacity, reduced Columbia River channel depth from 40 to 14 feet
 - 60 fatalities. 27 bridges & nearly 200 homes destroyed. 4m board ft. of timber blown down

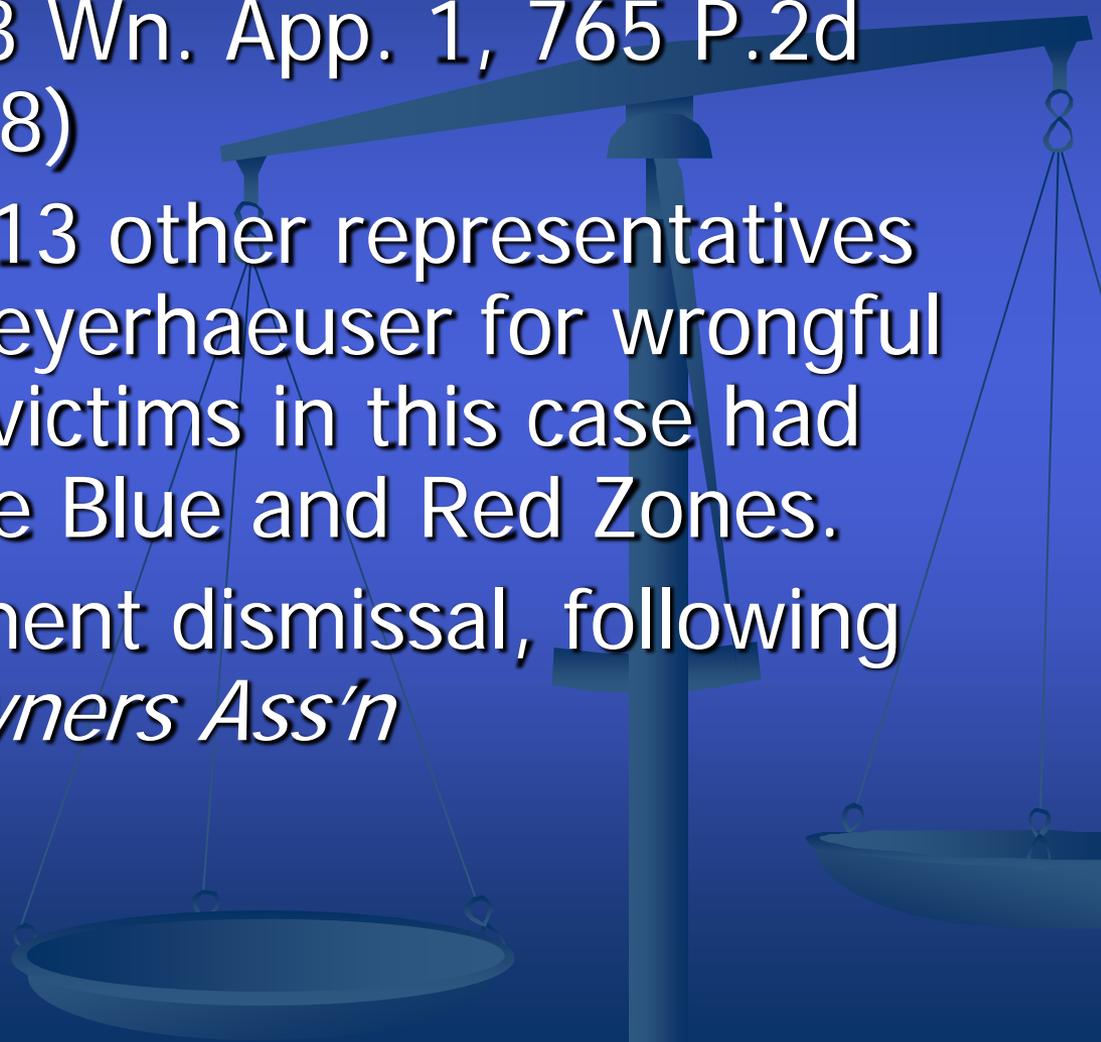
Litigation



- *Cougar Business Owners Ass'n v. State*, 97 Wn.2d 466, 647 P.2d 481 (1982)
- Stores in the Town of Cougar, on Southwest flank of the mountain, sued the governor for keeping the town within the Red Zone too long (Oct. 1), adversely impacting their business

