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

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TABLE OF CONTENTS

INTRODUCTION	2
I. THE COURT’S PROTECTION OF PROPERTY RIGHTS AND LIMITATIONS ON EMINENT DOMAIN.....	6
A. <i>The History of the Washington State Constitution</i>	7
B. <i>Modern Application of the “Takings Clause”</i>	9
1. “Public Use and Necessity”	10
2. Due Process.....	16
C. <i>Concluding Assessment</i>	21
II. THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE WASHINGTON CONSTITUTION	22
A. <i>The History of the Clause</i>	23
B. <i>Early Cases Applying the Privileges or Immunities Clause</i>	24
C. <i>Conflation with the Federal Equal Protection Clause</i>	26
D. <i>A Call for Independent State Constitutional Analysis: Grant County Fire Protection District No. 5 v. City of Moses Lake</i>	27
E. <i>Confusion in Grant County’s Wake</i>	31
1. <i>Andersen v. King County</i>	31
2. <i>Madison v. State</i>	35
3. <i>Ventenbergs v. City of Seattle</i>	38

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4. *American Legion Post # 149 v. Washington State Department of Health*.....41

F. *Conclusion*42

III. THE PROTECTION OF INDIVIDUAL RIGHTS43

A. *The Right to Free Speech*.....44

B. *Invasion of Private Affairs*.....47

C. *Religious Liberty*49

D. *The Right to Bear Arms*51

CONCLUSION.....55

INTRODUCTION

There is rich literature on the relationship between state constitutions and the United States Constitution.¹ While most public attention is directed at the United States Supreme Court and its interpretation of the United States Constitution, relatively little attention is paid to the decisions of state supreme courts in interpreting their own state constitutions. Of course there are logical reasons for this lesser degree of visibility. Because decisions of the United States Supreme Court are binding on all fifty states, and the process for amending the United States Constitution is sufficiently burdensome (as well as politically perilous for those who promote it), the United States Supreme Court is rightly viewed as a pivotal institution in American society. Nonetheless, state supreme courts, which are the final authority in interpreting their own state constitutions, may have an impact on the lives of their own citizens that warrants closer scrutiny.

One of the challenges in examining the way in which state supreme courts treat their own state constitutions is that many of the provisions in a state constitution will parallel—in some cases, repeat verbatim—a provision of the United States Constitution.² Of course, the obligation of a state supreme court is to uphold both the federal as well as the state constitution, but in doing so it is necessary to determine whether the state constitution imposes obligations *in addition to* those that are

1. See, e.g., JONATHAN BECHTLE & MICHAEL REITZ, TO PROTECT AND MAINTAIN INDIVIDUAL RIGHTS: A CITIZEN’S GUIDE TO THE WASHINGTON CONSTITUTION, ARTICLE I (2008); Jacob R. Brown, *Arrested Development: Arizona v. Gant and Article I, Section 7 of the Washington State Constitution*, 85 WASH. L. REV. 355 (2010); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7 (2008); Helen Gugel, *Remaking the Mold: Pursuing Failure-to-Protect Claims Under State Constitutions via Analogous Bivens Actions*, 110 COLUM. L. REV. 1294 (2010).

2. Compare U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”), with WASH. CONST. art. I, § 23 (“No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.”).

imposed by the Federal Constitution.³ Because there is frequently a more extensive body of law interpreting the Federal Constitution, lawyers may tend to focus their arguments on what is required by the Federal Constitution, and treating the state constitution as simply a restatement of the Federal Constitution.

This article is an effort to focus more careful attention on the way in which the Washington Supreme Court interprets the Washington State Constitution. In particular, it is an examination of 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.

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.

In Washington, the touchstone case for determining when the state constitution imposes rights and duties distinct from parallel provisions in the Federal Constitution is *State v. Gunwall*,⁴ decided in 1986. In *Gunwall* 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.⁵ The six *Gunwall* factors are: "(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."⁶

3. If the state constitution is more permissive than the federal constitution, obviously the state constitution must bow to the Federal Constitution. On the other hand, where the Federal Constitution is more permissive, and the state constitution more restrictive of the power of government, the state supreme court is bound to enforce the state constitution. *State v. Sieyes*, 225 P.3d 995, 1003 (Wash. 2010) ("Supreme Court application of the United States Constitution establishes a floor below which state courts cannot go to protect individual rights. But states of course can raise the ceiling and afford greater protections under their own constitutions.").

4. 720 P.2d 808 (Wash. 1986).

5. *Id.* at 811.

6. *Id.* The Washington Supreme Court has concluded that a provision of the Washington State Constitution provides citizens with greater protections than those found in the United States Constitution. *See, e.g., State v. Manussier*, 921 P.2d 473, 483-84 (Wash. 1996) (concluding that the court had previously held that article I, section 14's proscription against cruel punishment provides

Gunwall's approach to determining the independent rights afforded by the state constitution has distinct advantages as well as disadvantages. In terms of safeguarding individual rights, *Gunwall* analyses that interpret provisions of the Washington State Constitution as equally protective as the United States Constitution (but not more so) effectively incorporate federal constitutional jurisprudence into the Washington State constitutional jurisprudence. This means that Washington State Supreme Court decisions about how provisions of the Washington Constitution apply in certain factual settings will generally follow federal court decisions over how provisions of the United States Constitution apply in certain other factual settings. The *Gunwall* framework appears to assume that, where a provision in the Washington Constitution lacks an independent meaning from a related provision of the United States Constitution, the court will not consider the possibility of providing an independent and more vigorous *application* of that state constitutional provision to the facts involved in individual cases.

On the other hand, because *Gunwall*'s analytical framework is sensitive to the facts of particular cases, the court arguably has ample opportunity to safeguard individual rights when considering particular cases that come before it. In this

greater protection than the Eighth Amendment of the United States Constitution) (citing *State v. Fain*, 617 P.2d 720, 723, 728 (Wash. 1980)); *Collier v. City of Tacoma*, 854 P.2d 1046, 1051 (Wash. 1993) (concluding that article I, section 5 provides greater protection than the First Amendment by requiring that time, place, and manner restrictions on speech be justified by a compelling state interest rather than by a significant interest); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185-87 (Wash. 1992) (concluding that article I, section 11 provides greater protection than the First Amendment by prohibiting neutral laws that burden religious exercise unless the government demonstrates a "compelling interest"); *State v. Boland*, 800 P.2d 1112, 1114-17 (Wash. 1990) (concluding that article I, section 7 provides greater protection to persons under the Washington Constitution than the Fourth Amendment by prohibiting warrantless searches of the contents of a person's garbage container placed curbside for collection). *Gunwall* itself held that article I, section 7 provides greater protection to an individual's private affairs under the Washington Constitution than the Fourth Amendment by prohibiting law enforcement's warrantless obtaining of long distance telephone records by placing a pen register on a person's telephone. *Gunwall*, 720 P.2d at 813.

The Washington Supreme Court has also held to the contrary. *See, e.g., Richard v. Thompson*, 922 P.2d 1343, 1349-51 (Wash. 1996) (rejecting the claim that the Washington State Constitution's petition clause, article I, section 4, provides greater protection than the First Amendment to the United States Constitution in the form of an absolute privilege to petition government); *State v. Hopper*, 822 P.2d 775, 778 (Wash. 1992) (concluding that "Washington courts have frequently treated the Sixth Amendment and Const. art. 1, § 22 (amend. 10) as containing the same protection" and that "if anything, the United States Constitution's requirements are actually broader than state protection" (citations omitted)); *State v. Reece*, 757 P.2d 947, 955 (Wash. 1988) (rejecting the claim that obscenity is afforded broader protection under article I, section 4 of the Washington Constitution than under the First Amendment); *see also State v. Smith*, 814 P.2d 652, 660-61 (Wash. 1991) (concluding that article I, section 12 of the Washington Constitution, the privileges and immunities clause, and the Fourteenth Amendment Equal Protection Clause are "substantially identical" and citing prior rulings reaching the same conclusion).

