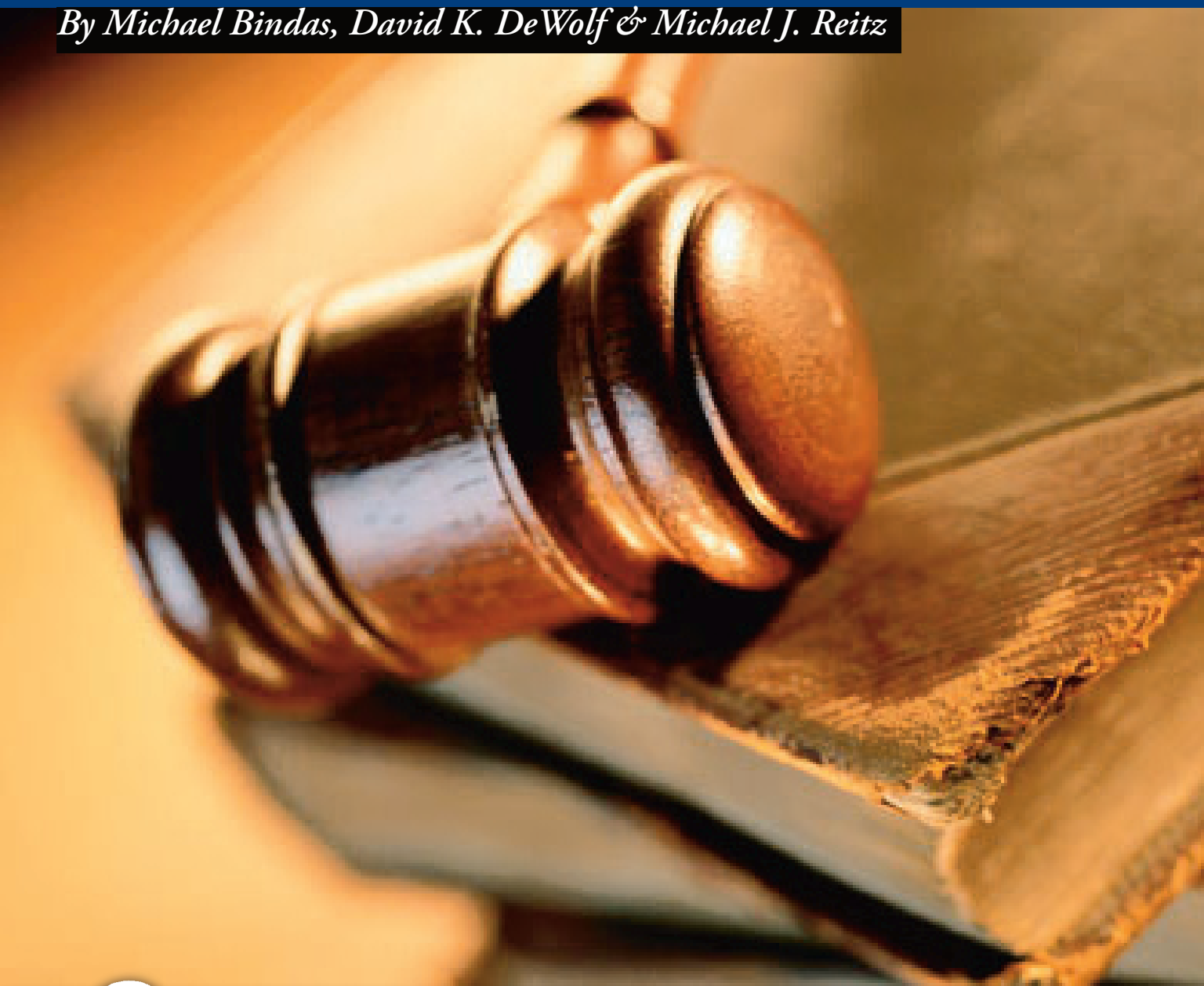
The Washington Supreme Court and the State Constitution: A 2010 Assessment

By Michael Bindas, David K. DeWolf & Michael J. Reitz



WASHINGTON JULY 2010

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Introduction

The Washington State Supreme Court plays an important role, often affecting the lives of Washington's citizens in profound and intimate ways. In this paper, we examine the court's record in three specific areas in which it must pay particular attention to the state constitution and the limits it imposes upon state and local government. These three areas are property rights (particularly in relation to the power of eminent domain), the Washington Constitution's Privileges or Immunities Clause, and individual liberties.

Because the interpretation of a state's constitution is subject to no higher authority than the state's supreme court, it is hard to overstate the importance of that function. At the same time, it is sometimes difficult to distinguish the application of the Federal Constitution from the application of the state constitution. Of course, Washington Supreme Court justices must uphold both constitutions, and in some cases the Court has turned to the Federal Constitution to decide cases before examining how the state constitution might apply. This in turn may encourage appellate attorneys to emphasize claims rooted in the Federal Constitution over claims rooted in the state constitution. As will be discussed in the sections below, while in some cases the Court has treated the state constitution as merely redundant of parallel federal constitutional provisions, in other cases the court has given separate meaning to state constitutional provisions and developed unique state constitutional jurisprudence through its decisions. Nonetheless, even in those cases the Washington Supreme Court has sometimes shown a willingness to rely upon federal constitutional standards to inform its own interpretation of the state constitution. In examining the Court's jurisprudence in the three areas mentioned above, this paper will address the extent to which the Washington Supreme Court has applied precedent, the text and original meaning of the Washington Constitution, and provisions of the Federal Constitution.

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I. The Court's Protection of Property Rights and Limitations on Eminent Domain

The first topic for our consideration is the constitutional limitation on the power of the state to infringe private property rights, particularly through the exercise of eminent domain. Most readers will be familiar with the "takings clause" of the Fifth Amendment to the United States Constitution, which permits the government to take private property only "for public use," and even then it must pay "just compensation."[1] In 2005 there was a vigorous debate over the scope of this protection as a result of the ruling by the United States Supreme Court in *Kelo v. City of New London*,[2] permitting the exercise of eminent domain over private property in order to foster economic development.[3] But as is true of the other three sections in this paper, the Federal Constitution is not the only (or in some cases, the most important) protection against usurpation of individual rights by government.[4] The Washington State Constitution places additional restrictions on what our state and local governments may do.

A threshold question for our state courts is whether or not the recitation of a right in the state constitution places any greater restriction on the powers of state and local governments if that same right is enumerated in the Federal Constitution. The seminal case answering this question is *State v. Gunwall*,[5] decided in 1986. In that case the Washington Supreme Court held that whether or not to require independent analysis and application

of a state constitutional provision should be decided on a case-by-case basis, and that in doing so the courts should consider six (nonexclusive) factors to make that determination.[6] This approach has the advantage of being sensitive to the facts of particular cases, but it has the disadvantage of providing very limited guidance to help predict the outcome in future cases.

Cases involving the "takings clause" of the Washington Constitution will be considered in a moment, but before doing so it is necessary to review the history of the adoption of the state constitution in order to put modern cases in perspective.

A. The History of the Washington State Constitution

The striking thing about the Washington state constitution is the extent to which it reflects a strong affirmation of the rights of the individual. Both the historical context in which the Washington Constitution was adopted and the structure of the Washington Constitution itself presuppose an individual's inherent right to acquire, use and transfer private property. The importance of private property as a fence to liberty was a key component of the American constitutional and common law traditions that extended from the time of the American Revolution through the year that the State of Washington was admitted to the Union as the 42nd state in 1889.[7] Through the Enabling Act that authorized the Washington Territory to obtain statehood, Congress recognized that the Washington Constitution would inherit that property rights tradition by requiring that the Washington Constitution must be consistent with the principles of the Declaration of Independence and the U.S. Constitution.[8] The strong individual rights emphasis of the Washington Constitution—which includes property rights—is implicit in the placement of a Declaration of Rights in Article I of the document. Article I, § 1 provides that "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."[9]

One could argue, then, that the Washington Constitution does not *grant* rights to individuals; rather, it *recognizes* them, because its history and structure presuppose that rights--including the right to acquire, use and transfer private property--belong to individuals by nature. The Washington Constitution thus acknowledges these rights and the duty of government to safeguard those rights. Further, in order to be consistent with the language of § 1 of Article I, it appears that those provisions in Article I of the Washington Constitution that specifically address private property cannot be designed to grant powers to the government to take private property from individuals, but rather impose conditions and limit the circumstances in which private property may be taken.

The two most significant provisions in Article I concerning the right to acquire, use and transfer private property are § 16's "eminent domain" clause and § 3's "personal rights" or due process clause. In pertinent part, § 16 states: "No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner . . . which compensation shall be ascertained by a jury. . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public." And § 3 succinctly states: "No person shall be deprived of life, liberty, or property without due process of law." These two sections both recognize a crucial role for the judiciary in determining whether state power to deprive or take private property from individuals is being exercised with proper constitutional limits.

B. Modern Application of the "Takings Clause"

In recent years, the Washington Supreme Court has grappled with the scope and limits on state power to deprive or take private property. Where property owners have invoked Sections 16 and 3 to challenge a taking of private property, the court has addressed the two salient questions: First, what constitutes a "public use and necessity," and how much deference should courts give to "findings" by the legislative or executive branch that the exercise of eminent domain is justified by "public use and necessity"? And second, what procedures must government actors follow in exercising the power of eminent domain?

1. *"Public Use and Necessity"*

The Washington Supreme Court has reaffirmed and extended the basic contours of its modern takings jurisprudence in a series of widely-discussed eminent domain cases. These cases, beginning with *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*,[10] have revealed a divide between the justices on how Article I, § 16 of the Washington Constitution is to be understood and applied.

The deferential approach of the majority. At issue in *HTK* was a local municipal authority's condemnation of downtown Seattle property for the construction of a monorail station and adjacent parking lot. The municipal authority condemned not only the area of land for which the future station and parking lot were sited but also the entirety of the private parcel. Upon completion of construction efforts occupying the rest of the condemned land, the municipal authority indicated intent to sell the surplus land to private developers and keep the proceeds.

Writing for the majority, then-Justice Barbara Madsen (now Chief Justice) upheld the municipal authority's condemnation in fee of the entire property. Then-Chief Justice Gerry Alexander and Justices Bobbi Bridge, Susan Owens, Charles Johnson, Tom Chambers and Mary Fairhurst joined the opinion. In so ruling the majority reiterated its eminent domain jurisprudence's three-part test for analyzing the lawfulness of proposed condemnations. "For a proposed condemnation to be lawful, the condemning authority must prove that (1) the use is really public, (2) the public interest requires it, and (3) the property appropriated is necessary for that purpose."[11]

According to the majority, only the first prong of the three-part test involves the judicial question of "public use" set out in § 16. In the majority's reading, legislative "public use" declarations are "not dispositive" but are still "entitled to great weight."[12] Legislative declarations of the "public necessity" of a proposed condemnation, however, are subject to a different standard of review. "A declaration of necessity by a proper municipal authority is conclusive in the absence of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud."[13] This is so, wrote Justice Madsen, because "[s]ince the turn of the century, Washington courts have provided significant deference to legislative determinations of necessity in the context of eminent domain proceedings . . . "[14] In particular, "necessity" requires only that the condemning authority show that the condemned property was "reasonably necessary" for the public use, not that it was absolutely necessary or indispensable."[15] Moreover, what was crucial to the result in *HTK* was the majority's conclusion that "decisions as to the amount of property to be condemned are legislative questions, reviewed under the legislative standard for necessity."[16]

Soon thereafter, the *HTK* majority's reading of article I, § 16 was bolstered by Justice Fairhurst's opinion for the majority in *Central Puget Sound Regional Transit Authority v. Miller*.[17] *Miller* involved the condemnation of private property for a transit station. While the pivotal issues of the case surrounded notice procedures, the issue of what kind of judicial standards apply to "public use" and "public necessity" declarations resurfaced.

Writing for the majority, Justice Fairhurst reiterated that "while the determination of public use is for the courts, this court has explicitly stated that it will show great deference to legislative determinations."[18] Justice Fairhurst repeated the standard set out in *HTK* that "[a] legislative body's declaration of necessity 'is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud.'"[19]

Justice Fairhurst added that this deferential standard of judicial review owes to the separation of powers, being born "[o]ut of respect for our coordinate branches of government."[20] Moreover, Justice Fairhust's opinion in *Miller* extended judicial deference in eminent domain cases a step further than *HTK*, holding that "[e]ven if the decision was partially motivated by improper considerations, it will not be vacated so long as 'the proposed condemnation demonstrates a genuine need and . . . the condemnor in fact intends to use the property for the avowed purpose.'"[21]

Justice Fairhust therefore had little trouble upholding Sound Transit's "public necessity" finding, concluding that it was supported by substantial evidence. Following *HTK*, Justice Fairhurst maintained that "[s]ubstantial evidence is viewed in the light most favorable to the

respondent and is evidence that would 'persuade a fair-minded, rational person of the truth of the finding.'"[22]

In so ruling, Justice Fairhurst and the majority rejected the property owner's challenge to certain facts relied on by Sound Transit in claiming public necessity: "[I]t is not for the court to substitute its judgment in the absence of some demonstration of fraud or arbitrary and capricious conduct."[23] Similarly, the majority rejected Miller's arguments that the condemning agency was obligated to consider alternative locations. Echoing *HTK*'s holding that condemning agencies receive significant deference in deciding the amount of land to be condemned, the majority ruled that "when there is a reasonable connection between the public use and the actual property, this element is satisfied. . . . This broad approach is rooted not only in our deference to other branches of government, but also to the institutional competence of courts."[24]

The most recent opportunity to delineate the standards for "public use" and "public necessity" came in *Grant County PUD v. North American Foreign Trade Zone Industries*.[25] The court once again distinguished the responsibility of the judiciary under Article I, § 16 to determine public use from the belief that the determination of necessity is a legislative question.[26]

While granting the legislature substantial discretion to determine necessity, it applied only modest scrutiny to the question of whether the proposed use of the condemned property was truly public or private: "[A] finding of public use is not defeated where alleged private use is incidental to the public use."[27] The court did not attribute significance to the fact that, prior to condemning the property, Grant County PUD had leased the same property as a site for storing diesel energy generators, and that the decision to condemn appeared to be a means simply to cut its business expenses or losses: "The prudence of the initial decision to purchase the generators is irrelevant to the question of whether the condemnation was necessary."[28] Thus, the Court's elaboration in *Miller* that an agency decision partly motivated by improper considerations would not be voided where there is a genuine need and the agency intends to use the property to meet that need proved significant in *Grant Co. PUD*.