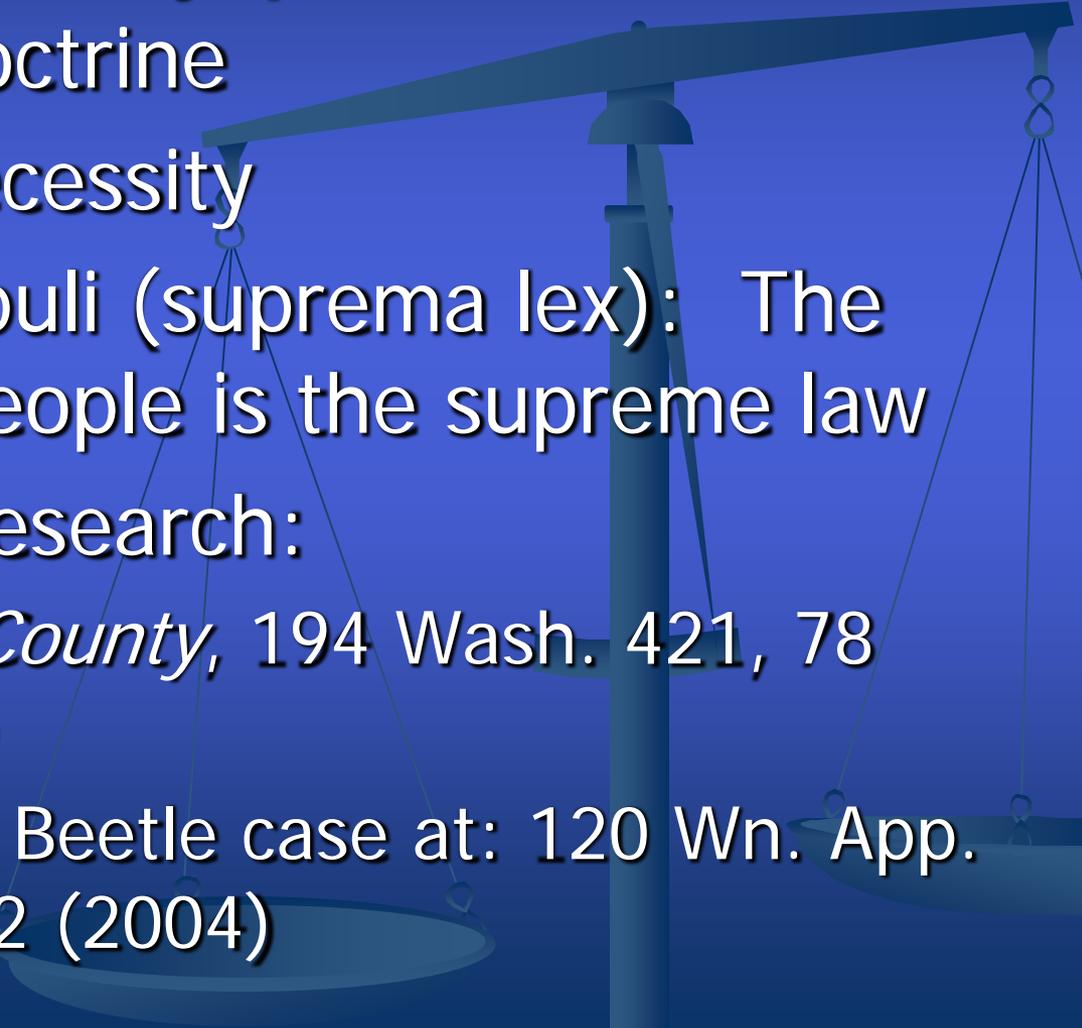
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- “[H]er actions were proper exercises of her police power and thus did not constitute a taking of property without just compensation.”
 - Imposition of exclusion zones were discretionary acts and thus immune from tort liability
 - Governor had full statutory authority to act as she did. See RCW 43.06.010; .210, .220; RCW Ch. 38.52; RCW Ch. 38.08
 - Plaintiffs could have used extraordinary writ to challenge the zones

Litigation



- *Karr v. State*, 53 Wn. App. 1, 765 P.2d 316 (Div. I, 1988)
- Barbara Karr & 13 other representatives sued State & Weyerhaeuser for wrongful death. The 14 victims in this case had been outside the Blue and Red Zones.
- Summary judgment dismissal, following *Cougar Bus. Owners Ass'n*

Common law concept of emergency powers:

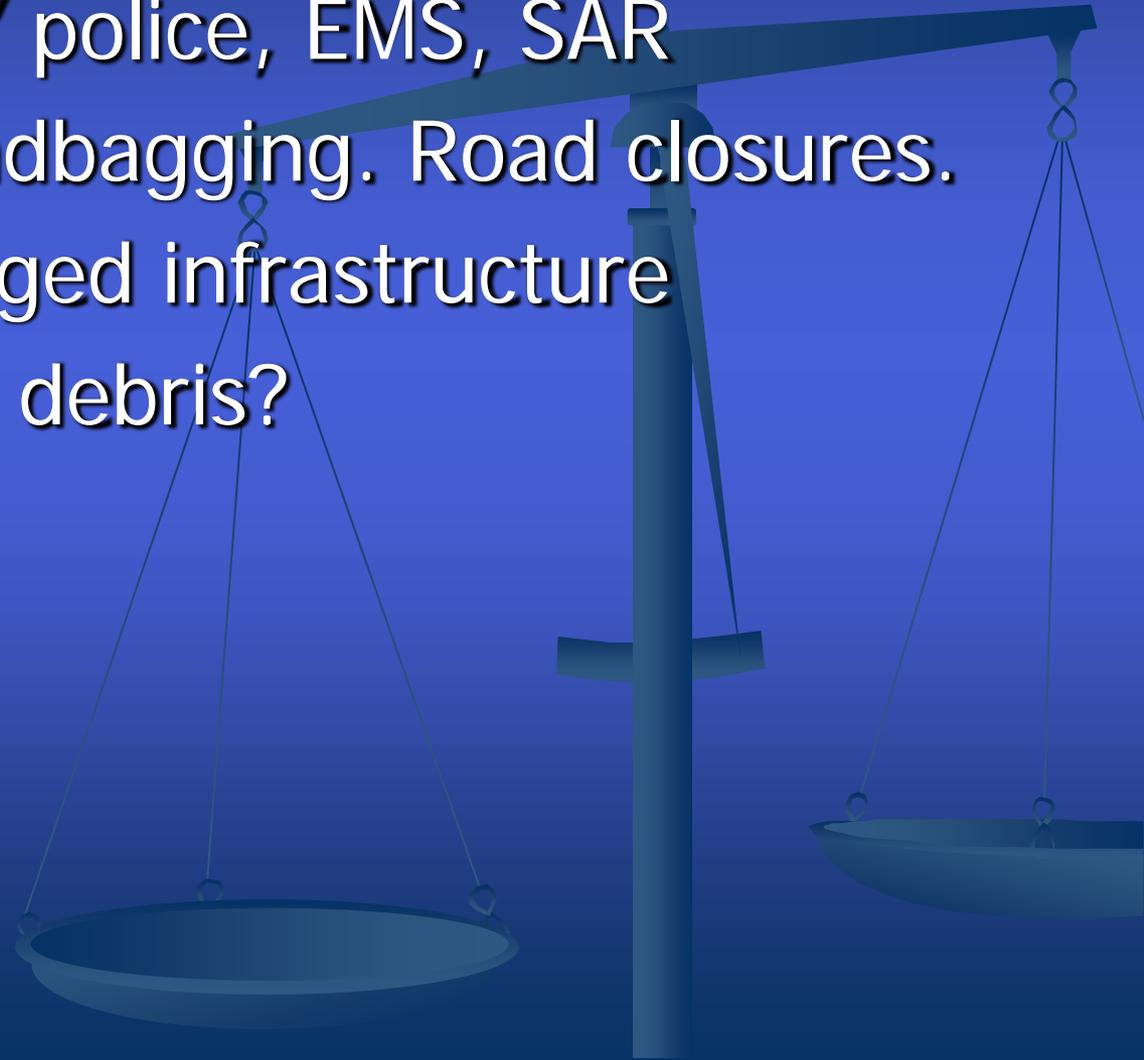
- Conflagration Doctrine
 - a.k.a.: Law of Necessity
 - a.k.a.: Salus Populi (suprema lex): The welfare of the people is the supreme law
 - Other cases to research:
 - *Short v. Pierce County*, 194 Wash. 421, 78 P.2d 610 (1938)
 - Citrus Longhorn Beetle case at: 120 Wn. App. 737, 86 P.3d 222 (2004)
- 

2007 PNW Windstorm and Flood

- Shows an example of a state agency stepping outside of its normal legal role to provide disaster relief
- December 2007 – extensive flooding in Lewis and Thurston Counties
- Extensive wind damage in coastal counties

2007 Emergency Response

- "run of the mill" police, EMS, SAR
- Sheltering. Sandbagging. Road closures.
- Repairing damaged infrastructure
- What about the debris?