An example of the application of the six-factor test to the Privileges and Immunities Clause is provided *infra* Part II(D).

respect, *Gunwall*'s case-by-case approach may plausibly give Washington State citizens protections that have been unanticipated or overlooked by the United States Constitution and federal constitutional jurisprudence.

In terms of predicting the outcome in future cases, the necessity of resorting to *Gunwall* factors to determine the existence of any independent meaning or extra protections embodied in a provision of the Washington Constitution provides limited guidance. Even where case precedents recognize that certain *Gunwall* factors favor a state constitutional provision's independent meaning and generally greater protectiveness of a particular right, the broader protection of that state constitutional provision may not speak to a particular issue in a given case.⁷ Cases decided pursuant to a *Gunwall* analysis have simultaneously recognized the independent meaning and greater protection offered by a particular provision of the Washington Constitution while nonetheless construing the particular claim or conduct involved in the case as outside the scope of state constitutional protection.⁸ Of course, where the court is considering a provision of the Washington Constitution that has been deemed to have no independent meaning or to provide no protections beyond those provided by its counterpart in the United States Constitution, existing federal constitutional jurisprudence provides additional authorities that may make outcome prediction more likely. But this means that the most predictable outcome in those cases is that the Washington Constitution will likely have no impact on the result.

Significantly, the Washington Supreme Court recently announced a modification of *Gunwall* that portends increased willingness by the court to entertain claims rooted in the Washington Constitution in future cases. In *First Covenant Church v. City of Seattle*, the court at least implicitly overturned prior "*Gunwall* cases" holding that "[i]f a party does not provide constitutional analysis based upon the factors set out in *Gunwall*, the court will not analyze the state constitutional grounds in a case."⁹

7. See, e.g., *In re Matteson*, 12 P.3d 585, 591 (Wash. 2000) (quoting *State v. Ortiz*, 831 P.2d 1060, 1065 (Wash. 1992)) (concluding that neither the first, second, or third *Gunwall* factors provided justification for interpreting article I, section 3 differently from the Fourteenth Amendment's Due Process Clause, and while acknowledging that the fifth *Gunwall* factor "may support the notion that our constitution is more protective in a general sense" concluded that the fifth factor did "not shed any light on [the] particular issue" of a prisoner's transfer to a private, out-of-state facility).

8. See, e.g., *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 162-66 (Wash. 1997) (rejecting the claim that sexually explicit dancing warrants the more protective time, place, and manner analysis developed under article I, section 5 of the Washington State Constitution, but concluding that the text and history of article I, section 5 provide enhanced protection in the context of adult entertainment regulations that impose prior restraints); *State v. Hobble*, 892 P.2d 85, 93-97 (Wash. 1995) (concluding that some of the *Gunwall* criteria generally support the conclusion that the state constitution provides greater protections than the United States Constitution where the right to a trial by jury is involved, but rejecting an absolute right to trial by jury in the case of direct contempt).

9. *First Covenant Church*, 840 P.2d at 186 (citing *Clark v. Pacificorp*, 809 P.2d 176, 189 (Wash. 1991)). In at least one other case the court has been willing to consider state constitutional claims absent briefing of *Gunwall* factors early in the litigation if raising such claims does not work

Justice James Johnson's opinion for the seven-member majority of the court in *City of Woodinville v. Northshore United Church of Christ*, concluded that "where we have 'already determined in a particular context the appropriate state constitutional analysis under a provision of the Washington State Constitution,' it is unnecessary to provide a threshold *Gunwall* analysis."¹⁰ The court rejected a "strict rule" that would prohibit it from considering state constitutional claims absent a thorough *Gunwall* analysis provided by litigants' briefing, instead maintaining that "*Gunwall* is better understood to prescribe appropriate arguments: if the parties provide argument on state constitutional provisions and citation, a court may consider the issue."¹¹

Although *Woodinville*'s modification of *Gunwall* may not have had any impact on the cases under discussion in this article, the court's decision could nonetheless affect future cases applying the Washington Constitution.

I. THE COURT'S PROTECTION OF PROPERTY RIGHTS AND LIMITATIONS ON EMINENT DOMAIN

A good example of limitations on governmental power imposed by the state constitution, as distinct from parallel protections provided in the Federal Constitution, is the protection of private property rights, particularly when the government exercises the power 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."¹² 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*,¹³ permitting the exercise of eminent domain over private property in order to foster economic development.¹⁴ But as is true of the other three

to prejudice either party to the litigation. See *Eggleston v. Pierce County*, 64 P.3d 618, 622 (Wash. 2003).

10. 211 P.3d 406, 410 (Wash. 2009) (quoting *State v. Reichenbach*, 101 P.3d 80, 84 n.1 (Wash. 2004)). Although Justice Richard Sanders issued an opinion in the case concurring in the result that was joined by Justice Tom Chambers, the concurrence did not object to the majority's modification of *Gunwall* and presumably agreed with that modification. See *id.* at 413 (Sanders, J., concurring) ("I concur in result but write separately to focus on 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."). For a brief discussion of the case, see Michael Reitz, *Decision Marks Shift in State v. Gunwall Analysis*, SUP. CT. WASH. BLOG (July 17, 2009, 10:06 AM), <http://www.wasupremecourtblog.com/2009/07/articles/opinions/decision-marks-shift-in-state-v-gunwall-analysis/>.

11. *Woodinville*, 211 P.3d at 410; see also *id.* ("Listing the *Gunwall* factors is a helpful approach when arguing how Washington's constitution provides greater rights than its federal counterpart.").

12. U.S. CONST. amend. V.

13. 545 U.S. 469 (2005).

14. The corporation the city was attempting to accommodate abandoned its plans to

sections in this article, the Federal Constitution is not the only (or in some cases, the most important) protection against usurpation of individual rights by government.¹⁵ The Washington State Constitution places additional restrictions on what the state and local governments may do.

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, particularly property rights. 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 1889.¹⁶ 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 United States Constitution.¹⁷ 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, section 1 provides that “[a]ll 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.”¹⁸

redevelop the property and in fact abandoned the city altogether. Patrick McGeehan, *Pfizer to Leave City that Won Land-Use Suit*, N.Y. TIMES, Nov. 13, 2009, at A1, available at <http://www.nytimes.com/2009/11/13/nyregion/13pfizer.html>.

15. 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 . . .” U.S. CONST. amend. I), the passage of the Fourteenth Amendment after the Civil War eventually led the United States Supreme Court to interpret its restrictions (“No state shall . . .” U.S. CONST. amend. I) 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.

16. See Wash. Rev. Code § 4.04.010 (2008) (“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.”).

17. See Enabling Act, ch. 180, § 4, 25 Stat. 676, 676-77 (1889).

18. WASH. CONST. art. I, § 1.

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 section 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 section 16's "eminent domain" clause and section 3's "personal rights" or due process clause. In pertinent part, section 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 . . .¹⁹

The language of section 16 has prompted the Washington Supreme Court to opine in prior cases that the provision's protections exceed, in some respects, protections contained in the Takings Clause of the Fifth Amendment to the United States Constitution.²⁰ And section 3 succinctly states: "No person shall be deprived of life, liberty, or property, without due process of law."²¹ These two sections both

19. *Id.* § 16.

20. *See, e.g.,* Eggleston v. Pierce County, 64 P.3d 618, 622 (Wash. 2003) ("Article I, section 16 is significantly different from its United States constitutional counterpart, and in some ways provides greater protection."); Manufactured Housing Cmty. v. State, 13 P.3d 183, 187-90 (Wash. 2000) (conducting a full *Gunwall* analysis of article I, section 16 and concluding that section 16's definition of "public use" is more restrictive than the Fifth Amendment's). Article I, section 16's clause calling for a judicial examination of "public use" questions appeared in only two other state constitutions in 1889, and records indicate that a motion made in the Washington Constitutional Convention to strike the clause failed. *See* BECHTLE & REITZ, *supra* note 1, at 56.