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The dissent from deference. Not all the members of the Washington Supreme Court agreed with the deferential approach that began with *HTK*. In *HTK*, Justice James Johnson, joined by Justice Richard Sanders, wrote: "In article I, § 16 our state constitution directly addresses only the 'public use' inquiry . . . the remaining two inquiries regarding public interest and necessity are judicial corollaries to enforce the constitutional mandate."[29] Framed as judicial corollaries to § 16, the dissenters maintained that the second two prongs of the three-part test for analyzing proposed condemnations should also be subject to rigorous judicial scrutiny. According to this view, decisions about the amount of property to be condemned by a government agency are judicial questions. Accordingly, for the purposes of *HTK*, Justice Johnson wrote, "There are two inquiries: Is this property necessary for the public purpose? Is *all* this property necessary for the public purpose?"[30]

Moreover, the dissenters rejected the majority's conclusion that legislative determinations for "public use" in the narrower sense were entitled to any deference: "[I]t is stupefying that the majority claims that we must give 'great weight' to such determinations when our constitution mandates that this '*shall* be a judicial question, and determined as such, *without regard to any legislative assertion* that the use is public.'"[31] Section 16, wrote Justice Johnson, "means that we must not show deference to the legislative assertion of public use; we decide the question independently. The plain language of our constitution does not require any deference and in fact mandates exactly the opposite."[32]

In response to the majority's reliance on the Court's own "long standing jurisprudence," Justice Johnson countered that "to the extent that this assertion by the majority is based on erroneous jurisprudence, it defies the plain language of our constitution and should be overruled."[33] Faced with what he perceived to be a choice between ignoring the plain text of the constitution and overruling previous cases, Justice Johnson thus explained that he was choosing fidelity to the constitutional text.

Justice Johnson also pointed to language from cases decided in the same era when the constitution was written, which on previous occasions the Court had acknowledged were more reliable indications of the meaning of the

constitutional language: "'State cases and statutes from the time of the constitution's ratification, rather than recent case law, are more persuasive in determining' the protections of a constitutional provision."[34]

When the same issue resurfaced in *Miller* and *Grant Co. PUD*, Justices Johnson and Sanders continued to dissent from what they believed to be the erroneous approach taken by the majority. Although Chief Justice Gerry Alexander and Tom Chambers did not join the majority in either *Miller* or *Grant Co. PUD*, they dissented on procedural grounds rather than on the merits of the "public use" question. (Their procedural dissents are discussed below.)

In *Miller*, Justice Johnson dissented on the same ground that he had raised in *HTK*: "The majority's standard of review for public use contradicts the express constitutional mandate of article I, § 16."[35] Justice Johnson repeated his view that "[t]he inquiries regarding public interest and necessity are judicial corollaries which provide enforcement of that constitutional mandate."[36] Because of the substantial overlap perceived by Justice Johnson between public use and necessity determinations, the majority's extension of great deference to agency declarations of necessity was rejected on the grounds it "would make agencies nearly immune from judicial review of public use."[37]

Responding to the majority's separation of powers rationale, Justice Johnson countered that "[o]ur respect for coordinate branches of government should not nullify an explicit constitutional provision requiring the judiciary to provide a check upon taking of private property."[38] In a similar vein, Justice Johnson asserted that judicial review of legislative determinations was not only an appropriate function of the judiciary, but indeed is obligatory:

> Judicial abdication of such a constitutional mandate unjustifiably expands the power of the legislature and agencies in contravention of the clear terms of article I, § 16. Our constitution's use of the word "shall" is imperative and operates to create a duty on the courts.[39]

Further criticizing the majority's approach, Justice Johnson pointed out that in previous cases the court had examined whether or not there were alternative sites for condemnation that would achieve the same purpose. In these cases, the court had held that if the private property owner presents evidence that condemnation of his or her property is not reasonably necessary and a slight change of location will meet the necessity of the condemning agency, the burden should be on the agency to rebut such evidence.[40]

Just as the majority applied the same standard in *Grant Co. PUD*, Justice Johnson (again joined by Justice Sanders) maintained their view in dissent. They believed that the Article I, § 16 public use and necessity requirements required even greater scrutiny when the public entity was using its power of eminent domain for what amounted to a private, rather than a public, purpose. If it appears that the public entity is using its power of eminent domain primarily to obtain an economic benefit, rather than to accomplish a purpose that requires the exercise of eminent domain, the judiciary is constitutionally obligated to protect the property owner: "Argued economic benefit is not automatically a legitimate public purpose justifying condemnation under article I, § 16."[41] Justice Johnson disputed the contention that "loss-cutting" constitutes a public purpose, "even if some public benefit is argued."[42] Quoting the analysis applied in *In re Petition of Seattle*,[43] Justice Johnson would have rejected the justification offered by the PUD: "If a private use is combined with a public use in such a way that the two cannot be separated, the right of eminent domain cannot be invoked."[44]

Justice Johnson believed it was particularly important to distinguish the approach taken in the Washington Constitution from that taken by the U.S. Supreme Court's Fifth Amendment takings ruling in *Kelo v. City of New London*, wherein the U.S. Supreme Court permitted "economic development" to justify the taking of private property. This interpretation of the U.S. Constitution "does not dictate that this court reach a similar conclusion under the more protective provisions of the Washington Constitution."[45] Instead, the "Washington Constitution article I, § 16 offers stronger protections of private property rights and more stringent procedural restrictions on the exercise of eminent domain power."[46]

2. *Due Process*

In addition to the debate over the scope of protections afforded by article I, section 16 and judicial

standards to be used in reviewing the exercise of eminent domain, there is also controversy over whether or what procedural processes must be followed in order to invoke that power. On this point, two additional justices found themselves dissenting from the court's approach.

A central issue in *Miller* was the type of notice that the government must provide before it conducts a public meeting to establish the public necessity of condemning a particular parcel of private land. In *Miller*, the condemning agency conducted a public hearing at which it adopted a resolution condemning private property belonging to Miller, but only publicized the proposed condemnation with an agency website posting that referred to property in the general area. Miller received no individualized notice about the hearing.

The deferential approach of the majority. Writing for the majority, Justice Fairhurst relied upon a Washington Court of Appeals decision from 1991[47]: "Washington courts have held that personal notice of the public meeting establishing necessity is not required either by the statute or due process."[48] Instead, personal notice is only required for the government to begin the condemnation process that follows after a public meeting. Moreover, Justice Fairhurst concluded that the public notice statutes on the books at the time of the ruling did not require that any particularized facts about the land to be condemned or about the public necessity of condemnation be contained in any condemning agency's resolution or petition issued in anticipation of a public meeting.[49]

The same majority's views about public notice similarly prevailed in *Grant Co. PUD*. As noted above, the public utility district used its condemnation power to acquire private property that it had previously leased for placement of its diesel power generators. Again writing for the majority, Justice Fairhurst held that "notice of a public hearing to authorize condemnation need only be 'descriptive enough for a reasonable person to be fairly apprised of what was to be discussed at the meeting' and is generally deemed adequate absent a showing that it was misleading."[50] Moreover, "although a specific description of the property is required for the public use and necessity hearing," such is not required for the prior public hearing.[51]

Speaking directly to the constitutional due process requirements in such circumstances, Justice Fairhurst maintained that the Fourteenth Amendment to the U.S. Constitution "guarantees due process to individuals," but that

> the notice at issue here is to the *public*, not the individual landowner. . . . A resolution does not result in a taking of property and does not deprive a property owner of any rights. Even if the resolution is approved, the condemnation action may or may not go forward. The actual condemnation action does not occur until the judicial hearing. . . . [T]he individual landowner's constitutional rights are protected in the judicial proceeding, *not* in the public meeting authorizing condemnation."[52]

Justice Fairhurst and the majority rejected what they considered to be the dissenters' "extraordinary claim that due process requires actual notice at this stage because PUD's determination of necessity in Resolution 7643 will be deemed conclusive in the judicial condemnation proceeding."[53] Moreover, Justice Fairhurst and the majority contended that "none of the cases Chief Justice Alexander or Justice J.M. Johnson cite support their contention that constitutional due process notice rights are at issue here . . . none of which suggests that their holdings have broader application to a public meeting to discuss authorizing a condemnation."[54]

In both *Miller* and *Grant Co. PUD*, Justice Fairhurst and the majority also rejected a type of "judicial due process" requirement that trial courts enter written findings detailing specific facts supporting the determination of public use and necessity: "We are not aware of any controlling authority requiring a trial court to set out the specific facts on which the court relied in reaching its determination of public use and necessity."[55]

In a concurring opinion Justice Barbara Madsen voiced additional support for the majority's due process analysis in *Grant Co. PUD*: "[U]nder Washington statutes, our legislature currently provides property owners with protections *beyond* those required by either the state or federal constitutions."[56] Justice Madsen took direct aim at the "dissenting opinions in which they, without any authority, attempt to erroneously 'constitutionalize' aspects of eminent domain proceedings."[57] Relying on decisions by the Washington Court of Appeals from

1927 and 1991 as well as federal cases, Justice Madsen concluded that "[t]ogether these decisions instruct us that because the condemning authority's decision regarding the need for taking and the property to be taken is fundamentally legislative, landowners have no right to participate in that decision or to litigate the decision to condemn on constitutional grounds."[58]

Justice Madsen singled out the dissenting Chief Justice Alexander's assertion that the notice provided by the Grant Co. PUD did not comply with 14th Amendment due process requirements. According to Justice Madsen, the Chief Justice's analysis was troubling because of its "equating condemnation proceedings with seizures of property."[59] In contrast to the condemnation process, she wrote, "a government seizure does not involve a legislative determination at a public hearing. In the context of a seizure, due process requires individual notice precisely because the seizure occurs without any public notice and often without a preliminary hearing."[60] Justice Madsen thought the matter entirely within the discretion of the legislature, noting that "if the legislature wishes to provide even greater statutory notice of the public process in condemnation proceedings, it is clearly free to do so."[61]

The dissent from deference. *Miller* and *Grant Co. PUD* combined to produce five dissenting opinions in all, with Chief Justice Alexander and Justice James Johnson each issuing dissents on both cases, and with Justice Tom Chambers issuing his own dissent in *Grant Co. PUD*.

In *Miller*, Chief Justice Alexander (joined by Justice Tom Chambers) thought that the notice provided by Grant Co. PUD did not even meet the statutory minimum that was in effect at the time of the ruling. But his dissenting opinion included a constitutional due process dimension as well. Chief Justice Alexander cited Washington cases regarding notice in zoning cases, as well as U.S. Supreme Court cases applying principles of fundamental fairness and procedural due process.[62] The Chief Justice insisted that "'a proper hearing can be no greater protection for the public and the individual landowner than the opportunity afforded by the notice to take an *informed* part therein.'"[63] This is not simply a protection for the private property owner, but a means by which the interests of the people as a whole are served: "When interested parties are ill-informed of government proposals 'the public at large will be deprived of an "informed" resolution of problems that are the subject of the hearing.'"[64] The Chief Justice did not appear to rely upon a specific constitutional provision, but his dissenting opinion concluded that "[d]ue process demands that government err on the side of giving abundant notice when it seeks to take property."[65]

In *Grant Co. PUD*, however, the Chief Justice offered a more specific test for whether government public notice proceedings for condemnation satisfy constitutional due process protections. Specifically, the Chief Justice concluded that the PUD "failed to 'fairly and sufficiently inform' the petition of a critical step toward condemning the petitioner's property--and that this failure violated the due process clause of the 14th Amendment to the United States Constitution."[66] Pointing to a distinction between statutory notice and notice required by due process, the Chief Justice reminded the majority that the due process clause "requires notice 'reasonably calculated to inform parties of *proceedings which may directly and adversely affect* their legally protected interests.'"[67]

In the Chief Justice's view, effective notice to the property owner prior to the public hearing is critical:

> At the public hearing stage, a property owner still can try to dissuade agency decision-makers from declaring a public necessity for condemnation based on any number of policy considerations including fairness, loss of tax revenue, and environmental or other concerns. Once a necessity determination is made, however, the affected property owner is powerless to challenge it, absent evidence of actual or constructive fraud by the agency. Thus, the owner is placed in a significantly less advantageous position in trying to resist condemnation. In my view, that is a tangible, "direct and adverse" impact that triggers due process rights.[68]

Moreover, the Chief Justice insisted that "the fact that a subsequent judicial proceeding takes place--in which actual notice is given to the affected property owner--does not cure all ills associated with the initial process of authorizing the condemnation."[69]

In evaluating the standard by which Washington courts measured the notice given by a public entity prior to the exercise of the power of eminent domain, Chief

Justice Alexander turned to the U.S. Supreme Court's treatment of this issue: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[70] The Chief Justice believed that at a minimum the 14th Amendment required a balance between the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment."[71] Applying this test, the Chief Justice concluded that the balance tipped in favor of the individual interest where the burden on the condemning agency of providing actual notice to the affected property owners is minimal.