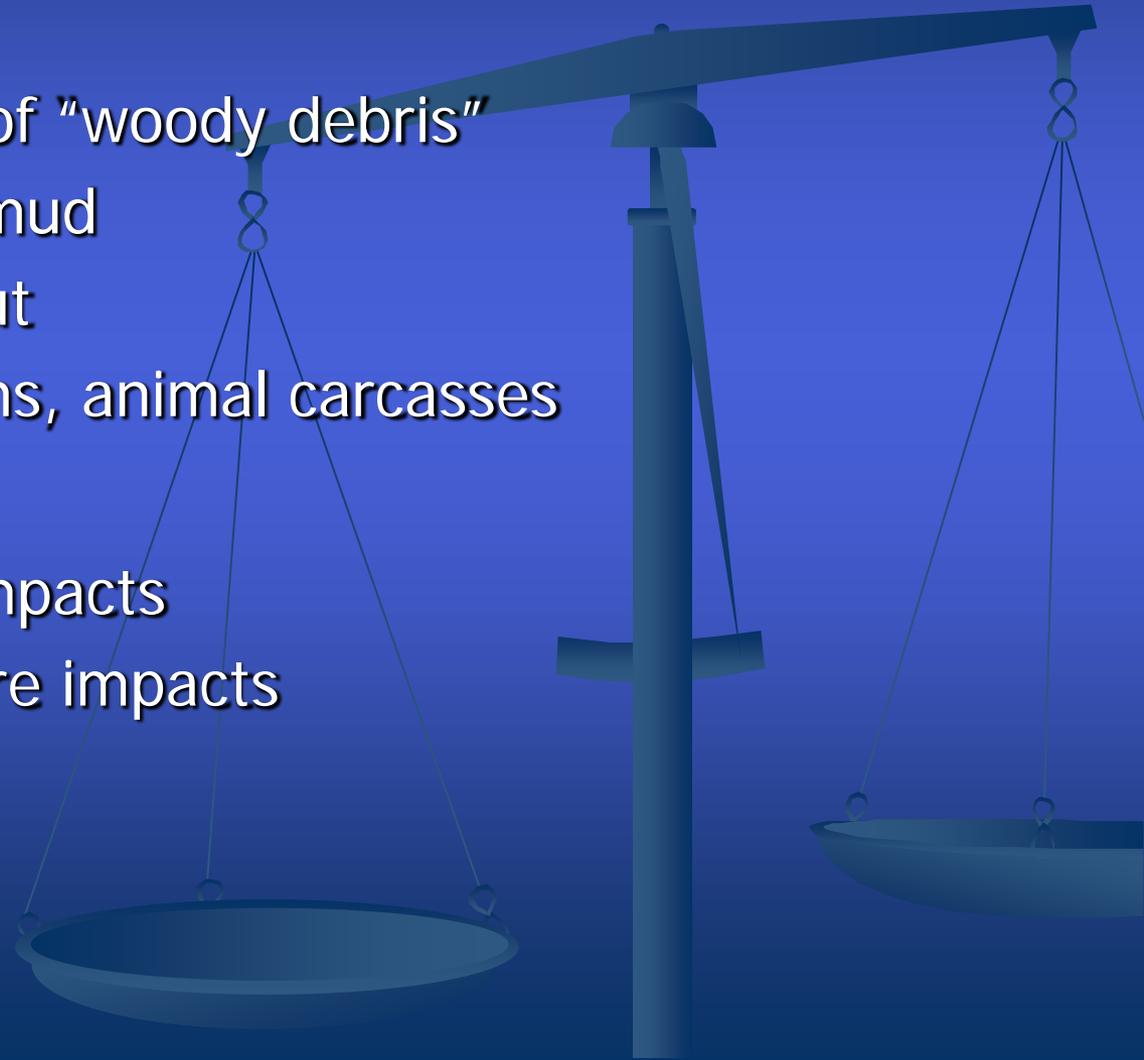
2007 Flood impacts

■ Flood debris

- Massive amounts of "woody debris"
- Huge volumes of mud
- Bridges washed out
- Homes, possessions, animal carcasses