21. In prior cases the Washington Supreme Court has determined that WASH. CONST. art. I, § 3 does not provide protections beyond those contained in the Fourteenth Amendment's Due Process Clause. *See* cases cited *supra* note 7. Although not discussed in this article, the Washington Supreme Court's vested rights jurisprudence concerning building permit applications and approvals is arguably traceable to or may be otherwise tied to article I, section 3's due process requirements. For contrasting opinions on the matter compare *Abbey Road Group v. City of Bonney Lake*, 218 P.3d 180, 182-88 (Wash. 2009), describing Washington State's vested rights doctrine as arising out of case

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.²²

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

law concerns over fundamental fairness, but rejecting extension of the doctrine to cover all land applications and also rejecting a constitutional claim raised against the ordinance at issue, with *id.* at 190-92 (Sanders, J., dissenting), analyzing a vested rights claim in the context of a due process claim and concluding that the ordinance at issue violates due process.

Recently, the Washington Supreme Court also announced a new, higher standard for due process protection concerning the right to use force in defense of private property without expressly invoking article I, section 3. *See State v. Vander Houwen*, 177 P.3d 93, 97-98 (Wash. 2008). For Washington State’s overall substantive due process standard of reasonableness for determining whether police power was abused in deprivation of property rights see for example *Rivett v. City of Tacoma*, 870 P.2d 299, 303 (Wash. 1994) (quoting *Presbytery of Seattle v. King County*, 787 P.2d 907, 913, (Wash. 1990)).

Of the cases decided by the Washington Supreme Court involving deprivation of property rights and due process, those involving rights to adequate notice and opportunity to be heard generally rely upon and apply the United States Supreme Court’s test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) without invoking article I, section 3 and presumably relying on the Fourteenth Amendment’s Due Process Clause alone. For recent examples, see for example *Post v. City of Tacoma*, 217 P.3d 1179, 1185-86 (Wash. 2009); *City of Bellevue v. Lee*, 210 P.3d 1011, 1013 (Wash. 2009); *Gourley v. Gourley*, 145 P.3d 1185, 1188 (Wash. 2006).

22. The Washington Supreme Court has also relied upon article I, section 16 as the basis for its inverse condemnation jurisprudence. An inverse condemnation claim is “an action alleging a governmental ‘taking’ or ‘damaging’ that is brought to recover the value of property which has been appropriated in fact, but with no formal exercise of the power of eminent domain.” *Dickgieser v. State*, 105 P.3d 26, 28-29 (Wash. 2005) (quoting *Phillips v. King County*, 968 P.2d 871, 876 (Wash. 1998)). Recently, in *Fitzpatrick v. Okanogan County*, No. 81257-8, 2010 Wash. LEXIS 716, at *8 (Sept. 2, 2010), Justice Alexander’s opinion on behalf of a seven-member majority rejected statutory sovereign immunity status for the State of Washington and Okanogan County from inverse condemnation claims. *Id.* at *9. Justice Alexander premised the rejection of statutory sovereign immunity on the constitutional basis for inverse condemnation claims at issue, “solely based on article I, section 16 of the Washington Constitution.” *Id.* (emphasis omitted). Chief Justice Madsen’s dissent, joined by Justice James Johnson, did not specifically address article I, section 16. *Id.* at *24 (Madsen, C.J., dissenting). Rather, the dissent countered that “the principles upon which the inverse condemnation claim is based in this case are those of the common law,” *id.*, and emphasized its disagreement with the majority’s reading of the common law doctrines of the common enemy rule and the “natural watercourse rule.” *See id.* at *25.

“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.²³ These cases, beginning with *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*,²⁴ have revealed a divide between the justices on how article I, section 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.²⁵ 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.²⁶ 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.²⁷

Writing for the majority, then-Justice Barbara Madsen (now Chief Justice) upheld the municipal authority’s condemnation in fee of the entire property.²⁸ Then-Chief Justice Gerry Alexander and Justices Bobbi Bridge, Susan Owens, Charles Johnson, Tom Chambers and Mary Fairhurst joined the opinion.²⁹ 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.”³⁰

According to the majority, only the first prong of the three-part test involves the judicial question of “public use” set out in section 16. In the majority’s reading, legislative “public use” declarations are “not dispositive” but are still “entitled to great

23. The beginnings of the Washington Supreme Court’s modern takings jurisprudence may be fairly traced, in significant respects, to the court’s ruling in a case involving Washington’s Community Urban Renewal Act. Wash. Rev. Code § 35.81 (2008); see *Miller v. City of Tacoma*, 378 P.2d 464, 469-73 (Wash. 1963) (ruling that government has authority to condemn property for public purposes rather than for merely public uses and transfer the condemned property to another private entity). The Court’s ruling in *Miller* was not unanimous, see *id.* at 477 (Rosellini, J., dissenting), and Washington’s Community Renewal Law remains controversial today. See, e.g., Jeanette M. Petersen, *The Use and Abuse of Washington’s Community Renewal Law*, WASH. POLICY CTR. (Nov. 2009), <http://www.washingtonpolicy.org/publications/brief?page=1>.

24. 121 P.3d 1166 (Wash. 2005).

25. *Id.* at 1170.

26. *Id.*

27. *Id.*

28. *Id.* at 1168.

29. *Id.* at 1180.

30. *Id.* at 1174-75.

weight.”³¹ 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.”³² 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.”³³ 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.”³⁴ 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.”³⁵

Soon thereafter, the *HTK* majority’s reading of article I, section 16 (Rule 11) was bolstered by Justice Fairhurst’s opinion for the majority in *Central Puget Sound Regional Transit Authority v. Miller*, which involved the condemnation of private property for a transit station.³⁶ 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.³⁷

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.”³⁸ 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.’”³⁹

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.”⁴⁰ Moreover, Justice Fairhurst’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.’”⁴¹

31. *Id.* at 1175 (citations omitted).

32. *Id.* (citing *City of Des Moines v. Hemenway*, 437 P.2d 171, 177 (Wash. 1968)).

33. *Id.* at 1176.

34. *Id.* at 1178 n.19.

35. *Id.* at 1177.

36. 128 P.3d 588, 591 (Wash. 2006).

37. *Id.* at 596-97.

38. *Id.* at 593 n.2 (citing *City of Des Moines v. Hemenway*, 437 P.2d 171, 176-77 (Wash. 1968)).

39. *Id.* at 593 (quoting *Hemenway*, 437 P.2d at 177).

40. *Id.*

41. *Id.* at 597 (quoting *In re Petition of Port of Grays Harbor*, 638 P.2d 633, 639 (Wash. Ct.

Justice Fairhurst 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.’”⁴²

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.”⁴³ 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.”⁴⁴

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*.⁴⁵ The court once again distinguished the responsibility of the judiciary under article I, section 16 to determine public use from the belief that the determination of necessity is a legislative question.⁴⁶

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.”⁴⁷ 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.”⁴⁸ 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*.

App. 1982)).

42. *Id.* (quoting *State v Hill*, 870 P.2d 313, 315 (Wash. 1994)).

43. *Id.* at 598.

44. *Id.*

45. 151 P.3d 176 (Wash. 2007).

46. *Id.* at 185-86 (citing *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 121 P.3d 1166, 1175 (Wash. 2005)).

47. *Id.* at 185.

48. *Id.* at 187 n.23.

The dissent from deference (Public Use and Necessity). 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, section 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.”⁴⁹ Framed as judicial corollaries to section 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.⁵⁰ 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?”⁵¹

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.”⁵² 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.”⁵³

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.”⁵⁴ Although he noted that there was persuasive case law that supported a contrary conclusion, even if the decision came down to a choice between the clear command of the constitution and deference to previous precedents, Justice Johnson felt bound to choose fidelity to the constitutional text.⁵⁵

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,

49. *HTK Mngmt.*, 121 P.3d at 1185 (J.M. Johnson, J., dissenting).