The dissenting opinions offered by Justice James Johnson in *Miller* and *Grant Co. PUD* (joined in both cases by Justice Richard Sanders) offered a different and broader due process analysis than the Chief Justice. In *Miller*, Justice Johnson concluded that the burden of proof rested on the condemning agency to prove not only public use and public necessity, but also that public notice standards were satisfied: "Because statutes delegating eminent domain power are in derogation of the people's rights . . . a condemning agency must establish that notice requirements were fulfilled in order to validly exercise the power and deprive a person of property."[72] Justice Johnson repeated this view about the burden of proof for public notice requirements in *Grant Co. PUD*.[73]

Justice Johnson interpreted the public notice statute at issue in *Miller* in light of what he viewed as constitutional requirements, insisting that "[b]ecause of the protection our constitution gives to the right to private property and the limited nature of eminent domain, I would hold that the statute requires specific identification of the property to be condemned."[74] Justice Johnson was even more explicit in asserting the constitutional basis for his view of public notice requirements in eminent domain cases in *Grant Co. PUD*. There he referenced article I, § 3 of the Washington Constitution (the due process clause) and concluded that "[p]ublic notice procedures required for initiating condemnation proceedings must also comply with due process" and that "the Washington Constitution requires that any governmental interference or deprivation of private property rights must follow procedures and individualized proceedings that are open and orderly."[75]

Significantly, Justice Johnson also maintained in his dissent in *Miller* that state constitutional requirements include what one might call a "judicial due process element," to ensure effective judicial review in eminent domain decisions. "The trial court must make findings that support the legal conclusion as to the necessity of the taking."[76] Justice Johnson was even more explicit in this regard in his dissent in *Grant Co. PUD*, insisting that "when government deprives law-abiding property owners of their private property, due process requirements of *article I, § 3* demand that clear written findings be entered by a trial court. Judicial review of government takings as required by *article I, § 16* is impossible without such a written decision below."[77] According to Justice Johnson, trial court findings should be entered with regard to public use, interest and necessity.

Also, Justice Johnson emphatically rejected Grant Co. PUD's attempt to retroactively "cure" its purportedly defective public notice with a subsequent notice. "Limiting the opportunity to be heard on legislation authorizing condemnation until after the proceeding has been commenced denies due process," he concluded.[78] In his view, Washington case law does not allow "retroactive curing" of public notice procedural defects of that kind, and that the condemning agency should have instead been required to restart the process if it wanted to pursue condemnation of the private property in question.

Justice Tom Chambers dissented in *Grant Co. PUD* on procedural grounds. He concluded that the public notice provided by Grant Co. PUD did not meet the statutory minimum, and he also rejected the retroactive curing of the purported public notice defect. He concluded, "To permit a fix would not effectuate the legislative intent that there be a meaningful debate in a public forum on any proposed eminent domain ordinance."[79]

C. Concluding Assessment

In December 2006, long after *Grant Co. PUD* had been argued and the decision was still pending, the Washington Supreme Court declined to review a controversial eminent domain case, *City of Burien v. Strobel Family Investments*. The Court's refusal to take up

the case suggests that the views of the respective justices concerning the public use and necessity requirements of article I, § 16 remains settled after *Grant Co. PUD*. The Washington Legislature has also responded to the personal notice issue raised in *Miller* with legislation clarifying the notice requirements for condemning agencies. Accordingly, despite the sharp differences between the justices concerning the scope and standards of judicial review of exercises of eminent domain power article I, § 16, the majority's view appears to be the clearly prevailing view at this time. Similarly, for the time being the controlling vote of the Court also inclines toward strong judicial deference to condemning agencies in the procedural exercise of eminent domain power.

II. The Privileges or Immunities Clause of the Washington Constitution

The previous section addressed the limitations that the state constitution places upon the use of the power of eminent domain to condemn private property. That protection extends to land and buildings. Another constitutional provision addresses more generalized threats to the economic liberties of Washington citizens. Like many state constitutions, Washington's constitution contains a "privileges or immunities" clause, which provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."[80] The appropriate interpretation of the clause--specifically, the extent to which its protections differ from those secured by similar federal constitutional provisions--has been a topic of considerable debate and uncertainty.

It appeared that clarity was on its way when the Washington Supreme Court decided *Grant County Fire Protection District No. 5 v. City of Moses Lake*[81] in 2004. In *Grant County*, the court for the first time held that the Privileges or Immunities Clause merits a state constitutional analysis independent of the federal constitution. But in the six years since *Grant County*, it has become harder, not easier, to identify the circumstances in which that independent analysis is warranted. Moreover, even when independent analysis is applied, the scope of protection afforded by the state constitution is far from clear. The court continues to analyze these issues but has yet to form a clear consensus.

A. The History of the Clause

The framers of the Washington Constitution modeled the Privileges or Immunities Clause on a similar provision in Oregon's 1859 constitution, which, in turn, was drawn from the 1851 Indiana Constitution.[82] As the Indiana Supreme Court has observed, there was considerable discussion of Indiana's clause at that state's constitutional convention, and the discussion made clear that the clause's principal purpose was to prohibit government from granting exclusive privileges or immunities in the field of commercial affairs--that is, to prevent government from conferring special favors on certain business interests to the exclusion of others.[83]

Although Washington's Privileges or Immunities Clause did not receive similarly robust discussion, historical sources confirm that its framers were equally-motivated by a desire to prevent governmental favoritism in commercial affairs. While today's politicians frequently feel a need to assure the voters that they are supporting the interests of the people, rather than conferring favor on "special interests," Washington's framers wanted to embed protections against governmental favoritism in the constitution itself, rather than simply trusting future legislatures to refrain from engaging in such behavior. Like most citizens of the Washington Territory, these delegates to Washington's 1889 convention were suspicious and distrustful of large corporations, particularly railroads, and the special favor that they curried with members of the territorial legislature:

> The Washington constitutional convention was noted for its distrust of legislative power and of the influence of large corporations, primarily railroads. The convention's distrust of the legislature may have resulted from the fact that the territorial legislature had been notorious for spending "much of its time granting special acts and privileges."[84]

In fact, while Washington's delegates modeled their Privileges or Immunities Clause on the clauses in the Oregon and Indiana Constitutions, they went even further to prevent a repetition of the types of economic favoritism that had prevailed during the territorial days. Whereas the Indiana and Oregon clauses prohibit grants

of special privileges or immunities to "citizen[s] or class[es] of citizens,"[85] Washington's framers extended the clause to explicitly reach "corporations." Commentators have attributed this deliberate inclusion of corporations to the delegates' twin distrust of corporate strength and legislative weakness.[86]

B. Early Cases Applying the Privileges or Immunities Clause

During early statehood, the Washington Supreme Court generally applied the Privileges or Immunities Clause in a manner consistent with its aim of eliminating governmental favoritism toward certain business interests. In *State v. Vance*,[87] for example, the court, looking to case law interpreting the Privileges and Immunities Clause in Article IV, § 2, of the U.S. Constitution, specifically recognized the right to "carry on business" as one of the "privileges" or "immunities" to which the clause applies.[88] Thereafter, it routinely struck down laws that played favorites with that right. For example, the court relied on the clause to strike down laws that:

- prohibited the peddling of fruit and vegetables but exempted farmers selling their own produce;[89]
- criminalized misrepresentations made by employment agencies but not those made by other businesses;[90]
- required a license for cigar sales by vending machine but not cigar sales by merchants;[91]
- imposed onerous conditions on the sale of concentrated feed by businesses other than cereal and flour mills;[92]
- subjected merchandise sold by secondhand dealers to a 10-day "hold" period but exempted secondhand stoves and furniture;[93]
- imposed license fees on solid fuel dealers but not on liquid fuel dealers;[94]
- required a solicitation license for paid charity fundraisers but exempted a particular community fund;[95]
- forced non-resident, but not resident, photographers to obtain a license to conduct business in a city;[96] and
- imposed license fees on peddlers but exempted honorably discharged veterans.[97]

In these early cases, the court carefully scrutinized the legislation at issue, often examining the record to determine the legislature's true purpose in enacting the law at issue and deeming certain purposes, such as economic protectionism, impermissible. The court's opinion in *Ralph v. City of Wenatchee*, striking down a license requirement for non-resident photographers, is a prime example:

> As it appears, both from the testimony in this case and from a study of the ordinance itself, that section 6 thereof was passed with the primary purpose of protecting local photographers from lawful competition, and was thereby designed to serve private interests in contravention of common rights, it must be condemned as an abuse of the police power, and, therefore, unreasonable and unlawful.[98]

Even in cases where a permissible governmental purpose existed, the court scrutinized the legislation to ensure that the classification drawn by the law was truly related to that purpose. In one formulation, the court explained that the classification must rest on "real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act."[99]

C. Conflation with the Federal Equal Protection Clause

In the second half of the twentieth century, however, the Washington Supreme Court began routinely conflating the Privileges or Immunities Clause with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[100] Although the court had done so on occasion in earlier cases,[101] the practice became increasingly common beginning in the 1960s. By the 1990s, the court was referring to the two clauses as "substantially similar"[102] and "substantially identical."[103]

The court made this move notwithstanding the fact that Washington's Privileges or Immunities Clause is a direct descendant of Indiana's clause, which pre-dated the federal Equal Protection Clause by more than a decade, and despite the fact that the only textual similarity between Washington's clause and the Equal Protection Clause is that both use some derivative of the word "equal."

Arguably closer linguistically to Washington's Privileges or Immunities Clause is the Privileges and Immunities Clause of Article IV, § 2, of the U.S. Constitution ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). But, for reasons that are unclear, the court deemed the Equal Protection Clause the appropriate touchstone.

As the court increasingly relied on equal protection jurisprudence, it abandoned the rigorous scrutiny it had once applied in reviewing economic legislation under the Privileges or Immunities Clause. In its place, the court began applying the far-less searching standard that federal courts employ in resolving equal protection claims--namely, the "rational basis" test. Under that standard, the court would uphold a challenged law so long as it could determine *some* legitimate purpose for the law (even if not the legislature's actual purpose in passing it) and could conceive of *some* set of circumstances, no matter how unlikely, under which the law might advance that purpose.[104] The rational basis test is thus particularly deferential to the government. Not surprisingly, as it took hold in Washington's privileges or immunities jurisprudence, the pro-economic liberty rulings that had characterized the early 1900s fell by the wayside--never overruled, but essentially ignored.

D. A Call for Independent State Constitutional Analysis: *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*

A potential turn in the state's privileges or immunities jurisprudence emerged in 2004. That year, in *Grant County Fire Protection District No. 5 v. City of Moses Lake*,[105] the Washington Supreme Court held for the first time that the state's Privileges or Immunities Clause--at least in some circumstances--"requires a separate and independent constitutional analysis from the United States Constitution."[106] The plaintiffs in the case had challenged Washington's petition method of annexation, claiming it conferred special privilege on property owners in violation of the Privileges or Immunities Clause. In resolving the claim, the court undertook an extensive examination of the *Gunwall* factors to determine whether an independent state constitutional analysis of the clause was warranted.

In considering the first two *Gunwall* factors--the text of the state constitutional provision and the extent to which it differs from the parallel federal constitutional provision--the court compared the language of the Privileges or Immunities Clause to the Equal Protection Clause. Presumably focusing on the fact that the state clause prohibits government from "grant[ing]" privileges or immunities to certain citizens or corporations not equally available to all, while the federal clause prohibits government from "deny[ing]" equal protection of the laws to any person, the court concluded that

> the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.[107]

Thus, the court concluded, "one might expect the state provision would have a harder 'bite' where a small class is given a special benefit, with the burden spread among the majority."[108]

Regarding the third *Gunwall* factor--state constitutional history--the court observed that Washington had modeled its Privileges or Immunities Clause, in part, on Oregon's clause and that the Oregon Supreme Court gives its clause an interpretation independent of the Federal Constitution.[109] The court also noted that Washington's framers added to the clause a specific reference to corporations, which, according to the court, "our framers perceived as manipulating the lawmaking process."[110] This addition, said the court,

> demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority. Our framers' concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.[111]

In this light, the court concluded that the historical context, like the linguistic differences, of the Privileges or Immunities Clause, "requires independent analysis from the federal provision when the issue concerns favoritism."[112]

For the fourth *Gunwall* factor, preexisting state law, the court noted that "[t]he limitation on government to grant special privileges to certain individuals or groups was recognized prior to the adoption of the Washington Constitution in 1889"[113]--specifically in the Organic Act that governed the Washington Territory, which provided that "'legislative assemblies of the several Territories shall not grant private charters or especial privileges.'"[114] The court also examined several Washington Territorial Court and early Washington Supreme Court cases in which the focus had been on whether the challenged law awarded special privileges or undue favoritism, rather than on whether it denied equal protection or engaged in hostile discrimination.[115] "Therefore," the court concluded, "preexisting law seems to favor a separate analysis of article I, section 12."[116]

The court handled the fifth and sixth *Gunwall* factors in relatively short order. Regarding the fifth factor--structural differences between the state and federal constitutions--it noted that such differences "always support an independent analysis," then briefly considered those differences, emphasizing that while the federal constitution was "a grant of enumerated powers," the state constitution was a "limit [on] the sovereign power, which directly lies with" the people.[117] As for the sixth factor--whether the matter at issue is one of particular state interest or local concern--the court simply noted that annexation is a matter of state and local concern and is therefore "more appropriately addressed by the state constitution."[118]

Based on its examination of the *Gunwall* factors, the court concluded that Washington's Privileges or Immunities Clause "requires an independent constitutional analysis from the equal protection clause of the United States Constitution."[119] It then turned to the underlying issue in the case: whether the petition method of annexation violated the Privileges or Immunities Clause. The court concluded it did not, because the prerequisite to a violation of article I, § 12--namely, the existence of a privilege or immunity--was not present in the case. "[N]ot every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, § 12," the court explained.[120] To define the terms "privileges" and "immunities," the court relied on its 1902 opinion in *State v. Vance*, which, in turn, looked to federal law construing those terms as used in Article IV, § 2, of the U.S. Constitution. "[T]he terms 'privileges and immunities,'" the court held:

> pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.[121]

Because "[t]he statutory authorization to landowners to commence annexation proceedings by petition does not involve a fundamental attribute of an individual's national or state citizenship,"[122] the court concluded that there was no "privilege" or "immunity" implicated in the case and, therefore, no violation of the Privileges or Immunities Clause.[123]

Justice Sanders authored a separate opinion concurring with the majority's disposition of the case, "but not with all of its analysis."[124] According to Justice Sanders, "the true comparison" for Washington's Privileges or Immunities Clause is not the Equal Protection Clause, but rather the Privileges and Immunities Clause of Article IV, § 2, of the U.S. Constitution.[125] He observed that a consequence of the majority opinion's use of the Equal Protection Clause as the relevant touchstone was the opinion's preoccupation with "class based" favoritism. According to Justice Sanders, "[a]lthough a privilege or immunity violation may be class based, the text of article I, § 12 also protects 'any citizen' as well as 'class of citizens.'"[126]

Ultimately, however, the case came down to the same issue for Justice Sanders as it had for the majority: whether the "right of a property owner to petition for annexation of his or her property into a municipality

is either a 'privilege' or 'immunity' within the scope of article I, § 12."[127] To inform his interpretation of the terms "privilege" and "immunity," Justice Sanders, like the majority, looked to the court's opinion in *State v. Vance*, as well to Justice Bushrod Washington's opinion in *Corfield v. Coryell* and Justice Clarence Thomas's dissent in *Saenz v. Roe*.[128] Along with the majority, he concluded that the terms encompass those "'fundamental rights which belong to the citizens of the state by reason of such citizenship,'" and that the right to petition for annexation was not such a right.[129]

Grant County Fire Protection Dist. No. 5 is significant not because of its conclusion regarding annexation, but because of the explicit recognition--by both the majority and Justice Sanders in his concurring opinion--that the clause is not mere surplusage of the Equal Protection Clause of the U.S. Constitution. Instead, the court decided, the Privileges or Immunities clause is an independent state constitutional provision deserving of independent analysis and application. Moreover, all of the justices agreed that "privileges" and "immunities" are those fundamental personal rights of state citizenship.