■ Impacts

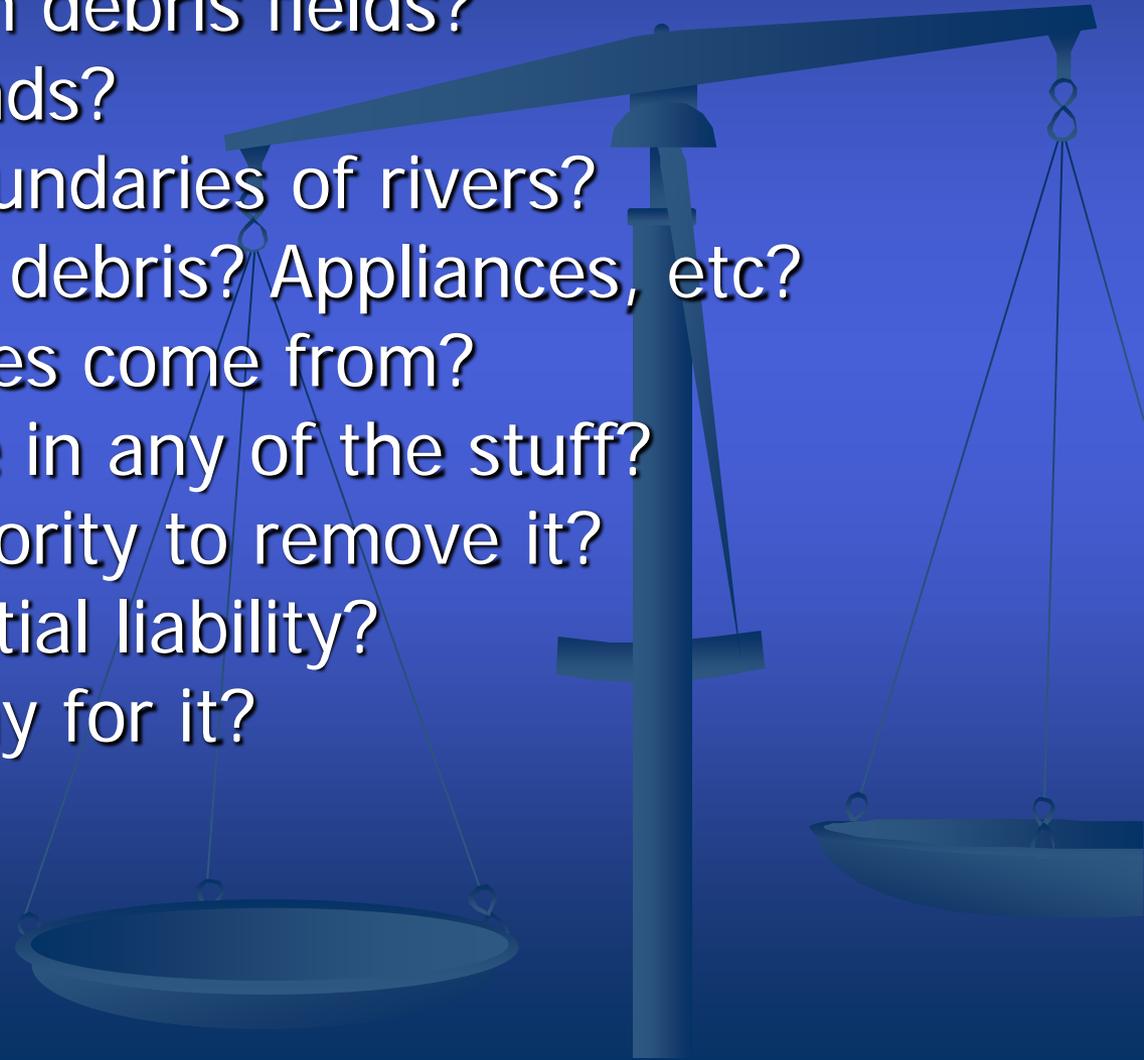
- Private property impacts
- Public infrastructure impacts
- Impacts on rivers



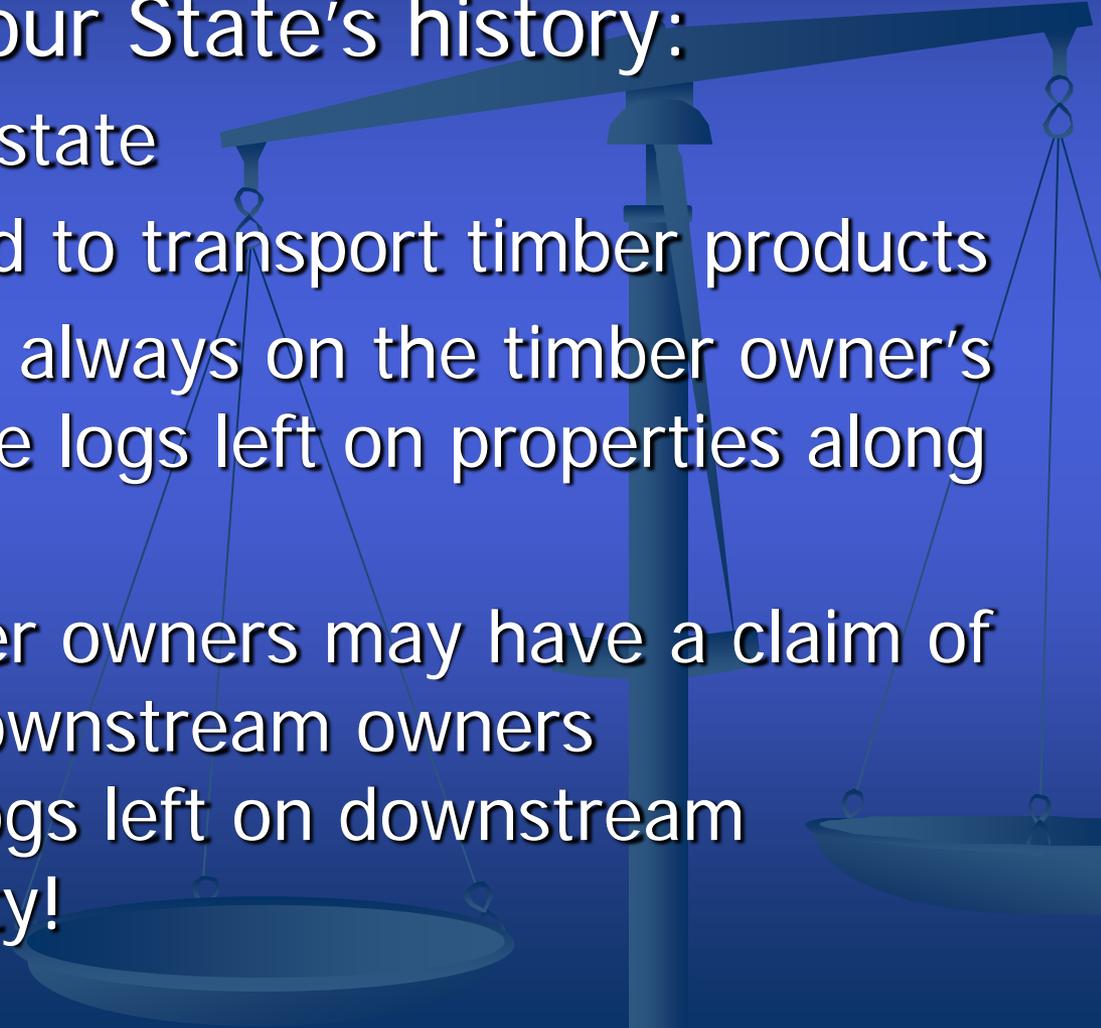


Debris Problems

- Who owns trees in debris fields?
- Left on private lands?
- Left within the boundaries of rivers?
- What about other debris? Appliances, etc?
- Where did the trees come from?
- Is there any value in any of the stuff?
- Who has the authority to remove it?
- What is the potential liability?
- Who's going to pay for it?