50. *Id.*

51. *Id.*

52. *Id.* (quoting WASH. CONST. art. I, § 16).

53. *Id.*

54. *Id.*

55. *Id.*

rather than recent case law, are more persuasive in determining' the protections of a constitutional provision."⁵⁶

When the same issue resurfaced in *Miller* and *Grant County PUD*, Justices Johnson and Sanders continued to dissent from what they believed to be the erroneous approach taken by the majority.⁵⁷ Although Chief Justice Gerry Alexander and Tom Chambers did not join the majority in either *Miller* or *Grant County PUD*, they dissented on procedural grounds rather than on the merits of the "public use" question.⁵⁸ (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, section 16."⁵⁹ Justice Johnson repeated his view that "[t]he inquiries regarding public interest and necessity are judicial corollaries which provide enforcement of that constitutional mandate."⁶⁰ 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."⁶¹

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."⁶² 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, section 16. Our constitution's use of the word "shall" is imperative and operates to create a duty on the courts.⁶³

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

56. *Id.* at 1185 n.10 (quoting *Ino Ino, Inc. v. City of Bellevue*, 937 P.2d 154, 165 (Wash. 1997)).

57. *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 128 P.3d 588, 600-01 (Wash. 2006) (J.M. Johnson, J., dissenting); *Grant Cnty. PUD v. N. Am. Foreign Trade Zone Indus.*, 151 P.3d 176, 195 (Wash. 2007) (J.M. Johnson, J., dissenting).

58. *Miller*, 128 P.3d at 600 (Alexander, C.J., dissenting).

59. *Id.* at 601 (J.M. Johnson, J., dissenting).

60. *Id.* at 602.

61. *Id.* at 606.

62. *Id.* at 602.

63. *Id.* at 603.

condemnation that would achieve the same purpose.⁶⁴ 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.⁶⁵

Just as the majority applied the same standard in *Grant County PUD*, Justice Johnson (again joined by Justice Sanders) maintained their view in dissent.⁶⁶ They believed that the article I, section 16 public use and necessity requirements did not permit the use of the power of eminent domain for what amounted to a private, rather than a public, purpose.⁶⁷ 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, section 16.”⁶⁸ Justice Johnson disputed the contention that “loss-cutting” constitutes a public purpose, “even if some public benefit is argued.”⁶⁹ Quoting the analysis applied in *In re Petition of Seattle*,⁷⁰ 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.”⁷¹

Justice Johnson believed it was particularly important to distinguish the approach taken in the Washington Constitution from that taken by the United States Supreme Court’s Fifth Amendment takings ruling in *Kelo v. City of New London*, wherein the United States Supreme Court permitted “economic development” to justify the taking of private property.⁷² This interpretation of the United States Constitution “does not dictate that this court reach a similar conclusion under the more protective provisions of the Washington Constitution.”⁷³ Instead, the “Washington Constitution article I, section 16 offers stronger protections of private property rights and more stringent procedural restrictions on the exercise of eminent domain power.”⁷⁴

64. *Id.* at 606.

65. *Id.* (quoting *State ex rel. Postal Tel.-Cable Co. v. Superior Court for Grant Cnty.*, 116 P. 855, 857-58 (Wash. 1911)).

66. *Grant Cnty. PUD v. N. Am. Foreign Trade Zone Indus.*, 151 P.3d 176, 195 (Wash. 2007) (J.M. Johnson, J., dissenting).

67. *Id.* at 199.

68. *Id.* at 200.

69. *Id.* at 199.

70. 638 P.2d 549 (Wash. 1981).

71. *Grant Cnty. PUD*, 151 P.3d at 199-200 (J.M. Johnson, J., dissenting) (quoting *In re Petition of Seattle*, 638 P.2d at 556).

72. *Id.* at 200.

73. *Id.*

74. *Id.* at 200-01.

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 what process must be followed in order to invoke that power. On this point two additional justices found themselves dissenting from the court's approach.⁷⁵

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.⁷⁶ 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.⁷⁷ Miller received no individualized notice about the hearing.⁷⁸

The deferential approach of the majority. Writing for the majority, Justice Fairhurst relied upon a Washington Court of Appeals decision from 1991⁷⁹: “Washington courts have held that personal notice of the public meeting establishing necessity is not required either by the statute or due process.”⁸⁰ Instead, personal notice is only required for the government to begin the condemnation process that follows after a public meeting.⁸¹ 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.⁸²

The same majority's views about public notice similarly prevailed in *Grant County PUD*.⁸³ 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.⁸⁴ 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.”⁸⁵ Moreover, “although a specific description of the property is required

75. *Id.* at 191 (Alexander, C.J., dissenting); *id.* at 194 (Chambers, J., dissenting).

76. Cent. Puget Sound Reg'l Transit Auth. v. Miller, 128 P.3d 588, 595 (Wash. 2006).

77. *Id.* at 592.

78. *Id.*

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

80. *Miller*, 128 P.3d at 593.

81. *Id.* at 593-94.

82. *Id.* at 597 n.5.

83. Grant Cnty. PUD v. N. Am. Foreign Trade Zone Indus., 151 P.3d 176, 195 (Wash. 2007).

84. *Id.* at 179.

85. *Id.* at 183 (quoting *Miller*, 128 P.3d at 596).

for the public use and necessity hearing,” such is not required for the prior public hearing.⁸⁶

Speaking directly to the constitutional due process requirements in such circumstances, Justice Fairhurst maintained that the Fourteenth Amendment to the United States 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.⁸⁷

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.”⁸⁸ 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. . . . [N]one of which suggests that their holdings have broader application to a public meeting to discuss authorizing a condemnation.”⁸⁹

In both *Miller* and *Grant County 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.”⁹⁰

In a concurring opinion Justice Barbara Madsen voiced additional support for the majority’s due process analysis in *Grant County PUD*: “[U]nder Washington statutes, our legislature currently provides property owners with protections *beyond* those required by either the state or federal constitutions.”⁹¹ Justice Madsen took direct aim at the “dissenting opinions in which they, without any authority, attempt to erroneously ‘constitutionalize’ aspects of eminent domain proceedings.”⁹² 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

86. *Id.*

87. *Id.* (footnote omitted).

88. *Id.* at 183 n.16.

89. *Id.* at 183.

90. *Id.* at 186 n.22.

91. *Id.* at 187 (Madsen, J., concurring).

92. *Id.* at 188.

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."⁹³

Justice Madsen singled out the dissenting Chief Justice Alexander's assertion that the notice provided by the Grant County PUD did not comply with Fourteenth Amendment due process requirements.⁹⁴ According to Justice Madsen, the Chief Justice's analysis was troubling because of its "equating condemnation proceedings with seizures of property."⁹⁵ 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."⁹⁶ 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."⁹⁷

The dissent from deference (Due Process). *Miller* and *Grant County 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 County PUD*.⁹⁸

In *Miller*, Chief Justice Alexander (joined by Justice Tom Chambers) thought that the notice provided by the condemning agency did not even meet the statutory minimum that was in effect at the time of the ruling.⁹⁹ But his dissenting opinion included a constitutional due process dimension as well.¹⁰⁰ 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."¹⁰¹ 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."¹⁰² The Chief Justice did not appear to rely upon a specific constitutional provision, but his

93. *Id.* at 189.

94. *Id.*

95. *Id.* at 190.

96. *Id.*

97. *Id.* at 191.

98. *Id.* at 194 (Chambers, J., dissenting).

99. Cent. Puget Sound Reg'l Trans. Auth. v. Miller, 128 P.3d 588, 600 (Wash 2006) (Alexander, C.J., dissenting).

100. *Id.*

101. *Id.* (quoting *Glaspey & Sons, Inc. v. Conrad*, 521 P.2d 1173, 1176 (Wash. 1974) (emphasis in original)).