Having broken this new ground, the opinion fell short of providing real guidance for future cases. Because of the court's conclusion that the right to participate in annexation proceedings was not a "privilege" or "immunity," there was no need to determine the degree of scrutiny to be applied in cases that *did* involve a "privilege" or "immunity." Would the court in future cases apply the Privileges or Immunities Clause strictly, striking down any law that conferred privileges or immunities to some while denying them to others, or would the court instead defer to the legislature and uphold such laws so long as they satisfied some more lenient application of judicial scrutiny?

E. Confusion in *Grant County's* Wake

In the six years and four significant Privileges or Immunities Clause decisions since *Grant County*, we are no closer to answering that critical question. If anything, the objective has receded further into the distance.

1. *Andersen v. King County*

The first significant Privileges or Immunities Clause case after *Grant County* was *Andersen v. King County*.[130] It involved a challenge to Washington's Defense of Marriage Act (DOMA), which limits marriage to one man and one woman. In upholding DOMA, then-Justice (now Chief Justice) Madsen, writing for a three-judge plurality comprised of herself, then-Chief Justice Alexander, and Justice Charles Johnson, adopted a considerably limited reading of *Grant County*. Seizing on its many statements regarding "favoritism" toward "minority" classes, Justice Madsen concluded that "an independent analysis applies *only* where the challenged legislation grants a privilege or immunity to a *minority* class, that is, in the grant of positive favoritism."[131] She reasoned as follows:

> [T]he concern underlying the state privileges and immunities clause, unlike that of the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a *minority class* ("a few"). Therefore, an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause.[132]

Because "DOMA does not involve the grant of a privilege or immunity to a favored minority class," Justice Madsen concluded, "we apply the same constitutional analysis that applies under the equal protection clause."[133] After determining that gay and lesbian persons were not a suspect class and that the fundamental right to marry does not include the right to same-sex marriage, she applied conventional rational basis review to DOMA and upheld it.[134]

In a separate opinion concurring in the plurality's judgment only, Justice Jim Johnson, joined by Justice Sanders, did apply an independent state analysis of the Privileges or Immunities Clause. Noting that "'[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well,'"[135] he argued that the text of the clause required a simple "two-part analysis":

> (1) Does a law grant a citizen, class, or corporation "privileges or immunities," and if so, (2) Are those "privileges or immunities" equally available to all?[136]

Resolution of the challenge to DOMA, he then argued, turned on the first prong of his proposed two-part

test. After a lengthy discussion of the usage of the terms "privilege" and "immunity" at common law and in early federal and state constitutional case law, he concluded, consistent with *Grant County*, that those terms refer only to fundamental rights of state citizenship.[137] Using historical understanding as his touchstone, he noted that while "many cases . . . support the conclusion that marriage between one man and one woman is [such] a right or privilege,"[138] the same was not true of same-sex marriage:

> [T]here is no basis whatsoever to conclude that same-sex "marriage" is historically fundamental in the sense that it does "belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign."[139]

Because there was no "privilege" or "immunity" at issue, Justice Johnson concluded, there could be no violation of the Privileges or Immunities Clause.

Justice Fairhurst, joined by Justices Bridge, Owens, and Chambers, dissented. While she agreed with Justice Johnson that the terms "privileges" and "immunities" refer to "'those fundamental rights which belong to the citizens of the state by reason of [their state] citizenship,'"[140] she disagreed with the way that his concurrence and the plurality opinion framed the right at issue. The relevant right, Justice Fairhurst argued, is "the right to marry the person of one's choice," which she deemed "fundamental" and, thus, a "privilege."[141]

That DOMA, in her opinion, granted a privilege to one class not equally available to others did not end Justice Fairhurst's inquiry. She proceeded to review DOMA under rational basis review, "assum[ing], like the plurality, that article I, § 12 of the Washington Constitution does not give greater protection than the federal equal protection clause in this situation."[142] She added, however, that she "would not foreclose the possibility that article I, § 12 provides greater protection."[143]

The version of rational basis review applied by Justice Fairhurst seemed at times akin to the conventional federal version (*e.g.*, requiring deference to the legislature;[144] allowing the purported rational basis to be based on "unsupported speculation"[145]) but, at others, appeared more exacting. For example, Justice Fairhurst argued that the rational basis test demands a "reasonable ground" for distinguishing "between those who fall within [a] class and those who do not,"[146] and requires that the relationship between the classification and the purported governmental interest not be "too attenuated."[147] Applying this rational basis test with "teeth,"[148] as she put it, Justice Fairhurst concluded that DOMA did not withstand scrutiny and consequently violated the Privileges or Immunities Clause.[149]

Justice Chambers, who had concurred in Justice Fairhurst's dissent, authored a separate dissenting opinion, which Justice Owens also joined, "to express [his] disagreement with the [plurality] opinion's analytical approach toward our state constitution's privileges and immunities clause."[150] Specifically, Justice Chambers took issue with Justice Madsen's cramped reading of *Grant County* and her conclusion that "unless a statute grants a privilege or immunity to a *minority* group," the court must "apply the tripartite approach the federal courts have developed to interpret the federal equal protection clause."[151] "There is nothing" in *Grant County*, he argued, "that should lead to the conclusion that the class receiving the benefit must be a minority class before we will independently examine our state constitution."[152] "While the privileges and immunities clause may have been inspired in part by preventing the State from granting privileges to a few," he concluded, "the clause protects all of us from privileges granted on unequal terms."[153]

For Justice Chambers, resolution of the privileges or immunities claim required a two-part test substantively identical to that urged by Justice Jim Johnson: "(1) has a law been passed granting a citizen, class, or corporation a privilege or immunity, and if so, (2) does that privilege or immunity belong equally to *all* of us?"[154] While he agreed that the terms "privileges" and "immunities" refer only to "those personal, fundamental rights that belong to each of us by virtue of our citizenship,"[155] he concluded that a privilege was, in fact, in play and had not been granted equally to all.[156]

In the end, the fractured court in *Andersen* did little to answer the unresolved issue from *Grant County*: namely, the degree of scrutiny that should apply when reviewing a law challenged under the Privileges or Immunities Clause.

More significantly, however, the justices' disagreement raised a new, even more fundamental, question: Does the independent state constitutional analysis envisioned by *Grant County* apply only where there is a grant of favoritism to a *minority* class, or does it apply in all circumstances? The three plurality justices--Madsen, Alexander, and Charles Johnson--opted for the more limited interpretation, while the concurring justices (Jim Johnson and Sanders) and two of the dissenters (Chambers and Owens) appeared to embrace the broader understanding. But because Justices Fairhurst and Bridge assumed, for purposes of the case, that the clause did not provide any protection beyond that provided by the Equal Protection Clause, they did not have to take a position on the question. Consequently, there was no consensus one way or the other.

2. *Madison v. State*

The next significant post-*Grant County* case involving the Privileges or Immunities Clause was *Madison v. State*,[157] a constitutional challenge to Washington's felon re-enfranchisement scheme. Specifically, the case objected to the requirement that a felon's legal financial obligations be paid in full before voting rights could be restored. The plaintiffs claimed that this condition violated the clause by conferring a privilege (voting rights) based on wealth.

In resolving the claim, the court was just as fractured as it had been in *Andersen*. A three-justice plurality again formed the lead opinion, which was authored by Justice Fairhurst and joined by Justices Owens and Bridge. Justice Fairhurst began by taking a position on the question she had avoided in *Andersen*: whether an independent state constitutional analysis is *always* warranted. She maintained that *Grant County* had already held that it was.[158] Thus, the task for the court was to conduct that analysis, which, for her, involved two inquiries: (1) whether the clause is "more protective of the claimed right *in th[is] particular context* than is the federal constitution"; and, if so, (2) "the scope of that protection."[159]

After concluding that "the right to vote is a privilege or immunity . . . protected by article I, section 12,"[160] Justice Fairhurst proceeded to conduct her independent analysis, asking "whether and to what extent the clause provides greater protection in the context of felon voting."[161] She explained that although the court had previously determined that the Washington Constitution provides greater protection to the franchise, it had done so "only in relation to individuals who currently possess the fundamental right to vote, not felons whose voting rights have been stripped."[162] In this light, she concluded that the Privileges or Immunities Clause "does not provide greater protection of voting rights for felons than does the equal protection clause of the federal constitution."[163]

Arguably Justice Fairhurst's conclusion in this regard was dicta, because she then disposed of the plaintiffs' challenge on a more fundamental ground: She concluded that the plaintiffs "had failed to [even] assert a privileges and immunities clause violation because Washington's disenfranchisement scheme does not involve a grant of favoritism."[164] This was the case, she noted, because the state "disqualifies voters on equal terms--that is, when individuals have been convicted of committing a felony"; and likewise "provides for the restoration of voting rights to felons on equal terms--that is, only after individuals have satisfied all of the terms of their sentences."[165] In this light, she concluded that a Privileges or Immunities Clause violation had not even been asserted.

Justice Madsen concurred in the judgment but wrote separately because, in her opinion, the plurality had failed to follow *Grant County*, which, as in *Andersen*, she construed as holding that "an independent analysis applies under article I, section 12 *only* where the challenged legislation grants a privilege or immunity to a *minority class*, that is, in the case of a grant of positive favoritism."[166] Because Washington's re-enfranchisement law did not grant positive favoritism to a minority class, she concluded that an independent state constitutional analysis was not warranted and that, therefore, the "court should apply the same constitutional analysis that applies under the equal protection clause of the United States Constitution"--namely, rational basis review.[167]

Justice Jim Johnson also wrote a concurring opinion, joined by Justice Sanders. Unlike Justice Madsen, he agreed with the plurality that an independent state constitutional analysis was warranted. But as in *Andersen*, he maintained that that analysis should begin and end with the "plain language" of the Privileges or Immunities Clause.[168] The plain language, he argued, required the

same two-part test he advocated in *Andersen*: "(1) Does a law grant a citizen, class, or corporation 'privileges or immunities,' and if so, (2) Are those 'privileges or immunities' equally available to all?"[169] Unlike the plurality, he did not view the re-enfranchisement scheme as implicating a "privilege"--that is, a fundamental right of state citizenship.

Relying on the *Corfield v. Coryell*'s classic definition of the term as used in Article IV, § 2, of the U.S. Constitution, Justice Johnson maintained that "the 'privilege' of the elective franchise is inherently limited in scope according to the manner in which it is 'regulated and established by the laws or constitution of the state'" in which it is to be exercised.[170] "In Washington," he noted, "the right to vote is regulated and established by multiple constitutional provisions," including a provision that "'[a]ll persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise.'"[171] Thus, he concluded that "no 'privilege' is implicated by Washington's re-enfranchisement scheme," because "'the elective franchise, as regulated and established by the . . . constitution of [Washington]' does not extend to felons."[172]

Justice Chambers, along with Justice Charles Johnson, joined a dissent authored by Chief Justice Alexander, who would have held the re-enfranchisement scheme in violation of the Equal Protection Clause. But as in *Andersen*, Justice Chambers wrote a separate dissenting opinion to respond to Justice Madsen's contention that the Privileges or Immunities Clause warrants an independent state analysis only in situations where there is a positive grant of favoritism to a *minority* class. "The text of our constitution," he argued, "does not distinguish between a statute that gives extra helpings of privileges to majorities or to minorities," and "[n]othing in the *Grant County* opinion . . . says otherwise."[173] He noted in a footnote:

> It is probably true that the *motivation* for our own privileges and immunities clause was our founders' well founded desire to establish a state where government benefits were not handed out to the special favorites of the legislature. But, as I have said before, the clause is plainly written to have a broader application.[174]

Justice Chambers would therefore have held the re-enfranchisement statute in violation of the clause, because, in his opinion, it effectively "restricts re-enfranchisement to those rich enough to buy it."[175]

In short, the court was just as fractured in *Madison* as it had been in *Andersen*. But at least one open issue seemed closer to resolution: Whereas, in *Andersen*, there had been no consensus on whether the Privileges or Immunities Clause warrants independent state constitutional analysis in all circumstances, a majority of the justices in *Madison* (albeit in three separate opinions) concluded that it does. The two justices who had taken no position on the matter in *Andersen*--Fairhurst and Bridge--now joined Justices Jim Johnson, Sanders, Chambers and Owens to form a majority on the issue.

Nevertheless, *Madison* did little to resolve the nature and content of that independent analysis. On one hand, Justices Fairhurst, Owens, and Bridge seemed to suggest that the analysis may involve different considerations from case to case. Specifically, they maintained that whether and to what extent the protections afforded by the clause differ from those provided by the Equal Protection Clause will turn on the "particular context" of the case.[176] On the other hand, Justices Jim Johnson and Sanders (as well, apparently, as Justice Chambers) seemed to suggest that the analysis will be the same in each case. Guided by the text of the clause, it simply involves answering two questions: (1) Does the law grant a "privilege" or "immunity" to a citizen, class of citizens, or corporation? (2) If it does, is the privilege or immunity equally available to all?[177]

3. *Ventenbergs v. City of Seattle*

The next significant privileges or immunities case in the post-*Grant County* era was *Ventenbergs v. City of Seattle*,[178] which involved a challenge to Seattle's grant of two exclusive contracts for the hauling of construction, demolition, and land clearing waste. An independent hauler challenged the grant, which went to two large corporations.