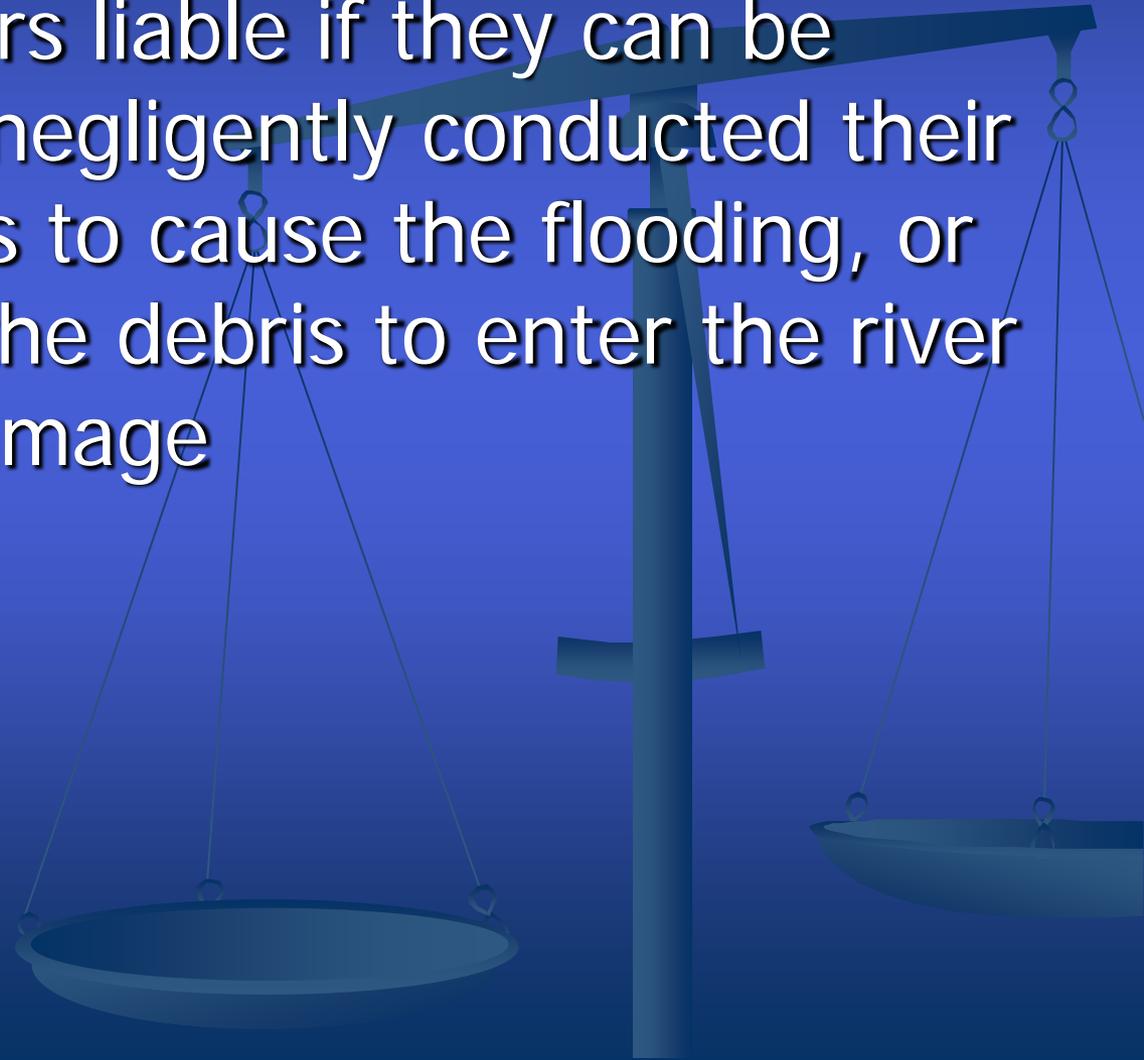


Ownership of Debris

- Understanding our State's history:
 - We're a timber state
 - Waterways used to transport timber products
 - Focal point was always on the timber owner's rights to retrieve logs left on properties along the river
 - Upstream timber owners may have a claim of conversion if downstream owners "appropriate" logs left on downstream owners' property!
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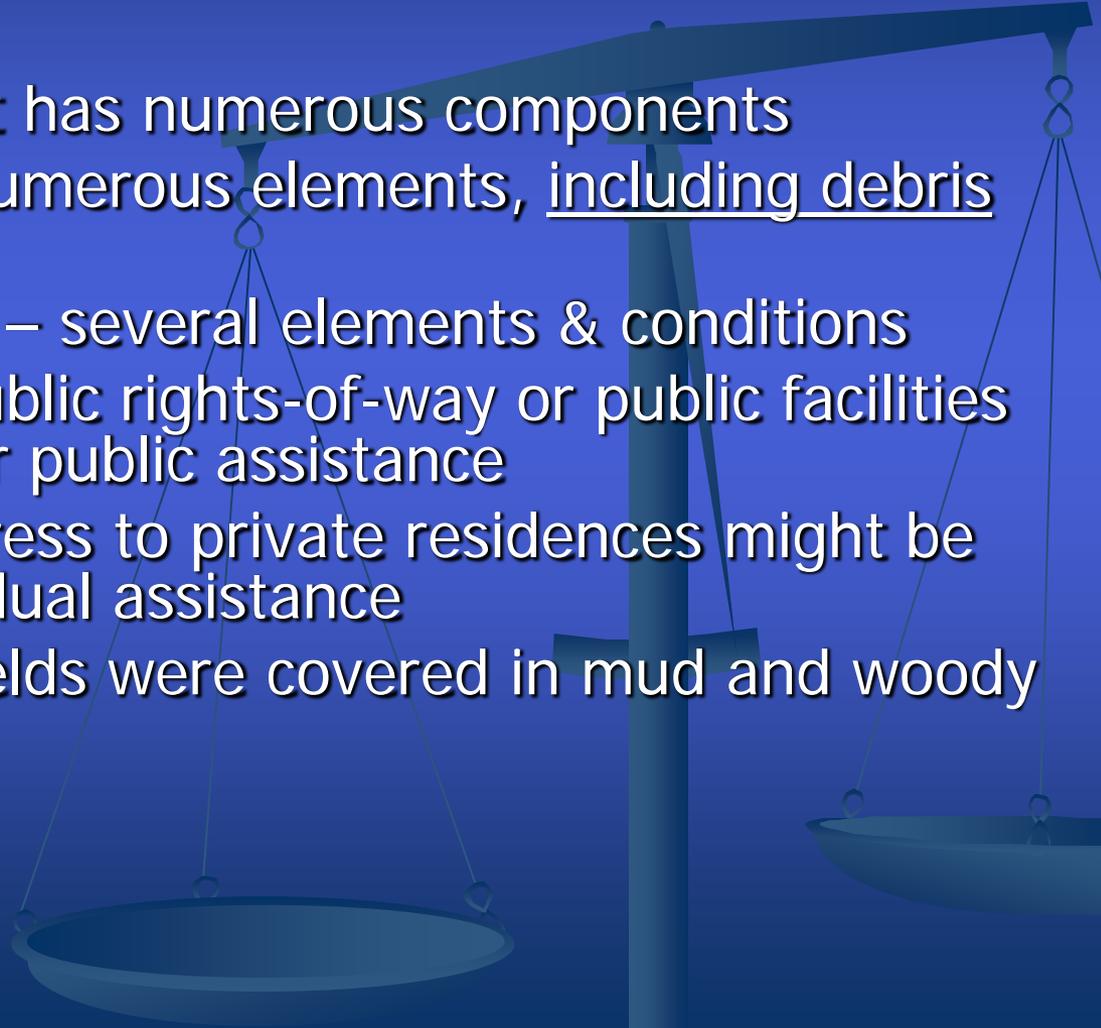
Liability