102. *Id.* (quoting *Glaspey*, 521 P.2d at 1176).

dissenting opinion concluded that “[d]ue process demands that government err on the side of giving abundant notice when it seeks to take property.”¹⁰³

In *Grant County 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 petitioner of a critical step toward condemning the petitioner’s property—and that this failure violated the due process clause of the [F]ourteenth [A]mendment to the United States Constitution.”¹⁰⁴ 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.’”¹⁰⁵

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.¹⁰⁶

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.”¹⁰⁷

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 United States 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

103. *Id.*

104. *Grant Cnty. PUD v. N. Am. Foreign Trade Zone Indus.*, 151 P.3d 176, 191 (Wash. 2007) (Alexander, C. J., dissenting).

105. *Id.* at 192 (quoting *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) (emphasis added by Chief Justice Alexander)).

106. *Id.* at 192 n.2.

107. *Id.* at 191-92.

them an opportunity to present their objections.”¹⁰⁸ The Chief Justice believed that at a minimum the Fourteenth Amendment required a balance between the “interest of the State” and “the individual interest sought to be protected by the Fourteenth Amendment.”¹⁰⁹ 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.¹¹⁰

The dissenting opinions offered by Justice James Johnson in *Miller* and *Grant County PUD* (joined in both cases by Justice Richard Sanders) offered a different and broader due process analysis than the Chief Justice.¹¹¹ 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.”¹¹² Justice Johnson repeated this view about the burden of proof for public notice requirements in *Grant County PUD*.¹¹³

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.”¹¹⁴ Justice Johnson was even more explicit in asserting the constitutional basis for his view of public notice requirements in eminent domain cases in *Grant County PUD*.¹¹⁵ There, he referenced article I, section 3 of the Washington Constitution (the due process clause) and concluded that “[p]ublic notice procedures required for initiating condemnation proceedings must 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.”¹¹⁶

Significantly, Justice Johnson also argued in his dissent in *Miller* that the state constitution directed the judiciary to perform a watchdog function in eminent domain decisions.¹¹⁷ “The trial court must make findings that support the legal conclusion as

108. *Id.* at 192 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

109. *Id.*

110. *Id.* at 193.

111. *Id.* at 195-96 (J.M. Johnson, J., dissenting).

112. *Cent. Puget Sound Reg'l Transit Auth. v. Miller*, 128 P.3d 588, 603 (Wash. 2006) (J.M. Johnson, J., dissenting) (citation omitted).

113. *Grant Cnty.*, 151 P.3d at 197 (J.M. Johnson, J., dissenting).

114. *Miller*, 128 P.3d at 605 (J.M. Johnson, J., dissenting).

115. *Grant Cnty.*, 151 P.3d at 196 (J.M. Johnson, J., dissenting).

116. *Id.*

117. *Miller*, 128 P.3d at 602 (J.M. Johnson, J., dissenting).

to the necessity of the taking.”¹¹⁸ Justice Johnson was even more explicit in this regard in his dissent in *Grant County PUD*, insisting that “[w]hen government deprives law-abiding property owners of their private property, due process requirements of article I, section 3 demand that clear written findings be entered by a trial court. Judicial review of government takings as required by article I, section 16 is impossible without such a written decision below.”¹¹⁹ According to Justice Johnson, trial court findings should be entered with regard to public use, interest, and necessity.

Also, Justice Johnson emphatically rejected Grant County PUD’s attempt to retroactively “cure” its purportedly defective public notice with a subsequent notice.¹²⁰ “Limiting the opportunity to be heard on legislation authorizing condemnation until after a proceeding has been commenced denies due process,” he concluded.¹²¹ 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.¹²²

Justice Tom Chambers dissented in *Grant County PUD* on procedural grounds.¹²³ He concluded that the public notice provided by Grant County PUD did not meet the statutory minimum, and he also rejected the retroactive curing of the purported public notice defect.¹²⁴ He concluded, “[t]o 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.”¹²⁵

C. Concluding Assessment

In December 2006, long after *Grant County 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*.¹²⁶ 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, section 16 remains settled after *Grant County PUD*. The Washington Legislature has also responded to the personal notice issue raised in *Miller* with legislation clarifying the notice requirements for condemning agencies.¹²⁷ Accordingly, despite the sharp

118. *Id.* at 606.

119. *Grant Cnty.*, 151 P.3d at 201 (J.M. Johnson, J., dissenting).

120. *Id.* at 198.

121. *Id.* at 198 n.5.

122. *Id.* at 198.

123. *Id.* at 194 (Chambers, J., dissenting).

124. *Id.* at 195.

125. *Id.*

126. 149 P.3d 378 (Wash. 2006).

127. See S.H.B. 1458, 60th Leg., Reg. Sess. (Wash. 2007), available at

differences between the justices concerning the scope and standards of judicial review of exercises of eminent domain power article I, section 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."¹²⁸ 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* in 2004.¹²⁹ 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.¹³⁰ 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.

<http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/House%20Passed%20Legislature/1458-S.PL.pdf>, Press Release, Wash. Attorney Gen. Office, Governor signs important McKenna-request bills protecting private property, seniors and consumers (Apr. 17, 2007), available at <http://www.atg.wa.gov/pressreleases.aspx?current=2007>. For a post-*HTK & Miller* critique of Washington State law's protections against eminent domain abuse, see William J. Maurer, *A False Sense of Security: The Potential for Eminent Domain Abuse in Washington*, WASH. POLICY CTR., (Dec. 2006), http://www.washingtonpolicy.org/sites/default/files/Eminent%20Domain%20-%20False%20Sense%20of%20Security%20PB_0.pdf.

128. WASH. CONST. art. I, § 12.

129. 83 P.3d 419 (Wash. 2004).

130. *Id.* at 425.

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.¹³¹ 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.¹³²

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.¹³³ 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 carried 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

131. See THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 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.

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

133. See ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 26 (2002) (describing the Washington framers' "distrust of corporations, particularly railroads," which "often lobbied lawmakers, offering free passes to legislators"); Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 228 (1913) ("In keeping with the growing distrust of the people in legislative bodies, the constitution of Washington . . . enters fully and explicitly into the field of legislative restriction."); Thompson, *supra* note 131, at 1253 (describing "the contemporary populist suspicion of the political influence accompanying large concentrations of wealth").

territorial legislature had been notorious for spending “much of its time granting special acts and privileges.”¹³⁴

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,”¹³⁵ Washington’s framers extended the clause to explicitly reach “corporations.”¹³⁶ Commentators have attributed this deliberate inclusion of corporations to the delegates’ twin distrust of corporate strength and legislative weakness.¹³⁷

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*, for example, the court, looking to case law interpreting the Privileges and Immunities Clause in Article IV, Section 2, of the United States Constitution, specifically recognized the right to “carry on business” as one of the “privileges” or “immunities” to which the clause applies.¹³⁸ Thereafter, it repeatedly 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 except for farmers peddling their own produce;¹³⁹
- criminalized misrepresentations made by employment agencies but not those made by other businesses;¹⁴⁰
- required a license for cigar sales by vending machines but not cigar sales by merchants;¹⁴¹

134. Thompson, *supra* note 131, at 1254 n.32 (quoting Wilfred J. Airey, A History of the Constitution and Government of Washington Territory 208-09 (1945) (unpublished Ph.D. dissertation, University of Washington) (on file with University of Washington Library); *see also* Knapp, *supra* note 133, at 239, 270-72; Thompson, *supra* note 131, at 1252-54; James Leonard Fitts, The Washington Constitutional Convention of 1889, at 9-10, 95-99 (1951) (unpublished Masters thesis, University of Washington) (on file with Washington State Library).

135. OR. CONST. art. I, § 20; *see also* IND. CONST. art. I, § 23.

136. WASH. CONST. art. I, § 12.

137. *E.g.*, UTTER & SPITZER, *supra* note 133, at 26-27.