The majority opinion, authored by Justice Bridge and joined by Justices Owens, Fairhurst, Madsen, Chambers, and Charles Johnson, disposed of the Privileges or Immunities Clause claim in short order. Recalling *Grant County*'s observation that "'not every statute authorizing

a particular class to do or obtain something involves a 'privilege' subject to article I, section 12," and that the terms "privileges" and "immunities" "'pertain *alone* to those fundamental rights which belong to the citizens of the state by reason of such citizenship,'"[179] Justice Bridge began (and ended) her analysis by asking whether the right at issue was "fundamental." She maintained that the relevant right was not, as the plaintiff had argued, the "right to hold specific private employment,"[180] because hauling construction, demolition, and land clearance waste is a "governmental service":

> The type of employment that Ventenbergs seeks is not private--it is in a realm belonging to the State and delegated to local governments. . . . [B]ecause the power to regulate solid waste collection lies entirely with the legislature and local governments, Ventenbergs has no fundamental right of citizenship to provide this governmental service.[181]

By characterizing waste hauling as a "governmental service," she disposed of the Privileges or Immunities Clause claim and was not forced to determine whether the right to hold private employment "is fundamental for purposes of our privileges and immunities clause."[182]

Justice Sanders authored a lengthy dissent (joined by Chief Justice Alexander and Justice Jim Johnson), that characterized the exclusive waste-hauling contracts as government-created "private monopol[ies]."[183] He traced the lineage of state constitutional prohibitions on exclusive privileges, arguing that they were "imbued with natural law principles of liberty and equality . . . set . . . down in a positive law proscription that no man, or set of men, may be granted privileges not granted to everyone in the community."[184] He noted that in the decades preceding Washington's admission to the Union, many states amended their constitutions to specifically curb the granting of special, or exclusive, privileges, and he argued that the stimulus for this move, was "'fraud and corruption in public-land dealings and in the getting and granting of franchises, subsidies, and rate privileges for turnpikes, canals, river improvements, toll bridges, and, of course, especially railroads and street railways.'"[185]

Against this backdrop, Justice Sanders turned to the specific climate in Washington at the time of the 1889 constitutional convention. He focused on the territorial legislature's propensity for "special" legislation, by which it granted monopolies and special charters to favored business interests. "By the time the constitutional convention convened," Justice Sanders noted,

> the purpose of the special privileges and immunities prohibition was evident: it was "a response to perceived manipulation of lawmaking processes by corporate and other powerful minority interests seeking to advance their interests at the expense of the public." The framers drafted the constitution with the purpose of protecting "personal, political, and economic rights from both the government and corporations, and they strove to place strict limitations on the powers of both."[186]

Having considered its history, Justice Sanders turned to the meaning of the Privileges or Immunities Clause at the time it was adopted. Drawing from an 1889 legal dictionary, he concluded that the "plain meaning" of the clause was to prohibit the legislature from "derogating the common right of all for the benefit of one 'citizen, class of citizens, or corporation.'"[187] Seattle had done just that, he maintained: It had "carve[d] out the common right to collect [construction, demolition, and land clearing] waste for the benefit of two corporations," in effect "grant[ing] a monopoly to those two corporations."[188]

"Keeping in mind the text of the clause as well as its historical and precedential context," Justice Sanders continued, "we must determine the contours of the claimed fundamental right which constitutes a privilege of state citizenship."[189] Unlike the majority, he maintained that the relevant right was "the right to earn a living in a lawful occupation free from unreasonable governmental interference."[190] To assess whether Seattle's interference with Ventenbergs' ability to earn a living was or was not reasonable, he relied on the early Washington Supreme Court cases that had applied the fairly rigorous "real and substantial relation" test in assessing economic regulation. He asserted that "[w]here an economic benefit or privilege is granted to a small and select group, as it is here, the classification must be based on 'real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made.'"[191] Applying that standard, he concluded that Seattle's conduct in forcing all but the

two contract holders from the market was anything but reasonable. The factual record in the case, he argued, made clear that "the city's only rationale for the exclusivity agreement" was "pure economic protectionism," which "is inherently unreasonable."[192] He therefore would have held Seattle's actions in violation of the Privileges or Immunities Clause, "which was adopted to combat this exact sort of unholy alliance between government and big business."[193]

While the court was far less fractured in *Ventenbergs* than it had been in *Andersen* and *Madison*, a new source of uncertainty nevertheless became apparent. While the entire court had agreed that the terms "privileges" and "immunities" refer to fundamental rights of state citizenship, the justices could not agree on how to frame the particular right at issue. That disagreement was significant, because the way in which the right was framed became the dispositive issue of the case. *Ventenbergs* therefore suggested that future cases would turn in large part on the level of generality at which the justices framed the right asserted to be a "privilege" or "immunity."

4. *American Legion Post # 149 v. Washington State Department of Health*

The most recent privileges or immunities case of significance was *American Legion Post # 149 v. Washington State Department of Health*,[194] a challenge to a statewide ban on smoking in places of employment. A chapter of the American Legion challenged the ban, arguing, among other things, that it violated the Privileges or Immunities Clause by treating certain similarly situated businesses differently than others--for example, by allowing smoking in hotels, but not in other establishments.

Justice Fairhurst authored the majority opinion, which was joined by Chief Justice Alexander and Justices Madsen, Owens, and Bridge. She began by noting that because the court had already examined the *Gunwall* factors in prior cases and determined that the Privileges or Immunities Clause warrants a constitutional analysis independent of the Equal Protection Clause, it was unnecessary to go through the *Gunwall* process again.[195] Consistent with her approach in *Madison*, Justice Fairhurst asserted that the independent analysis begins with an inquiry into whether, "*in [this] particular context*," the "'provision in question extends greater protections for the citizens of this state.'"[196] In answering that question, she explained, the court should "look at the language of the constitutional provision in question and the historical context surrounding its adoption."[197]

Justice Fairhurst concluded that no privilege or immunity was implicated by the smoking ban. While she agreed that "engaging in business . . . is a privilege for purposes of article I, section 12"[198] (as the American Legion post had argued it was), she disagreed that this was the right at issue:

> [T]he Act does not prevent any entity from engaging in business, which is a privilege for purposes of article I, section 12. Instead, the Act merely prohibits smoking within a place of employment. Smoking inside a place of employment is not a fundamental right of citizenship and, therefore, is not a privilege. Because there is no privilege involved, we hold there is no violation of article I, section 12.[199]

Although there were four dissenting justices, none addressed the Privileges or Immunities Clause claim. Therefore, the case did not compound the uncertainties that already existed in the wake of *Grant County* and its progeny, but it did confirm what had become apparent in *Ventenbergs*: that the viability of a Privileges or Immunities Clause claim will turn in large part on how the court chooses to frame the right at issue in the case.

F. Conclusion

When it was decided, *Grant County* seemed to initiate a renaissance in state Privileges or Immunities Clause jurisprudence. But six years down the road, the extent of that renaissance is unclear. On one hand, after considerable initial uncertainty, it now appears that a majority of justices believes that the independent constitutional analysis called for in *Grant County* should apply in all cases, not just those involving a positive grant of favoritism to a *minority* class.

Yet the nature and content of that analysis is no clearer today than it was when *Grant County* was decided. Some of the justices, including Jim Johnson, Sanders, and, perhaps, Chambers, appear to believe that the independent analysis involves two simple questions, derived from the text of the clause itself: "(1) Does

a law grant a citizen, class, or corporation 'privileges or immunities,' and if so, (2) Are those `privileges or immunities' equally available to all?"[200] Others, including now-Chief Justice Madsen and Justices Fairhurst, Alexander, and Owens, also appear to endorse a two-part test, but one that seems to depend to a greater degree on the circumstances of the case: (1) Is the clause "more protective of the claimed right *in th[is] particular context* than is the federal constitution"?; and, if so, (2) What is "the scope of that protection"?[201] Justice Bridge lent a fifth, and, thus, majority, vote to the latter approach in *American Legion*, but she has since left the court.

Finally, it seems that even though the justices agree, at least conceptually, on one point--namely, the definition of the phrase "privileges or immunities"--there is sufficient "wiggle room" in the application of that definition that justices will likely continue to disagree on whether a "privilege" or "immunity" is implicated in any given case. To clarify its jurisprudence in this area, the court may develop a more consistent approach and resolve the other lingering uncertainties in future privileges or immunities cases.

III. The Protection of Individual Rights

The first two sections of this paper focused on the possibility that the government will inflate its powers at the expense of private initiative, or favor some interests at the expense of others. In this final section we examine the limits that the state constitution places on the power of state and local government to infringe more personal liberties. Here the conflict between state power and individual freedom is more easily recognized, but the test for resolving such conflicts is similarly elusive.

The Washington State Constitution is emphatic in its defense of individual liberty. Article I opens by proclaiming: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."[202] As the last section of Article I (before it was amended), the constitution's framers included an admonition: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government."[203]

Given the constitution's heavy emphasis on individual liberty, it is appropriate to review the Washington State Supreme Court's record on this front, particularly in four areas: free speech, protection from invasion of one's private affairs, religious liberty, and the right to bear arms.

A. The Right to Free Speech

Article I, § 5 of the Washington Constitution states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."[204] It has long been settled that given the textual difference of the state and federal free speech provisions, courts should conduct an independent interpretation of the state constitution under *State v. Gunwall*.[205] This is not to say that the state provision will always afford greater protection than the First Amendment; only that an independent analysis must be performed.

Washington courts have interpreted the state and federal provisions to be functionally equivalent as applied to obscene speech,[206] speech in nonpublic forums,[207] commercial speech,[208] and defamation.[209] In other contexts, courts have found that the Washington Constitution grants more expansive protection of the right to free speech than does the U.S. Constitution. For example, time, place, and manner restrictions in a public forum are only upheld upon a showing of a "compelling state interest," compared with a "substantial governmental interest" which is adequate under First Amendment analysis.[210] Additionally, unlike the First Amendment, the Washington Constitution categorically prohibits prior restraints on constitutionally-protected speech.[211]

State courts have wrestled with how competing private interests should be balanced, as well as with the issue of whether state action is a prerequisite for a violation of the state constitution's free speech protections. Such issues arise in cases where a private corporation (such as a mall or grocery store) imposes restrictions on activities such as protesting or signature-gathering. While the First Amendment to the U.S. Constitution appears directed at government actors ("Congress shall make no law . . . abridging the freedom of speech,"[212] Article I, § 5 contains no such limitation.

In *Sutherland v. Southcenter Shopping Center, Inc.*[213] the Court of Appeals concluded that initiative supporters had a constitutional right to solicit signatures at private shopping malls, so long as the practice did not unduly

interfere with normal use of the private property. The state Supreme Court addressed the same question in *Alderwood Associates v. Washington Environmental Council*,[214] in a closely divided opinion concerning whether initiative supporters were entitled to gather signatures at a privately owned shopping center. In *Alderwood* a four-member plurality held that both article I, § 5 and the constitution's initiative provision protected signature gathering on private property. A fifth justice, Justice James Dolliver, concurred with the result, but declined to find that signature gathering on private property was afforded protection under Article I, § 5, since no state action was involved.

Eight years later, in *Southcenter Joint Venture v. National Democratic Policy Committee*,[215] the Supreme Court reviewed article I, § 5 to determine whether a *political* organization has a right to solicit contributions and sell literature in a privately owned shopping mall under the Washington Constitution. There, a majority on the Supreme Court endorsed Justice Dolliver's view in *Alderwood*, that "the free speech provision of our state constitution protects an individual only against actions of the State; it does not protect against actions of other private individuals."[216]

In recent years the Supreme Court has addressed several free speech cases, often with Chief Justice Barbara Madsen playing a significant role in the decision.

In *Rickert v. Public Disclosure Com'n*[217] candidate Marilou Rickert challenged incumbent Senator Tim Sheldon in an election for state senate. The Public Disclosure Commission fined Rickert for a mailing containing false information, a violation of a state law that prohibited false statements about a candidate in political advertisements. Rickert appealed, challenging the law as unconstitutional, and the Supreme Court agreed. Writing for the majority, Justice James Johnson wrote that the state advanced no compelling interests in support of the law, and that it was not narrowly tailored to further any compelling interests. "[T]he best remedy for false or unpleasant speech is more speech, not less speech. The importance of this constitutional principle is illustrated by the very real threats to liberty posed by allowing an unelected government censor like the PDC to act as an arbiter of truth."[218] Justice Madsen dissented, arguing that while the First Amendment embodies the nation's commitment to robust debate, "the use of calculated falsehood is not constitutionally protected."[219]

The Supreme Court struck down restrictions on placing messages on the doors of public housing units in *Resident Action Council v. Seattle Housing Authority*.[220] The Seattle Housing Authority operated low-income public housing, with approximately 5,300 units in Seattle. Tenants agree to abide by certain "house rules" which are incorporated into their leases. The housing authority issued a rule banning all signs, flyers, placards, advertisements "or similar material" from exterior walls, interior common area walls and doors, or unit doors facing common hallways or outside. A nonprofit organization of elected tenant representatives sued, alleging the rule violated the United States and Washington Constitutions. Justice Charles Johnson, writing for the Supreme Court, concluded that the rule restricted the First Amendment free speech rights of tenants, and that the housing authority could adopt more temperate measures to address its aesthetic concerns.[221] Justice Barbara Madsen dissented, reasoning that because the housing authority property was a nonpublic forum, like a jail, military base, or internal school district mail system, the housing authority was justified in imposing regulations on speech.[222]

Most recently in *Bradburn v. North Cent. Regional Library Dist.*,[223] the Washington Supreme Court answered a certified question from the U.S. District Court for Eastern Washington regarding whether a library's Internet filtering policy violates the free speech protections in the Washington Constitution. The North Central Regional Library District maintained Internet filters on its computers to block websites and images considered "harmful to children." The Supreme Court, with Chief Justice Barbara Madsen writing, concluded that a library can filter Internet access for all patrons, including adults, without violating the Washington Constitution. Madsen reasoned that the library's filtering policy and practice were not prior restraints on speech. "A public library has traditionally and historically enjoyed broad discretion to select materials to add to its collection of printed materials for its patrons' use. We conclude that the same discretion must be afforded a public library to choose what materials from millions of Internet sites it will add to its collection and make available to its patrons."