- Upstream owners liable if they can be shown to have negligently conducted their operations so as to cause the flooding, or so as to cause the debris to enter the river and increase damage

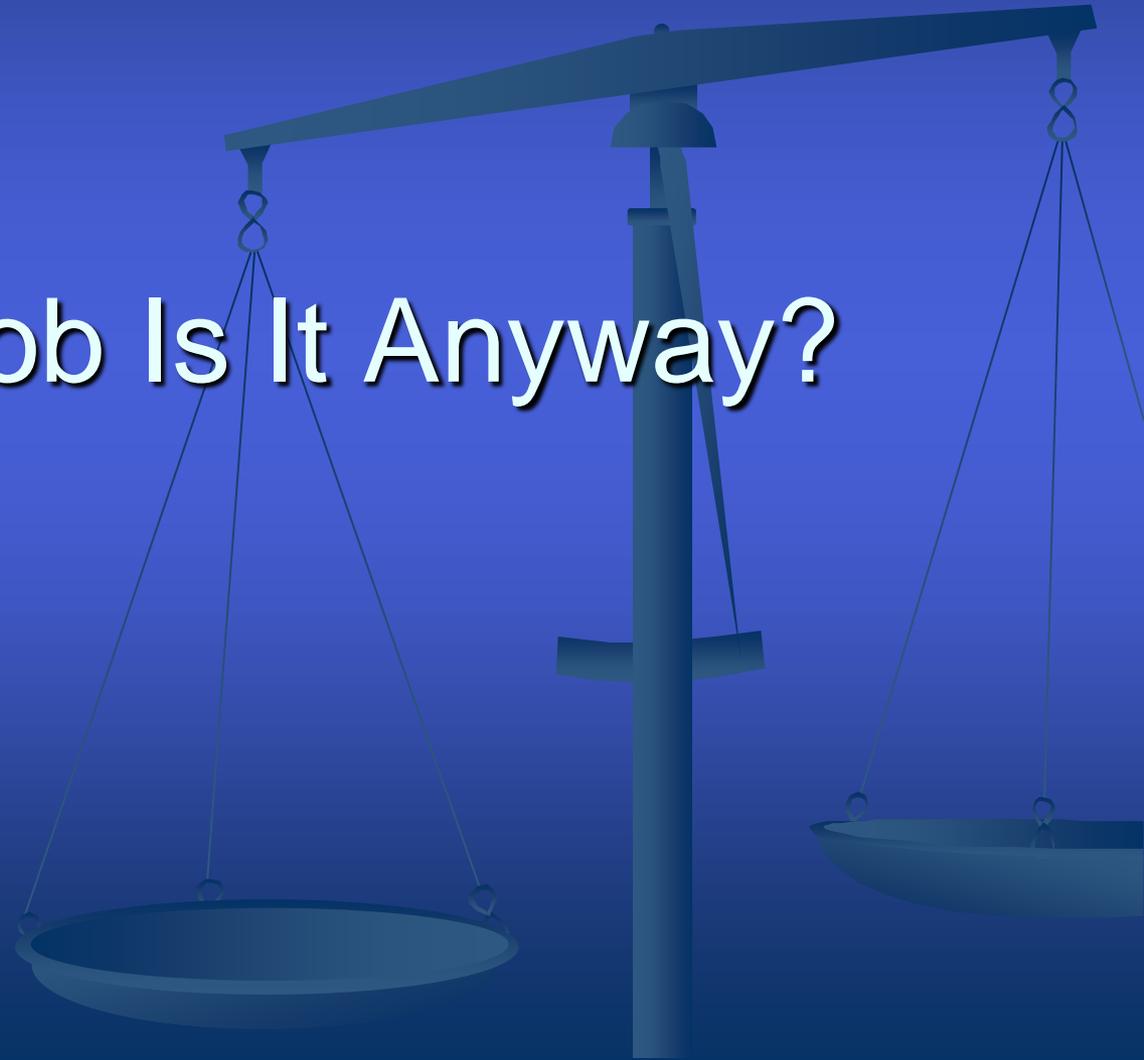


WHO IS GOING TO PAY FOR IT?