138. 70 P. 34, 41 (Wash. 1902).

139. *Ex Parte Camp*, 80 P. 547, 548-49 (Wash. 1905).

140. *City of Spokane v. Macho*, 98 P. 755, 755-56 (Wash. 1909).

141. *City of Seattle v. Dencker*, 108 P. 1086, 1087-88 (Wash. 1910).

- imposed onerous conditions on the sale of concentrated feed by businesses other than cereal and flour mills;¹⁴²
- subjected merchandise sold by secondhand dealers to a ten-day “hold” period but exempted secondhand stoves and furniture;¹⁴³
- subjected solid, but not liquid, fuel dealers to licensing fees;¹⁴⁴
- required a solicitation license for paid charity fundraisers but exempted a particular community fund;¹⁴⁵
- forced non-resident, but not resident, photographers to obtain a license to conduct business in a city;¹⁴⁶ and
- exempted honorably discharged veterans from peddler licensing fees.¹⁴⁷

In these early cases, the court closely scrutinized the legislation at issue. It reviewed the record to discern the legislature’s actual purpose in enacting the law and identified certain purposes, such as economic protectionism, as rendering the law unconstitutional.¹⁴⁸ 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.¹⁴⁹

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.”¹⁵⁰

142. *State v. W.W. Robinson Co.*, 146 P. 628, 629 (Wash. 1915).

143. *Sherman Clay & Co. v. Brown*, 231 P. 166, 170 (Wash. 1924).

144. *Pearson v. City of Seattle*, 90 P.2d 1020, 1023 (Wash. 1939).

145. *City of Seattle v. Rogers*, 106 P.2d 598, 600-01 (Wash. 1940).

146. *Ralph v. City of Wenatchee*, 209 P.2d 270, 272-73 (Wash. 1949).

147. *Larson v. City of Shelton*, 224 P.2d 1067, 1072 (Wash. 1950).

148. *E.g., Ralph*, 209 P.2d at 273; *see also City of Seattle v. Dencker*, 108 P. 1086, 1088 (Wash. 1910) (“[I]f we were to start an investigation to determine the purpose of this act, it could only end in a report that . . . the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of the delivery of the cigars; or, in other words, to prevent honest competition in the cigar trade.”).

149. *Ralph*, 209 P.2d at 273.

150. *State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1105 (Wash. 1936), *overruled on other*

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 United States Constitution.¹⁵¹ Although the court had done so on occasion in earlier cases,¹⁵² the practice became increasingly common beginning in the 1960s. By the 1990s, the court was referring to the two clauses as “substantially similar”¹⁵³ and “substantially identical.”¹⁵⁴

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.”¹⁵⁵ Arguably closer linguistically to Washington’s privileges or immunities clause is the Privileges and Immunities Clause of Article IV, Section 2, of the United States 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 challenges to economic legislation—namely, the “rational basis” test.¹⁵⁶ Under that standard, the court would uphold a challenged law so long as it could conceive of *some* legitimate purpose for the law (even if not the legislature’s actual purpose for passing it) and *some* set of circumstances, however unlikely, under which the law *might* advance that conjectural purpose.¹⁵⁷ The rational basis test is thus particularly deferential to the government. Not surprisingly, as it took hold in Washington’s privileges or

grounds by Puget Sound Gillnetters Ass’n v. Moos, 603 P.2d 819 (Wash. 1979).

151. U.S. CONST. amend. 14, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

152. *See, e.g.*, *State v. Hart*, 217 P. 45, 47 (Wash. 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.”).

153. *Seeley v. State*, 940 P.2d 604, 610 (Wash. 1997).

154. *State v. Smith*, 814 P.2d 652, 660 (Wash. 1991); *Am. Network, Inc. v. Wash. Utils. & Transp. Comm’n*, 776 P.2d 950, 960 (Wash. 1989).

155. *Compare* U.S. CONST. amend. 14, § 1, *with* WASH. CONST. art. I, § 12.

156. *See generally* Thompson, *supra* note 131, at 1264 & n.79, 1278 (observing that the Washington Supreme Court applied “a cautiously interventionist, ‘reasonable ground’” test through the late 1960s, after which it increasingly relied on the federal “rational basis” test).

157. *See, e.g.*, *Am. Network, Inc.*, 776 P.2d at 960-63.

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 District 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*,¹⁵⁸ 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.”¹⁵⁹ 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.¹⁶⁰

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.¹⁶¹ 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

[T]he 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.¹⁶²

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.”¹⁶³

158. 83 P.3d 419 (Wash. 2004).

159. *Id.* at 425. *Grant County* was decided on rehearing. In its earlier opinion in the case, which the court vacated in part, the court had similarly concluded that article I, section 12 warrants a separate and independent constitutional analysis. *See Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 42 P.3d 394 (Wash. 2002), *vacated in part*, 83 P.3d 419 (Wash. 2004).

160. *Grant Cnty.*, 83 P.3d at 425-28.

161. *Id.* at 425-26.

162. *Id.*

163. *Id.* at 426 (quoting Thompson, *supra* note 131, at 1251).

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.¹⁶⁴ 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.”¹⁶⁵ This addition, said the court,

[D]emonstrates 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.¹⁶⁶

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.”¹⁶⁷

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”¹⁶⁸—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.”¹⁶⁹ 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.¹⁷⁰ “Therefore,” the court concluded, “preexisting law seems to favor a separate analysis of article I, section 12.”¹⁷¹

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

164. *Id.*

165. *Id.* (citing Thompson, *supra* note 131, at 1253).

166. *Id.* at 426 (citations omitted) (citing 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 131, at 1253).

167. *Id.* at 427.

168. *Id.*

169. *Id.* (quoting U.S. REV. STAT. tit. 23, § 1889 (2d ed. 1878)).

170. *Id.* at 427 n.12.

171. *Id.* at 428.

federal constitution was “a grant of enumerated powers,” the state constitution was a “limit [on] the sovereign power, which directly lies with” the people.¹⁷² 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.”¹⁷³

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.”¹⁷⁴ It then turned to the underlying issue in the case: whether the petition method of annexation violated the privileges or immunities clause.¹⁷⁵ The court concluded it did not, because the prerequisite to a violation of article I, section 12—namely, the existence of a privilege or immunity—was not present in the case.¹⁷⁶ “[N]ot every statute authorizing a particular class to do or obtain something involves a ‘privilege’ subject to article I, section 12,” the court explained.¹⁷⁷ To define the terms “privileges” and “immunities,” the court relied on its 1902 opinion in *State v. Vance*, which, in turn, looked to the interpretation given those terms as they are used in Article IV, Section 2, of the United States Constitution.¹⁷⁸ “[T]he terms ‘privileges and immunities,’” the court held:

[P]ertain 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.¹⁷⁹

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,”¹⁸⁰ the court concluded that there was no “privilege” or

172. *Grant Cnty.*, 83 P.3d at 42-28.

173. *Id.*

174. *Id.*

175. *Id.* at 428-30.

176. *Id.* at 429.

177. *Id.* at 428.

178. *Id.* at 428-29; see also *State v. Vance*, 70 P. 34, 41 (Wash. 1902).

179. *Grant Cnty.*, 83 P.3d at 428-29 (citation omitted) (quoting *Vance*, 70 P. at 41).

180. *Id.* at 429.

“immunity” implicated in the case and, therefore, no violation of the privileges or immunities clause.¹⁸¹

Justice Sanders authored a separate opinion concurring with the majority’s disposition of the case, “but not with all of its analysis.”¹⁸² 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, Section 2, of the United States Constitution.¹⁸³ 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.¹⁸⁴ According to Justice Sanders, “[a]lthough a privilege or immunity violation may be class based, the text of article I, section 12 also protects ‘any citizen’ as well as ‘class of citizens.’”¹⁸⁵

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, section 12.”¹⁸⁶ 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*.¹⁸⁷ 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.¹⁸⁸

Grant County Fire Protection District 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 United States Constitution.¹⁸⁹ Instead, the court decided, the privileges or immunities clause is an independent state constitutional provision deserving of independent analysis and application.¹⁹⁰

181. *Id.*

182. *Id.* at 430-31 (Sanders, J., concurring).