Justice Tom Chambers dissented, writing: "Simply put, the State has no interest in protecting adults from constitutionally protected materials on the Internet. These policies do exactly that. The filter should be removed on the request of an adult patron."

B. Invasion of Private Affairs

Perhaps the most striking difference in the approach to a state constitutional provision in comparison to the U.S. Constitution has been with respect to the right to privacy. The Washington Constitution provides: "No person shall be disturbed in his private affairs or his home invaded, without authority of law."[224]

Washington courts have not always recognized a significant difference in the state constitution. Despite the marked differences between § 7 and the Fourth Amendment of the U.S. Constitution, early state decisions tracked closely with federal Fourth Amendment decisions, particularly after the U.S. Supreme Court held the Fourth Amendment was incorporated against the states in *Mapp v. Ohio*.[225] The state Supreme Court hinted at the need for independent analysis under state constitutional grounds in *State v. Hehman*,[226] when it held that a custodial arrest for a minor traffic violation was unjustified and impermissible if the defendant has signed a written promise to appear in court. The court noted that such arrests may be allowable under federal decisions, but that state courts can afford defendants greater rights.[227]

In 1984 the Supreme Court explicitly noted that the textual difference between the state and federal provisions required separate analyses.[228] Under the Fourth Amendment, the government is only prevented from conducting "unreasonable" searches and seizures, a standard that can change with technology and public perception. By contrast, the state constitution flatly prohibits invasions of privacy without authority of law.[229]

Two years later in *State v. Gunwall*[230] the Supreme Court considered whether phone records were obtained from the defendant in a way that violated the Washington Constitution's guarantee of privacy. In deciding the case the Supreme Court developed the criteria it would use in determining whether the restrictions on state and local government imposed by the Washington Constitution warrant analysis independent of those imposed by the United States Constitution in the Bill of Rights. Based on that analysis the court held that police had illegally obtained the defendant's phone records but found that there was independent evidence that supported the conviction. More recently the court has relied upon a two-part analysis of whether or not article I, § 7 has been violated: (1) whether the action complained of constitutes a disturbance of one's private affairs, and if so, (2) whether authority of law justifies the intrusion.[231]

The independent analysis employed in the privacy cases following the *Gunwall* case has resulted in outcomes that reflect greater protection for the right to privacy than is enforced under the federal constitution. For example, courts have found that § 7 protects against unwarranted searches of a person's garbage cans,[232] government invasion of bank and telephone records,[233] and unwarranted searches of vehicles, even those driven by a felon on work release.[234]

More recently, the Supreme Court refused to permit use of evidence obtained by a search initiated by a person who was not a state actor.[235] In *Eisffeldt* the defendant left a key to his house for a repairman to fix a diesel spill in the living room. The repairman noticed what he thought was marijuana in the garage and called the police. When the police arrived he led them through the house and into the garage. After observing the marijuana a police officer obtained a search warrant, leading to the defendant's arrest and conviction of manufacturing a controlled substance. Writing for the majority, Justice Sanders acknowledged that the Federal Constitution permits a warrantless search by a state actor if it does not expand the scope of the private search. But Sanders wrote that this doctrine is inapplicable under the Washington Constitution, resulting in a reversal of the defendant's conviction.

In *State v. Winterstein*[236] the defendant was convicted of unlawful manufacture of methamphetamine after his probation officer conducted a warrantless search of his residence. The Court of Appeals had held that, even if the search was illegal, the evidence was still admissible under the "inevitable discovery" doctrine.[237]

Writing for the Supreme Court's majority, Justice Stephens rejected the overturned inevitable discovery doctrine and reversed the conviction. Contrasting

cases interpreting the Fourth Amendment to the U.S. Constitution, Justice Stephens labeled the doctrine "speculative" and incompatible with the state constitution's "nearly categorical exclusionary rule."[238]

C. Religious Liberty

As it does with privacy, the Washington Constitution describes freedom of religion in seemingly unconditional terms: "Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion. . . ."[239] As in the privacy cases, Washington courts have generally viewed these constitutional provisions as requiring more extensive protections for religious liberty than those that are required by the U.S. Constitution.

This tendency toward independent interpretation was accelerated by the U.S. Supreme Court's decision in *Employment Division v. Smith*,[240] in which the Court retreated from the "compelling interest" test that had previously been applied to free exercise cases.[241] Instead of requiring the state to show a compelling interest in restricting religious liberty, *Smith* permitted enforcement of neutral laws of general applicability.[242] The Washington State Supreme Court found the approach in *Smith* incompatible with the Washington Constitution and continued to employ the compelling interest standard.[243]

Despite the appearance of showing special solicitude to the free exercise of religion, the Washington Supreme Court has applied the "compelling interest" standard inconsistently, particularly in cases involving land use regulations. In *First Covenant Church v. City of Seattle*, Seattle designated the church a historical landmark and imposed specific controls upon the church's ability to alter the building's exterior, in addition to the provisions of the city's landmarks preservation ordinance. The Supreme Court held that the state must demonstrate it has a compelling interest in taking action that burdens the exercise of religion. When the City of Walla Walla imposed a "cooling off period" before a religious organization could demolish an historic or architecturally significant structure, the Supreme Court held it to be unconstitutional[244]: "A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, § 11, if it indirectly burdens the exercise of religion."[245]

Then in 2000 the Court apparently experienced a conversion of sorts, upholding a county's burdensome permitting process for churches in rural areas.[246] Clark County adopted a land use plan that required churches, among other nonconforming uses, to obtain a special conditional use permit to operate. The application process involved preparing and submitting, at the church's expense, a nine-volume set of reports and plans for a pre-application conference, in addition to a more detailed eight-volume application--all with no guarantee the permit would be granted. Writing for the majority, Justice Alexander held that the free exercise protection Washington Constitution was not offended by the requirement that churches apply for a conditional use permit. Relying on the words of Justice Utter, he wrote, "[Courts] ought to require a very specific showing of hardship to justify exemption from land use restrictions."[247]

Justice Sanders wrote a biting dissent, calling the ordinance "blatantly unconstitutional" and said the majority opinion "sets a precedent not only dangerous to religious liberty but inconsistent with our enjoyment of other civil liberties as well."[248]

The Court reached a result more accommodating to religious liberty in *City of Woodinville v. Northshore United Church of Christ*,[249] but at the same time left *Open Door* undisturbed. In 2006, tent city organizers approached Northshore United Church of Christ about locating a tent city on church property. The church agreed and submitted an application to the City of Woodinville for a temporary permit. A short-term moratorium on temporary use permits was currently in place, and the city refused to process the application. This time Justice James Johnson wrote for the majority, finding that constitutional protections only applied when the burden on religious exercise was "substantial," but that the city's total refusal to process a permit application rose to this level. "[T]he City's total moratorium placed a substantial burden on the Church. It prevented the Church from even applying for a permit. It gave the Church no alternatives. The moratorium lasted a full year . . . . The City failed to show that the moratorium was a narrow means for achieving a compelling goal. Therefore, the

City's action constituted a violation of article I, § 11 of our constitution."[250]

Justice Sanders concurred in the result but wrote separately to object to "the majority's errant and dangerous assumption that the government may constitutionally be in the business of prior licensing or permitting religious exercise anymore than it can license journalists."[251]

As for analyzing whether a governmental act results in an impermissible establishment of religion, state courts have sometimes applied the Washington Constitution in a manner consistent with the Establishment Clause of the Federal Constitution. However, particularly in matters affecting education, the court has held that the Washington Constitution demands greater separation than is required by the Establishment Clause.[252]

D. The Right to Bear Arms

Academics have long debated whether the Second Amendment to the U.S. Constitution established an individual or corporate right to keep and bear arms. The U.S. Supreme Court recently settled the question and emphatically stated that the Second Amendment conferred an individual right to keep and bear arms in the case of *District of Columbia v. Heller*.[253]

This question was largely precluded in Washington State, where the constitutional delegates chose to explicitly recognize the right to bear arms: "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."[254]

Over the years courts have diluted the absolute nature of this provision by allowing the State to regulate the possession of guns under its police power. In 1945, the Washington State Supreme Court held that the constitutional guarantee in article I, § 24 is subject to "reasonable regulation."[255] What is "reasonable" is determined by (1) whether "the regulation be reasonably necessary to protect the public safety, health, morals and general welfare" and (2) whether the regulation is "substantially related to the legitimate ends sought."[256] While blanket prohibitions are generally not upheld, less invasive regulations face a lower threshold of review.

For example, in *Second Amendment Foundation v. City of Renton*, Renton adopted an ordinance that limited the possession of firearms in establishments where alcoholic beverages are dispensed by the drink. The Second Amendment Foundation and a group of licensed handgun owners challenged the municipal ordinance. The Court of Appeals held that the right to bear arms is only "minimally reduced" by prohibiting guns in bars, while the law advanced a significant public safety interest by reducing intoxicated, armed conflict.[257]

In *State v. Spencer*,[258] the appeals court reviewed a state law that prohibited carrying a weapon in a fashion that would cause alarm. A King County man was convicted under this statute after he was seen walking his dog in a residential area while carrying an AK-47 semi-automatic rifle with ammunition clip attached, *à la* John Rambo. The defendant argued the law constituted an effective ban on carrying weapons as it is unclear which weapons might cause alarm. The court ruled that the statute was "narrowly drawn, and it promotes a substantial public interest,"[259] while balancing the individual right to bear arms.

State law allows sentence enhancements when a defendant is armed with a deadly weapon during commission of the crime, and these enhancements are not unconstitutional. The defendant is considered armed during commission of a crime if a weapon is "easily accessible and readily available for use."[260] The State must establish a nexus between the weapon, the defendant, and the crime. Recently, however, the Supreme Court has allowed a looser application of the nexus rule. In *State v. Schelin*,[261] for example, a defendant convicted of manufacturing marijuana was standing at the foot of the stairs to his basement as police executed a search warrant. After his arrest, police discovered a loaded weapon approximately six to ten feet from where he had first been seen. A divided Supreme Court held that close proximity to the weapon at the time of arrest justified an enhanced sentence.[262]

Justice Sanders dissented in *Schelin*, disagreeing with the majority's claim that that the right guaranteed in article I, § 24 was subject to "reasonable regulation." He reasoned that the existing limitations in article I, § 24 were the only limitations that the framers of the state constitution were willing to impose. By including some limitations they presumably rejected others.[263] Moreover, a comparison with other state constitutional

provisions undercuts the majority's claims; unlike the qualified language in the provisions found in other state constitutions,[264] the Washington Constitution leaves no room for abridgement in the name of the police power.[265]

More recently *State v. Sieyes*[266] presented the court with an opportunity to recalibrate its analysis of gun regulations. Christopher Sieyes, 17, was charged and convicted for unlawfully possessing a loaded .380 semiautomatic handgun--a violation of RCW 9.41.040(2)(a)(iii), which generally prohibits children under the age of 18 from possessing firearms. The questions in the case were whether the Second Amendment to the United States Constitution applies to the states via the Fourteenth Amendment, and whether the state law banning possession by minors unconstitutionally infringes on the right to bear arms protected under the U.S. and Washington Constitutions.[267]

The Washington Supreme Court, with Justice Sanders writing for the majority, held that the Second Amendment applies to the states. Justice Sanders also noted that the Washington Constitution explicitly guarantees the right to bear arms.[268]

The Court then turned to the question of the constitutionality of the prohibition on minor possession of firearms. Significantly, the Court voiced agreement with the analysis used in *Heller*--that strict scrutiny would invalidate most infringements on the Second Amendment, while a rational basis test would set too low a standard to protect the right to bear arms. "We follow *Heller* in declining to analyze RCW 9.41.040(2)(a)(iii) under any level of scrutiny. Instead we look to the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on children by upholding the statute."[269] Justice Sanders acknowledged the Court's--as he put it--"occasional rhetoric" about the "reasonable regulation" of firearms, but he stated the Court has never settled on a precise standard of review.[270]

However, the Court found that Sieyes made inadequate arguments on whether the law was unconstitutional and whether the state constitution should be interpreted independently under *Gunwall.* Thus, the Court declined to address the constitutionality of the law. "In sum appellant offers no convincing authority supporting his argument that Washington's limit on childhood firearm possession violates the United States or Washington Constitutions. Accordingly we keep our powder dry on this issue for another day."[271] The case was remanded for consideration of additional issues.

Justice James Johnson dissented, writing that "the majority disregards our long-standing national tradition allowing younger citizens to bear arms,"[272] and he argued strict scrutiny is the appropriate standard of review for a challenge to a statute restricting one's constitutional rights. Using this analysis, Justice Johnson would have invalidated the law.

Conclusion

In each of the three sections of this paper we identified recent cases in which the Washington Supreme Court confronted provisions of the state constitution that place boundaries on the power of government. As the opinions of the various justices illustrate, the Court has not always achieved consensus as to what the state constitution requires or permits. In fact, on some key points there is no clear direction as to how the unique authority of the state constitution (as distinguished from the federal constitution) should be understood. In the selection of Washington Supreme Court justices, there needs to be a more intensive and widespread public discussion about whether the Court needs to be more definitive in defining the rights-based parts of our state constitution. There is, at present, much division and ambiguity. And, as the discussion proceeds, we hopefully also will see a healthy exchange over whether the scope of the protections afforded by the Court meet the mark in terms of the text and meaning of the state constitution.

Endnotes

1 U.S. Const. amd. 5.

2 545 U.S. 469 (2005).

3 The corporation the city was attempting to accommodate abandoned its plans to redevelop the property and in fact abandoned the city altogether. Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Suit*, New York Times, 11/13/09, at A1.