The link to federal funding:

- FEMA reimbursement has numerous components
 - Public assistance – numerous elements, including debris removal
 - Individual assistance – several elements & conditions
 - Debris obstructing public rights-of-way or public facilities can be paid for under public assistance
 - Debris impacting ingress to private residences might be covered under individual assistance
 - But many farmers' fields were covered in mud and woody debris
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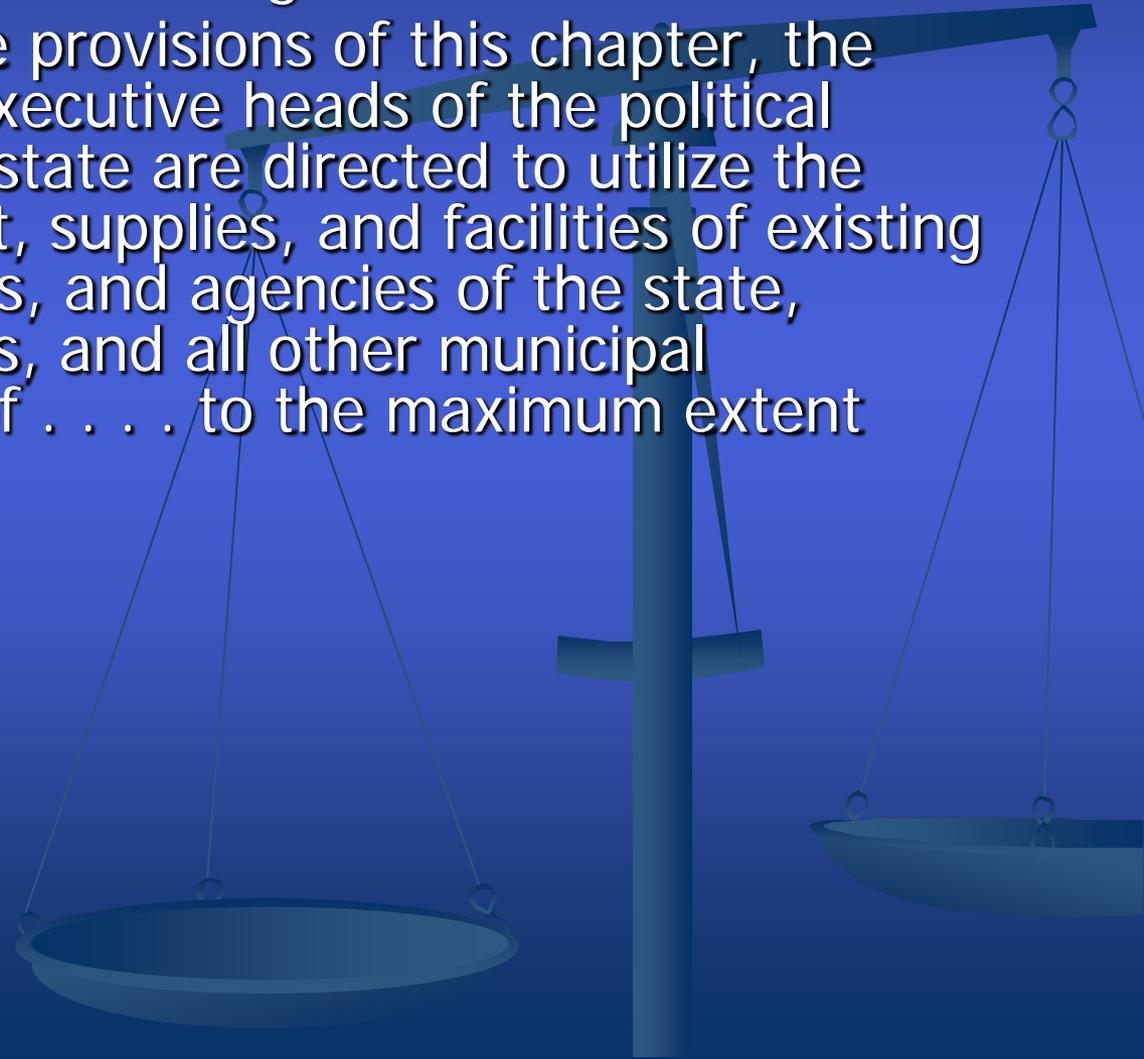
Whose Job Is It Anyway?



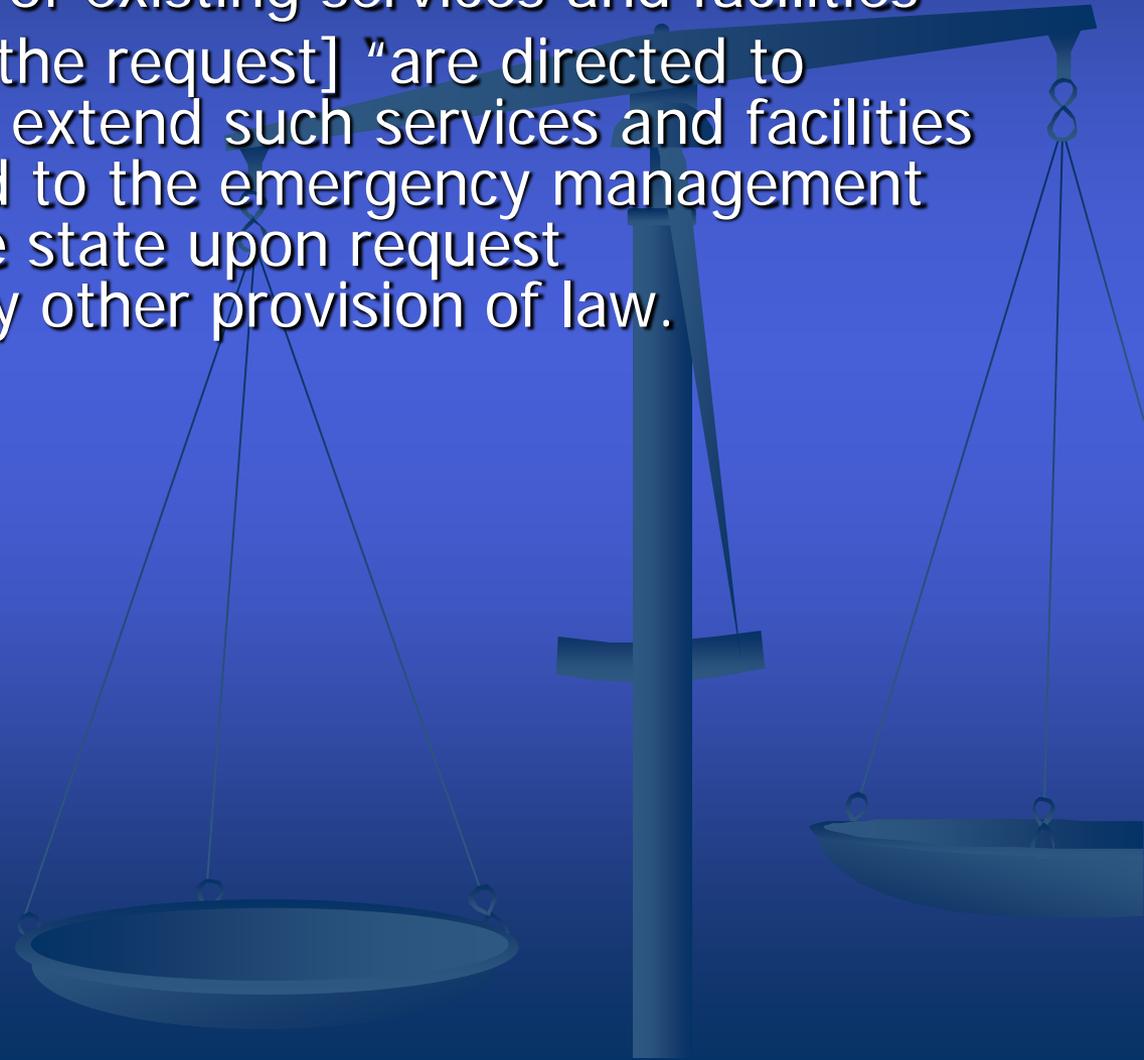
Power of Government to Act Outside Statutory Roles?