183. *Id.* at 431. 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 United States 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 Cnty.*, 83 P.3d at 431 (Sanders, J., concurring).

184. *Grant Cnty.*, at 431 (Sanders, J., concurring).

185. *Id.*

186. *Id.* at 432.

187. *Id.* (citing *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230); *State v. Vance*, 70 P. 34 (1902); *Saenz v. Roe*, 526 U.S. 489 (1999) (Thomas, J., dissenting)).

188. *Id.* (quoting *Vance*, 70 P. at 41).

189. *Id.* at 428, 431.

190. *Id.* at 428.

Moreover, all of the justices agreed that “privileges” and “immunities” are those fundamental personal rights of state citizenship.¹⁹¹

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*.¹⁹² It involved a challenge to Washington’s Defense of Marriage Act (“DOMA”), which limits marriage to one man and one woman.¹⁹³ 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*.¹⁹⁴ 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.”¹⁹⁵ 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

191. *Id.* at 428-29, 432.

192. *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

193. *Id.* at 968.

194. *Id.* at 971-73.

195. *Id.* at 971 (emphasis added).

minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause.¹⁹⁶

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”¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ Noting that “[a]ppropriate constitutional analysis begins with the text and, for most purposes, should end there as well,”²⁰⁰ 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?²⁰¹

Resolution of the challenge to DOMA, he then argued, turned on the first prong of his proposed two-part test.²⁰² 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.²⁰³ Using historical understanding as his touchstone, he noted that while “[m]any cases . . . support the conclusion that marriage between one man and one woman is [such] a right or privilege,”²⁰⁴ 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.”²⁰⁵

196. *Id.* at 972 (emphasis added).

197. *Id.* at 973.

198. *Id.* at 980-85.

199. *Id.* at 993-96 (J.M. Johnson, J., concurring in judgment).

200. *Id.* at 993 (quoting *Malyon v. Pierce County*, 935 P.2d 1272 (Wash. 1997)).

201. *Id.* 993.

202. *Id.* at 993-95.

203. *Id.* at 994-96.

204. *Id.* at 995-96.

205. *Id.* at 996 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230)).

Because there was no “privilege” or “immunity” at issue, Justice Johnson concluded there could be no violation of the privileges or immunities clause.²⁰⁶

Justice Fairhurst, joined by Justices Bridge, Owens, and Chambers, dissented.²⁰⁷ 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,”²⁰⁸ she disagreed with the way that his concurrence and the plurality opinion framed the right at issue.²⁰⁹ 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.”²¹⁰

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, section 12 of the Washington Constitution does not give greater protection than the federal equal protection clause in this situation.”²¹¹ She added, however, that she “would not foreclose the possibility that article I, section 12 provides greater protection.”²¹²

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,²¹³ allowing the purported rational basis to be based on “unsupported speculation”²¹⁴) 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,”²¹⁵ and requires that the relationship between the classification and the purported governmental interest not be “too attenuated.”²¹⁶ Applying this rational basis test with “teeth,”²¹⁷ as she put it, Justice Fairhurst concluded that DOMA did not withstand scrutiny and consequently violated the privileges or immunities clause.²¹⁸

Justice Chambers, who had concurred in Justice Fairhurst’s dissent, authored a separate dissenting opinion, which Justice Owens also joined, “to express [his]

206. *Andersen*, 138 P.3d at 995.

207. *Id.* at 1012 (Fairhurst, J., dissenting).

208. *Id.* at 1016 (alteration in original) (quoting *State v. Vance*, 70 P.3d 34, 41 (1902)).

209. *Id.* at 1013.

210. *Id.*

211. *Id.* at 1015 n.12 (citing *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419, 425-28 (Wash. 2004)).

212. *Id.* at 1016 n.12.

213. *Id.* at 1016.

214. *Id.* at 1017.

215. *Id.* at 1016 (quoting *State ex rel. Bacich v. Huse*, 59 P.2d 1101, 1104 (Wash. 1936), *overruled on other grounds by Puget Sound Gillnetters Ass’n v. Moos*, 603 P.2d 819 (Wash. 1979)).

216. *Id.* at 1017 (emphasis omitted).

217. *Id.* at 1016.

218. *Id.* at 1019.

disagreement with the [plurality] opinion's analytical approach toward our state constitution's privileges and immunities clause"²¹⁹ 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."²²⁰ "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."²²¹ "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."²²²

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?"²²³ 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,"²²⁴ he concluded that a privilege was, in fact, in play and had not been granted equally to all.²²⁵

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.²²⁶ But because Justices Fairhurst

219. *Id.* at 1040 (Chambers, J., concurring in dissent).

220. *Id.*

221. *Id.* at 1043.

222. *Id.* at 1041 (citation omitted).

223. *Id.* at 1040.

224. *Id.* at 1041.

225. *Id.* at 1043.

226. *Compare id.* at 972 (plurality opinion) ("[A]n independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class."), *with id.* at 1042 (Chambers, J., concurring in dissent) ("This court has never held . . . that the effect of article I, section 12 is limited to positive grants of favoritism to a minority class."). Although Justice Jim Johnson's concurrence did not expressly take a position on the issue, it applied the Privileges or Immunities Clause independently of the Equal Protection Clause, reflecting the broader understanding of *Grant County*. *See id.* at 993-1009 (J.M. Johnson, J.,

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*, a constitutional challenge to Washington's felon re-enfranchisement scheme.²²⁷ Specifically, the case objected to the requirement that a felon's legal financial obligations be paid in full before voting rights could be restored.²²⁸ The plaintiffs claimed that this condition violated the clause by conferring a privilege (voting rights) based on wealth.²²⁹

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.²³⁰ Justice Fairhurst began by taking a position on the question she had avoided in *Andersen*: whether an independent state constitutional analysis is *always* warranted.²³¹ She maintained that *Grant County* had already held that it was.²³² 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."²³³

After concluding that "the right to vote is a privilege or immunity . . . protected by article I, section 12,"²³⁴ 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."²³⁵ 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."²³⁶ In this light, she concluded that the privileges or immunities clause "does not provide

concurring in judgment).

227. 163 P.3d 757 (Wash. 2007).

228. *Id.* at 761.

229. *Id.*

230. *Id.*

231. *See id.* at 764-75 & n.6.

232. *Id.* at 764.

233. *Id.* (emphasis added).

234. *Id.* at 765.

235. *Id.*

236. *Id.*

greater protection of voting rights for felons than does the equal protection clause of the federal constitution.”²³⁷

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 “fail[ed] to [even] assert a privileges and immunities clause violation because Washington’s disenfranchisement scheme does not involve a grant of favoritism.”²³⁸ 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.”²³⁹ 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.”²⁴⁰ 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.²⁴¹

Justice Jim Johnson also wrote a concurring opinion joined by Justice Sanders.²⁴² Unlike Justice Madsen, he agreed with the plurality that an independent state constitutional analysis was warranted.²⁴³ But as in *Andersen*, he maintained that that analysis should begin and end with the “plain language” of the privileges or immunities clause.²⁴⁴ 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?”²⁴⁵ Unlike the plurality, he did not view the re-enfranchisement

237. *Id.* at 766.

238. *Id.*

239. *Id.*

240. *Id.* at 773 (Madsen, J., concurring) (emphasis added).

241. *Id.*

242. *Id.* at 776 (J.M. Johnson, J., concurring).

243. *Id.*

244. *Compare id.* at 776-77, with *Andersen v. King County*, 138 P.3d 963, 993 (Wash. 2006) (J.M. Johnson, J., concurring in judgment).