4 One source of recurring confusion is the relationship between the Bill of Rights (the first ten amendments to the constitution) and the federal government. While the Bill of Rights was

originally drafted to constrain the power of the *federal* government ("Congress shall make no law . . . "), the passage of the 14th amendment after the Civil War eventually led the U.S. Supreme Court to interpret its restrictions ("No state shall . . . ") as having incorporated the rights enumerated in the Bill of Rights. This is known as the "incorporation doctrine," and while its scope is still being debated (and litigated), it is the basis upon which federal constitutional limitations are applied to the actions of state and local governments.

5 106 Wash.2d 54, 720 P.2d 808 (1986).

6

> The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

Gunwall, 106 Wash.2d at 58, 720 P.2d at 811. An example of the application of the six-factor test to the Privileges or Immunities Clause is provided in § II(D), *infra*.

7 See RCW 4.04.010 ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.").

8 *See* Enabling Act, ch. 180, § 8, 25 Stat. 679 (1889).

9 Wa. Const. art. I, § 1.

10 155 Wash.2d 612, 121 P.3d 1166 (2005).

11 155 Wash.2d at 629, 121 P.3d at 1174-75.

12 155 Wash.2d at 629, 121 P.3d at 1176 (citations omitted).

13 155 Wash.2d at 629, 121 P.3d at 1176.

14 155 Wash.2d at 631, 121 P.3d at 1176.

15 155 Wash.2d at 636 n.19, 121 P.3d at 1178 n.19.

16 155 Wash.2d at 633, 121 P.3d at 1177.

17 156 Wash.2d 403, 128 P.3d 588 (2006).

18 156 Wash.2d at 411 n.2, 128 P.3d at 593. Justices Charles Johnson, Madsen, Bridge and Owens joined the opinion for the court.

19 156 Wash.2d at 411, 128 P.3d at 593.

20 156 Wash.2d at 411-12, 128 P.3d at 593.

21 156 Wash.2d at 418, quoting *In re Petition of Port of Grays Harbor*, 30 Wash.App. 855, 864, 638 P.2d 633 (1982).

22 156 Wash.2d at 419, 128 P.3d at 597, quoting *State v Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994).

23 156 Wash.2d at 421, 128 P.3d at 598.

24 156 Wash.2d at 421, 128 P.3d at 598.

25 159 Wash.2d 555, 151 P.3d 176 (2007).

26 159 Wash.2d at 575, 151 P.3d at 186 (citing *HTK*).

27 159 Wash.2d at 573, 151 P.3d at 185.

28 159 Wash.2d 577 n.23, 151 P.3d 187 n.23.

29 155 Wash.2d at 647, 121 P.3d at 1185.

30 155 Wash.2d at 647, 121 P.3d at 1185.

31 155 Wash.2d at 648, 121 P.3d at 1185, quoting Wa. Const. art. I, § 16 (emphasis added by Justice Johnson).

32 155 Wash.2d 648, 155 P.3d 1185.

33 155 Wash.2d 648, 155 P.3d 1185.

34 155 Wash.2d 648 n.10, 121 P.3d 1185 n.10, quoting *Ino Ino, Inc. v. City of Bellevue*, 132 Wash.2d 103, 120, 937 P.2d 154 (1997).

35 156 Wash.2d at 426, 128 P.3d at 601.

36 156 Wash.2d at 429, 128 P.3d at 602.

37 156 Wash.2d at 436, 128 P.3d at 606.

38 156 Wash.2d at 429, 128 P.3d at 602.

39 156 Wash.2d at 430, 128 P.3d at 603.

40 156 Wash.2d at 437, 128 P.3d at 606, quoting *State ex rel. Postal Tel.-Cable Co. v. Superior Court for Grant County*, 64 Wash. 189, 195, 116 P. 855, 858 (1911).

41 159 Wash.2d at 603, 151 P.3d at 200.

42 159 Wash.2d at 603, 151 P.3d at 199.

43 96 Wash.2d 616, 627, 638 P.2d 549 (1981).

44 *Grant Co. PUD*, 159 Wash.2d at 603, 151 P.3d at 199-200, quoting *Westlake*, 96 Wash.2d at 627, 638 P.2d 549.

45 159 Wash.2d at 605, 151 P.3d at 200.

46 159 Wash.2d at 605, 151 P.3d at 200.

47 *Port of Edmonds v. NW. Fur Breeders Coop., Inc.*, 63 Wash.App. 159, 816 P.2d 1268 (1991).

48 156 Wash.2d at 412, 128 P.3d at 593.

49 156 Wash.2d at 418 n.5, 128 P.3d at 596 n.5.

50 159 Wash.2d at 569, 151 P.3d at 183, citing *Miller*, 156 Wash.2d at 416, 128 P.3d at 596.

51 159 Wash.2d at 569, 151 P.3d at 183.

52 159 Wash.2d at 570-71, 151 P.3d at 183 (emphasis in original).

53 159 Wash.2d at 571 n.16, 151 P.3d at 183 n.16.

54 159 Wash.2d at 571, 151 P.3d at 183.

55 *Grant Co. PUD*, 159 Wash.2d at 576 n.22, 151 P.3d at 186 n.22.

56 159 Wash.2d at 578, 151 P.3d at 187 (emphasis in original).

57 159 Wash.2d at 579, 151 P.3d at 188.

58 159 Wash.2d at 582, 151 P.3d at 189.

59 159 Wash.2d at 583, 151 P.3d at 190.

60 159 Wash.2d at 585, 151 P.3d at 190.

61 159 Wash.2d at 585, 151 P.3d at 191.

62 156 Wash.2d at 424, citing *Glaspey & Sons, Inc. v. Conrad*, 83 Wash.2d 707, 521 P.2d 1173 (1974).

63 156 Wash.2d at 424, 128 P.3d at 600, quoting *Glaspey*, 83 Wash.2d at 713 (emphasis added in *Miller*).

64 156 Wash.2d at 425-26, 128 P.3d at 600, quoting *Glaspey*, 83 Wash.2d at 713.

65 156 Wash.2d at 425, 128 P.3d at 600.

66 159 Wash.2d at 586, 151 P.3d at 191.

67 159 Wash.2d at 587, 151 P.3d at 192, quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 77 S.Ct. 200, 1 L.Ed.2d 178 (1956) (emphasis added by Chief Justice Alexander).

68 159 Wash.2d at 588 n.2, 151 P.3d at 192 n.2.

69 159 Wash.2d at 587, 151 P.3d at 192.

70 159 Wash.2d at 588, 151 P.3d at 192, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950),

71 159 Wash.2d at 588-89, 151 P.3d at 192, quoting *Mullane*, 339 U.S. at 314.

72 156 Wash.2d at 431, 128 P.3d at 603.

73 159 Wash.2d at 597.

74 156 Wash.2d at 435-36, 128 P.3d at 605.

75 159 Wash.2d at 597, 151 P.3d at 196.

76 156 Wash.2d at 436, 128 P.3d at 606.

77 159 Wash.2d at 606, 151 P.3d at 201 (emphasis added).

78 159 Wash.2d at 600 n.5, 151 P.3d at 198 n.5.

79 159 Wash.2d at 595, 151 P.3d at 195.

80 Wash. Const. art. I, § 12.

81 150 Wash.2d 791 (2004).

82 *See* Journal of the Washington State Constitutional Convention 1889 501 n.20 (Beverly Paulik Rosenow ed. 1999); Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temple L. Rev. 1247, 1252-53 (1996). Oregon's clause provides, "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. I, § 20. Indiana's clause, in turn, states, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. I, § 23.

83 *See Collins v. Day*, 644 N.E.2d 72, 75-77 (Ind. 1994).

84 Thompson, *supra* note 78, at 1254 n.32 (1996) (quoting Wilfred Airey, A History of the Constitution and Government of Washington Territory 208 (1945) (unpublished Ph.D. dissertation, University of Washington)); *see also id.* at 1252-54; James Leonard Fitts, The Washington Constitutional Convention of 1889 9-10, 95-99 (1951) (unpublished Masters thesis on file at the University of Washington); Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 Wash. Hist. Q. 227, 239, 270-72 (1913).

85 Or. Const. art. I, § 20; *see also* Ind. Const. art. I, § 23.

86 *E.g.*, Robert F. Utter & Hugh D. Spitzer, The Washington State Constitution: A Reference Guide 26-27 (2002).

87 29 Wash. 435, 70 P. 34 (1902).

88 29 Wash. at 458, 70 P. at 41 (1902).

89 *Ex Parte Camp*, 38 Wash. 393, 80 P. 547 (1905).

90 *Spokane v. Macho*, 51 Wash. 322, 98 P. 755 (1909).

91 *Seattle v. Dencker*, 58 Wash. 501, 108 P. 1086 (1910).

92 *State v. W.W. Robinson*, 84 Wash. 246, 146 P. 628 (1915).

93 *Sherman Clay & Co. v. Brown*, 131 Wash. 679, 231 P. 166 (1924).

94 *Pearson v. City of Seattle*, 199 Wash. 217, 90 P.2d 1020 (1939).

95 *City of Seattle v. Rogers*, 6 Wash.2d 31, 106 P.2d 598 (1940).

96 *Ralph v. City of Wenatchee*, 34 Wash.2d 638, 209 P.2d 270 (1949).

97 *Larson v. City of Shelton*, 37 Wash.2d 481, 224 P.2d 1067 (1950).

98 34 Wash.2d at 644, 209 P.2d at 273.

99 *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d at 1105 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wash.2d 939 (1979).

100 U.S. Const. amend. 14, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

101 *See, e.g.*, *State v. Hart*, 125 Wash. 520, 525-26, 217 P. 45, 47 (1923) ("We have not deemed it necessary to discuss separately appellant's claims of right under the state and federal Constitutions, being of the opinion that the reason and the result to be reached would necessarily be the same, in view of the manifest identity in substance of the rights guaranteed by the respective provisions thereof.")

102 *Seeley v. State*, 132 Wash.2d 776, 788, 940 P.2d 604, 610 (1997).

103 *State v. Smith*, 117 Wash.2d 263, 281, 814 P.2d 652, 660 (1991); *Am. Network, Inc. v. Wash. Utils. & Transp. Comm'n*, 113 Wash.2d 59, 77, 776 P.2d 950, 960 (1989).

104 *See*, *e.g.*, *Am. Network, Inc. v. Wash. Utils. & Transp. Comm'n*, 113 Wash.2d 59, 77-82, 776 P.2d 950, 960-963 (1989).

105 150 Wash.2d 791, 83 P.3d 419 (2004).

106 150 Wash.2d at 806, 83 P.3d at 425.

107 150 Wash.2d at 806-07, 83 P.3d at 425-26.

108 150 Wash.2d at 807, 83 P.3d at 426 (quoting Thompson, *supra* note 82, at 1251).

109 150 Wash.2d at 808, 83 P.3d at 426.

110 150 Wash.2d at 808, 83 P.3d at 426 (citing Thompson, *supra* note 82, at 1253).

111 150 Wash.2d at 808, 83 P.3d at 427 (emphasis added; citations omitted). The court cited Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington Constitution*, 67 Wash. L. Rev. 669, 671-72 (1992); and Thompson, *supra* note 82, at 1253).

112 150 Wash.2d at 809, 83 P.3d at 427.

113 150 Wash.2d at 809-10, 83 P.3d at 427.

114 150 Wash.2d at 810, 83 P.3d at 427, quoting U.S. Rev. Stat. tit. 23, § 1889, at 333 (2d ed. 1878).

115 150 Wash.2d at 810, 83 P.3d at 427.

116 150 Wash.2d at 811, 83 P.3d at 428.

117 150 Wash.2d at 811, 83 P.3d at 428.

118 150 Wash.2d at 811, 83 P.3d at 428.

119 150 Wash.2d at 811, 83 P.3d at 428.

120 150 Wash.2d at 812, 83 P.3d at 428.

121 150 Wash.2d at 812-13, 83 P.3d at 428-29, quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902).

122 150 Wash.2d at 813, 83 P.3d at 429.

123 150 Wash.2d at 814, 83 P.3d at 429.

124 150 Wash.2d at 816-17, 83 P.3d at 430-31 (Sanders, J., concurring).

125 150 Wash.2d at 817, 83 P.3d at 431 (Sanders, J., concurring). Justice Sanders also cited the Privileges or Immunities Clause of the Fourteenth Amendment as an appropriate touchstone, although he presumably did so based on an understanding of the clause different from the very limited interpretation by the U.S. Supreme Court in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), an opinion that, as Justice Sanders noted, has been widely criticized. *Grant County Fire Prot. Dist. No. 5*, 150 Wash.2d at 817, 818, 83 P.3d at 431 (Sanders, J., concurring).

126 150 Wash.2d at 817, 83 P.3d at 431 (Sanders, J., concurring).

127 150 Wash.2d at 820, 83 P.3d at 432 (Sanders, J., concurring).

128 150 Wash.2d at 820, 83 P.3d at 432 (Sanders, J., concurring) (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D.Pa. 1823); *State v. Vance*, 29 Wash. 435, 70 P. 40 (1902); *Saenz v. Roe*, 526 U.S. 489 (1999) (Thomas, J., dissenting)).

129 150 Wash.2d at 820, 83 P.3d 432 (Sanders, J., concurring) (quoting *Vance*, 29 Wash. at 458).

130 158 Wash.2d 1, 138 P.3d 963 (2006).

131 158 Wash.2d at 14, 138 P.3d at 971 (emphasis added).

132 158 Wash.2d at 16, 138 P.3d at 972 (emphasis added).

133 158 Wash.2d at 18, 138 P.3d at 973.

134 158 Wash.2d at 42, 138 P.3d 985.

135 158 Wash.2d at 58, 138 P.3d at 993 (J. Johnson, J., concurring in judgment) (quoting *Malyon v. Pierce County*, 131 Wash.2d 779, 799, 935 P.2d 1272 (1997)).

136 158 Wash.2d at 58-59, 138 P.3d at 993 (J. Johnson, J., concurring in judgment).

137 158 Wash.2d at 59-62 (J. Johnson, J., concurring in judgment).

138 158 Wash.2d at 63 (J. Johnson, J., concurring in judgment).