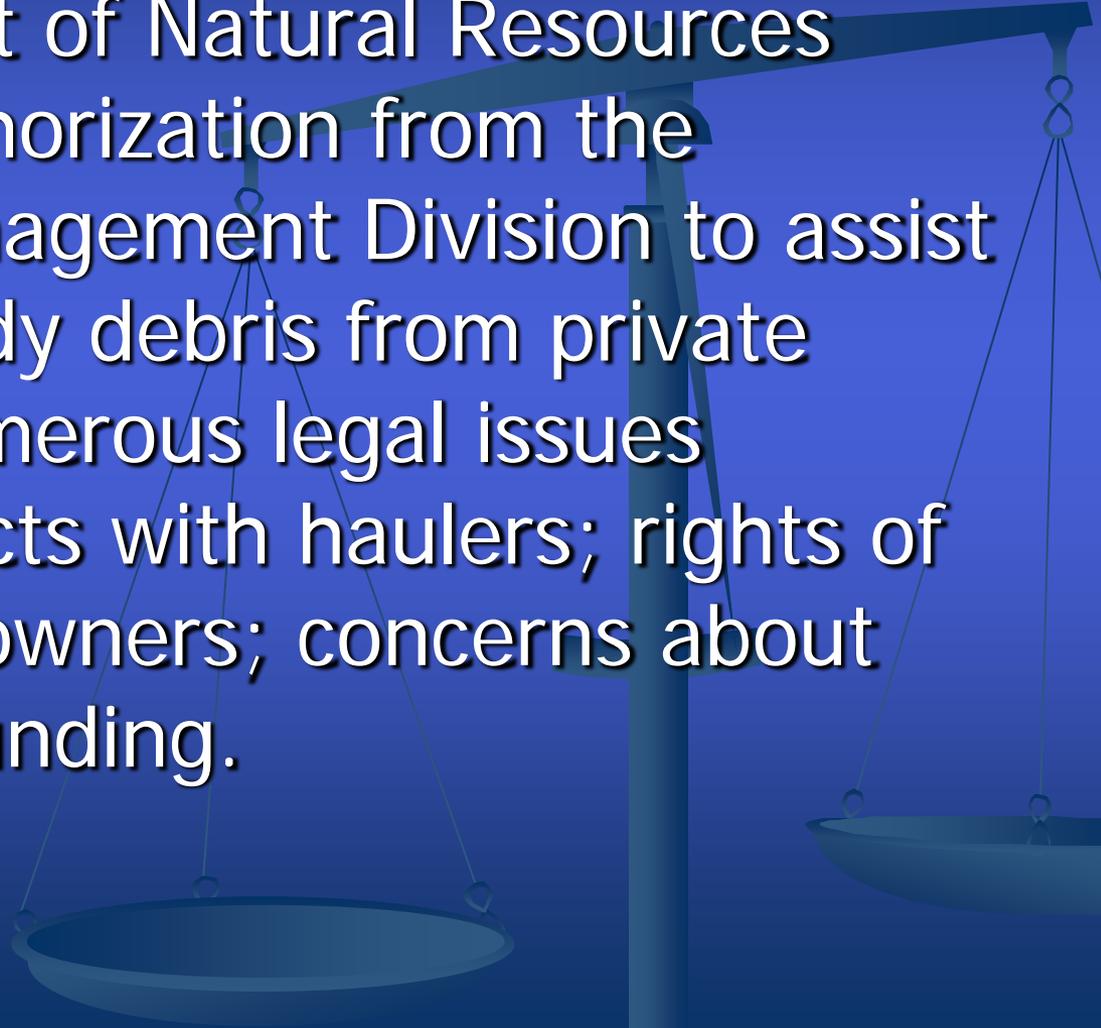


- RCW 38.52.110 Use of existing services and facilities —
 - (1) In carrying out the provisions of this chapter, the governor and the executive heads of the political subdivisions of the state are directed to utilize the services, equipment, supplies, and facilities of existing departments, offices, and agencies of the state, political subdivisions, and all other municipal corporations thereof to the maximum extent practicable,



- RCW 38.52.110 Use of existing services and facilities —
(1) [and recipients of the request] “are directed to cooperate with and extend such services and facilities to the governor and to the emergency management organizations of the state upon request notwithstanding any other provision of law.”



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- The Department of Natural Resources relied upon authorization from the Emergency Management Division to assist in clearing woody debris from private properties. Numerous legal issues present: contracts with haulers; rights of entry with landowners; concerns about state liability; funding.



QUESTIONS?

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