139 158 Wash.2d at 63 (J. Johnson, J., concurring in judgment) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D.Pa. 1823)).

140 158 Wash.2d at 135 (Fairhurst, J., dissenting) (alteration in original) (quoting *State v. Vance*, 29 Wash. 435, 458 (1902)).

141 158 Wash.2d at 129, 138 P.3d at 1013 (Fairhurst, J., dissenting).

142 158 Wash.2d at 134 n.12, 138 P.3d 1015 n.12 (Fairhurst, J., dissenting).

143 158 Wash.2d at 135 n.12, 138 P.3d at 1016 n.12 (Fairhurst, J., dissenting).

144 158 Wash.2d at 136, 138 P.3d at 1016 (Fairhurst, J., dissenting).

145 158 Wash.2d at 137, 138 P.3d at 1017 (Fairhurst, J., dissenting).

146 158 Wash.2d at 135, 138 P.3d at 1016 (Fairhurst, J., dissenting) (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80 (1936)).

147 158 Wash.2d at 137, 138 P.3d at 1017 (Fairhurst, J.,

dissenting).

148 158 Wash.2d at 136, 138 P.3d at 1016 (Fairhurst, J., dissenting).

149 158 Wash.2d at 142, 138 P.3d at 1019 (Fairhurst, J., dissenting).

150 158 Wash.2d at 120, 138 P.3d at 1040 (Chambers, J., dissenting).

151 158 Wash.2d at 121, 138 P.3d at 1040 (Chambers, J., dissenting) (emphasis added).

152 158 Wash.2d at 126, 138 P.3d at 1043 (Chambers, J., dissenting).

153 158 Wash.2d at 123-24, 138 P.3d at 1041 (Chambers, J., dissenting) (citations omitted).

154 158 Wash.2d at 121, 138 P.3d at 1040 (Chambers, J., dissenting) (emphasis supplied).

155 158 Wash.2d at 123, 138 P.3d at 1041 (Chambers, J., dissenting).

156 158 Wash.2d at 127, 138 P.3d at 1043 (Chambers, J., dissenting).

157 161 Wash.2d 85, 163 P.3d 757 (2007).

158 161 Wash.2d at 94, 163 P.3d at 764.

159 161 Wash.2d at 93-94, 163 P.3d at 764 (emphasis added).

160 161 Wash.2d at 95, 163 P.3d at 765.

161 161 Wash.2d at 95, 163 P.3d at 765.

162 161 Wash.2d at 96, 163 P.3d at 765.

163 161 Wash.2d at 96, 163 P.3d at 766.

164 161 Wash.2d at 96, 163 P.3d at 766.

165 161 Wash.2d at 97, 163 P.3d at 766.

166 161 Wash.2d at 111, 163 P.3d at 773 (Madsen, J., concurring) (emphasis added).

167 161 Wash.2d at 112, 163 P.3d at 773 (Madsen, J., concurring).

168 161 Wash.2d at 118, 119, 163 P.3d 776-77 (J. Johnson, J., concurring).

169 161 Wash.2d at 119, 163 P.3d at 777 (J. Johnson, J., concurring) (quoting *Andersen*, 158 Wash.2d at 59 (J. Johnson, J., concurring in judgment)).

170 161 Wash.2d at 120, 163 P.3d at 777-78 (J. Johnson, J., concurring) (quoting *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 F. Cas. 546, 551-52 (C.C.E.D.Pa.1823) (No. 3,230) (emphasis removed).

171 161 Wash.2d at 121, 163 P.3d at 778 (J. Johnson, J., concurring) (omission in original; quoting Wash. Const. art. VI, § 3).

172 161 Wash.2d at 121, 163 P.3d at 778 (J. Johnson, J., concurring) (omission and alteration in original; quoting *Corfield*, 6 F. Cas. at 552).

173 161 Wash.2d at 128, 163 P.3d at 781 (Chambers, J., concurring in dissent).

174 161 Wash.2d at 128 n.1, 163 P.3d at 781 n.1 (Chambers, J., concurring in dissent) (emphasis supplied).

175 161 Wash.2d at 128, 163 P.3d at 782 (Chambers, J., concurring in dissent).

176 161 Wash.2d at 94, 96, 163 P.3d at 764, 765.

177 *See* 161 Wash.2d at 119, 163 P.3d at 777 (J. Johnson, J., concurring); 161 Wash.2d at 127, 128, 163 P.3d at 781 (Chambers, J., concurring in dissent).

178 163 Wash.2d 92, 178 P.3d 960 (2008).

179 163 Wash.2d at 103, 178 P.3d at 966 (quoting *Grant County*, 150 Wash.2d at 812-13, 83 P.3d at 428).

180 163 Wash.2d at 103,178 P.3d at 966.

181 163 Wash.2d at 103-04, 178 P.3d at 966.

182 163 Wash.2d at 104 n.10, 178 P.3d at 966 (emphasis omitted).

183 163 Wash.2d at 110, 178 P.3d at 969 (Sanders, J., dissenting).

184 163 Wash.2d at 114, 178 P.3d at 971 (Sanders, J., dissenting).

185 163 Wash.2d at 114-15, 178 P.3d at 972 (Sanders, J., dissenting) (quoting Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1253 n.31 (1996)).

186 163 Wash.2d at 117, 178 P.3d at 973 (Sanders, J., dissenting) (footnote and citations omitted; quoting Thompson, *supra* note 82, at 1253; Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 519 (1984))

187 163 Wash.2d at 118, 178 P.3d at 973 (Sanders, J., dissenting).

188 163 Wash.2d at 119, 178 P.3d at 974 (Sanders, J., dissenting).

189 163 Wash.2d at 124, 178 P.3d at 977 (Sanders, J., dissenting).

190 163 Wash.2d at 125, 178 P.3d at 977 (Sanders, J., dissenting).

191 163 Wash.2d at 130, 178 P.3d at 979 (Sanders, J., dissenting) (quoting *Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wash.2d 939, 948, 603 P.2d 819 (1979)).

192 163 Wash.2d at 129, 178 P.3d at 979 (Sanders, J., dissenting).

193 163 Wash.2d at 133, 178 P.3d at 981 (Sanders, J., dissenting).

194 164 Wash.2d 570, 192 P.3d 306 (2008).

195 164 Wash.2d at 606, 192 P.3d at 324. It is interesting that Justice Madsen concurred in this portion of the opinion given her insistence in *Andersen* and *Madison* that an independent analysis is only warranted where favoritism is conferred on a minority class. Perhaps she viewed the smoking ban as an example of such favoritism.

196 164 Wash.2d at 606, 192 P.3d at 324 (quoting *Madison*, 161 Wash.2d at 93).

197 164 Wash.2d at 606, 192 P.3d at 324-25.

198 164 Wash.2d at 608, 192 P.3d at 325.

199 164 Wash.2d at 608, 192 P.3d at 325-26.

200 *Andersen*, 158 Wash.2d at 58-59, 138 P.3d at 993 (J. Johnson, J., concurring in judgment); *see also id.* at 123 n.3 (Chambers, J., concurring in dissent).

201 *Madison*, 161 Wash.2d at 93-94, 163 P.3d at 764; *see also American Legion*, 164 Wash.2d at 606, 192 P.3d at 325.

202 Wa. Const. art. I, § 1.

203 Wa. Const. art. I, § 32.

204 Wa. Const. art. I, § 5.

205 106 Wash.2d 54, 720 P.2d 808 (1986). The *Gunwall* analysis has been previously described in § II(D).

206 *State v. Reece*, 110 Wash.2d 766, 757 P.2d 947 (1988),

207 *City of Seattle v. Huff*, 111 Wash.2d 923, 767 P.2d 572 (1989).

208 *National Fed'n of Retired Persons v. Insurance Commn'r*, 120 Wash.2d 101, 838 P.2d 680 (1992).

209 *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343 (1996)).

210 *Bering v. SHARE*, 106 Wash.2d 212, 234, 721 P.2d 918 (1986) (enjoining an antiabortion organization from picketing in front of medical building).

211 *State v. Coe*, 101 Wash.2d 364, 679 P.2d 353 (1984) (invalidating order prohibiting broadcasts of recordings played in open court in prosecution for solicitation of murder).

212 As noted earlier, this limitation on federal restriction of first amendment rights was later extended to the states by the Fourteenth Amendment ("No state shall . . . ").

213 3 Wash.App. 833, 478 P.2d 792 (1970).

214 96 Wash.2d 230, 635 P.2d 108 (1981),

215 113 Wash.2d 413, 780 P.2d 1282 (1989),

216 113 Wash.2d at 419, 780 P.2d at 1285.

217 161 Wash.2d 843, 168 P.3d 826 (2007),

218 161 Wash.2d at 855-56, 168 P.3d at 832.

219 161 Wash.2d at 858, 168 P.3d at 833 (Madsen, J., dissenting).

220 162 Wash.2d 773, 174 P.3d 84 (2008).

221 162 Wash.2d at 783, 174 P.3d at 89.

222 162 Wash.2d at 785, 174 P.3d at 90.

223 ___ Wash.2d ___, __ P.3d __ (2010) (2010 WL 1795621).

224 Wa. Const. art. I, § 7.

225 367 U.S. 643 (1961).

226 90 Wash.2d 45, 578 P.2d 527 (1978).

227 90 Wash.2d at 49, 578 P.2d at 529.

228 *State v. Myrick,* 102 Wash.2d 506, 688 P.2d 151 (1984).

229 102 Wash.2d at 510, 688 P.2d at 153-54 (1984).

230 106 Wash.2d 54, 720 P.2d 808 (1986). The *Gunwall* analysis has previously been discussed. The court adopted a test for determining whether independent analysis of a state constitutional provision is warranted based upon the following (nonexclusive) factors: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern.

231 *State v. Miles*, 160 Wash.2d 236, 156 P.3d 864 (2007).

232 *State v. Boland*, 115 Wash.2d 571, 800 P.2d 1112 (1990).

233 *State v. Miles*, *supra.*

234 *State v. Hendrickson,* 129 Wash.2d 61, 917 P.2d 563 (1996).

235 *State v. Eisfeldt*, 163 Wash.2d 628, 185 P.3d 580 (2008).

236 167 Wash.2d 620, 220 P.3d 1226 (2009).

237 167 Wash.2d at 624, 220 P.3d at 1227.

238 167 Wash.2d at 636, 220 P.3d at 1233.

239 Wa. Const. art. I, § 11.

240 494 U.S. 872 (1990).

241 *Open Door Baptist Church v. Clark County*, 140 Wash.2d 143, 162, 995 P.2d 33, 43 (2000).

242 *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

243 *First Covenant Church v. City of Seattle,* 120 Wash.2d 203, 840 P.2d 174 (1992).

244 *Munns v. Martin,* 131 Wash.2d 192, 930 P.3d 318 (1997).

245 131 Wash.2d 200, 930 P.2d at 321, quoting *First Covenant Church v. City of Seattle*, 120 Wash.2d 203, 226, 840 P.2d 174 (1992).

246 *Open Door Baptist Church v. Clark County,* 140 Wash.2d 143,

995 P.2d 33 (2000).

247 140 Wash.2d at 169, 995 P.2d 47, quoting *First Covenant Church v. City of Seattle*, 114 Wash.2d 392, 787 P.2d 1352 (1990), *vacated and remanded*, 499 U.S. 901, 111 S.Ct. 1097, 113 L.Ed.2d 208 (1991), *judgment reinstated*, 120 Wash.2d 203, 840 P.2d 174.

248 140 Wash.2d at 173, 995 P.2d 49 (Sanders, J., dissenting).

249 166 Wash.2d 633, 211 P.3d 406 (2009).

250 166 Wash.2d at 644-45, 211 P.3d at 411.

251 166 Wash.2d at 647-48, 211 P.3d at 413.

252 *See, e.g., Witters v. State Comm'n for the Blind*, 112 Wash.2d 363, 771 P.2d 1119 (1989); *Weis v. Bruno*, 82 Wash.2d 199, 509 P.2d 973 (1973), *overruled in part by Gallwey v. Grimm*, 146 Wash.2d 445, 48 P.3d 274 (2002).

253 128 S.Ct. 2783 (2008).

254 Wa. Const. art. I, § 24.

255 *State v. Krantz*, 24 Wash.2d 350, 164 P.2d 453 (1945).

256 *Second Amendment Foundation v. City of Renton*, 35 Wash. App. 583, 668 P.2d 596 (1983).

257 35 Wash.App. at 586, 668 P.2d at 598.

258 75 Wash.App. 118, 876 P.2d 939 (1994).

259 75 Wash.App. at 124, 876 P.2d at 942.

260 *State v. Valdobinos*, 122 Wash.2d 270, 858 P.2d 199 (1993).

261 147 Wash.2d 562, 55 P.3d 632 (2002).

262 147 Wash.2d at 574-75, 55 P.3d at 639.

263 147 Wash.2d at 589, 55 P.3d at 646 (Sanders, J., dissenting) ("Not only do these textual qualifications limit the scope of the right to bear arms, but they also prove the general rule by enumerating an explicit list of exceptions--*expressio unius est exclusio alterius*--the inclusion of one is the exclusion of the other.").

264 For example, Ill. Const. art. I, § 22 ("Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."); Ga. Const. art. I, § 1, para. VIII ("The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne."); Tex. Const. art. I, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.").

265 147 Wash.2d at 592, 55 P.3d at 647 (Sanders, J., dissenting).

266 168 Wash.2d 276, 225 P.3d 995 (2010).

267 The U.S. Supreme Court addressed the question of Second Amendment incorporation in *McDonald v. Chicago*, 561 U.S. ___ (2010), holding that the individual right to keep and bear arms is incorporated against the states through the Fourteenth Amendment to the U.S. Constitution.

268 168 Wash.2d at 292, 225 P.3d at 1003.

269 168 Wash.2d at 295, 225 P.3d at 1005.

270 168 Wash.2d at 295, n.20, 225 P.3d at 1005 n.20.

271 168 Wash.2d at 296, 225 P.3d at 1005.

272 168 Wash.2d at 298, 225 P.3d at 1006 (James Johnson, J., dissenting).

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