245. *Madison*, 163 P.3d at 777 (J.M. Johnson, J., concurring) (quoting *Andersen*, 138 P.3d at 993 (J.M. Johnson, J., concurring in judgment)).

scheme as implicating a “privilege”—that is, a fundamental right of state citizenship.²⁴⁶

Relying on the *Corfield v. Coryell*'s classic definition of the term as used in Article IV, Section 2, of the United States 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.²⁴⁷ “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.”²⁴⁸ 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.”²⁴⁹

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.²⁵⁰ 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.²⁵¹ “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.”²⁵² 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.²⁵³

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.”²⁵⁴

246. *Id.* at 777.

247. *Id.* at 777-78 (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa.1823) (No. 3,230)).

248. *Id.* at 778 (omission in original) (quoting WASH. CONST. art. VI, § 3).

249. *Id.* (omission and alteration in original) (quoting *Corfield*, 6 F. Cas. at 552).

250. *Id.* at 778-81 (Alexander, C.J., dissenting).

251. *Id.* at 781-82 & n.1 (Chambers, J., concurring in dissent).

252. *Id.* at 781-82.

253. *Id.* at 781 n.1.

254. *Id.* at 782.

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.²⁵⁵ 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?²⁵⁶

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*, which involved a challenge to Seattle’s grant of two exclusive contracts for the hauling of construction, demolition, and land clearing waste.²⁵⁷ An independent hauler challenged the grant, which went to two large corporations.²⁵⁸

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.²⁵⁹ 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

255. *Id.* at 764 (plurality opinion) (stating that the analysis “focuses on whether our state constitution provision is more protective of the claimed right in the particular context than is the federal constitution provision, and the scope of that protection,” and that the “analysis involves, among other things, an examination of the language of the provision, its relationship to other constitutional provisions, the existing and preceding statutory and common law at the time it was adopted, and other historical context” (internal quotation marks omitted)); *see also id.* at 765.

256. *See id.* at 777 (J.M. Johnson, J., concurring); *id.* at 781 (Chambers, J., concurring in dissent).

257. 178 P.3d 960 (Wash. 2008).

258. *Id.* at 962.

259. *Id.* at 965-66.

“immunities” ““pertain *alone* to those fundamental rights which belong to the citizens of the state by reason of such citizenship,””²⁶⁰ Justice Bridge began (and ended) her analysis by asking whether the right at issue was “fundamental.”²⁶¹ She maintained that the relevant right was not, as the plaintiff had argued, the “right to hold specific private employment,”²⁶² 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.²⁶³

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.”²⁶⁴

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].”²⁶⁵ 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.”²⁶⁶ 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.””²⁶⁷

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

260. *Id.* at 966 (quoting *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 83 P.3d 419, 428 (Wash. 2004)).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.* at 966 n.10 (emphasis omitted).

265. *Id.* at 969 (Sanders, J., dissenting).

266. *Id.* at 971.

267. *Id.* at 972 (quoting Thompson, *supra* note 131, at 1253 n.31).

monopolies and special charters to favored business interests.²⁶⁸ “By the time the constitutional convention convened,” Justice Sanders noted,

[T]he 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.”²⁶⁹

Having considered its history, Justice Sanders turned to the meaning of the privileges or immunities clause at the time it was adopted.²⁷⁰ 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.’”²⁷¹ 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.”²⁷²

“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.”²⁷³ 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.”²⁷⁴ 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 case law that had applied the fairly rigorous “real and substantial relation” test in assessing economic regulation.²⁷⁵ 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

268. *Ventenbergs*, 178 P.3d at 972-73.

269. *Id.* at 973 (footnote omitted) (citations omitted) (quoting Thompson, *supra* note 131, 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)).

270. *Id.* at 973-74.

271. *Id.* at 973.

272. *Id.* at 974.

273. *Id.* at 977.

274. *Id.*

275. *Id.* at 979-80 (citing *Ralph v. City of Wenatchee*, 209 P.2d 270, 272-73 (Wash. 1949); *State ex rel. Bacich v. Huse*, 59 P.2d 1101 (Wash. 1936), *overruled on other grounds by Puget Sound Gillnetters Ass’n v. Moos*, 603 P.2d 819 (Wash. 1979)); *see also id.* at 975 (citing *Ralph*, 209 P.2d at 274; *Seattle v. Dencker*, 108 P. 1086, 1090 (Wash. 1910); *Ex Parte Camp*, 80 P. 547, 549 (Wash. 1905)) (discussing unreasonableness of government-created monopolies).

substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act in respect to which the classification is made.”²⁷⁶ Applying that standard, he concluded that Seattle’s conduct in forcing all but the two contract holders from the market was anything but reasonable.²⁷⁷ 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.”²⁷⁸ 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.”²⁷⁹

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 citizenship²⁸⁰, the justices could not agree on how to frame the particular right at issue.²⁸¹ 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*, a challenge to a statewide ban on smoking in places of employment.²⁸² 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

276. *Id.* at 979 (quoting *Bacich*, 59 P.2d at 1105).

277. *Id.* at 979-81.

278. *Id.* at 979.

279. *Id.* at 981.

280. *Id.* at 966 (majority opinion); *id.* at 975 (Sanders, J., dissenting).

281. Compare *id.* at 966 (majority opinion) (characterizing the right at issue as the “right to provide [a] governmental service”), with *id.* at 977 (Sanders, J., dissenting) (characterizing the right at issue as “the right to earn a living in a lawful occupation free from unreasonable governmental interference”).

282. 192 P.3d 306, 312 (Wash. 2008).

Gunwall process again.²⁸³ 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.”²⁸⁴ 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.”²⁸⁵

Justice Fairhurst concluded that no privilege or immunity was implicated by the smoking ban.²⁸⁶ While she agreed that “engaging in business . . . is a privilege for purposes of article I, section 12”²⁸⁷ (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 12.²⁸⁸

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 *Ventenebergs*: 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.

283. *Id.* 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.

284. *Id.* at 324 (emphasis added) (quoting *Madison v. State*, 163 P.3d 757, 764 (Wash. 2007)).

285. *Id.* at 324-25.

286. *Id.* at 325-26.

287. *Id.* at 325.

288. *Id.* at 325-26 (citation omitted).

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?”²⁸⁹ 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?”²⁹⁰ Justice Bridge lent a fifth, and, thus, majority, vote to the latter approach in *American Legion*,²⁹¹ 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 “wobble 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 article 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.”²⁹² 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.”²⁹³

289. *Andersen v. King County*, 138 P.3d 963, 993 (Wash. 2006) (J.M. Johnson, J., concurring in judgment); *see also id.* at 1041 n.3 (Chambers, J., concurring in dissent).

290. *Madison v. State*, 163 P.3d 757, 764 (Wash. 2007); *see also Am. Legion*, 192 P.3d at 325.

291. 192 P.3d at 329.

292. WASH. CONST. art. I, § 1.

293. *Id.* § 32.

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, section 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."²⁹⁴ 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*.²⁹⁵ 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,²⁹⁶ speech in nonpublic forums,²⁹⁷ commercial speech,²⁹⁸ and defamation.²⁹⁹ In other contexts, courts have found that the Washington Constitution grants more expansive protection of the right to free speech than does the United States Constitution.³⁰⁰ 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.³⁰¹ Additionally, unlike the First Amendment, the Washington Constitution categorically prohibits prior restraints on constitutionally-protected speech.³⁰²

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.³⁰³ While the First Amendment to the United States Constitution appears directed at government actors ("Congress shall

294. *Id.* § 5.

295. 720 P.2d 808 (Wash. 1986). The *Gunwall* analysis has been previously described *infra* Part II(D).

296. *State v. Reece*, 757 P.2d 947, 952 (Wash. 1988).

297. *City of Seattle v. Huff*, 767 P.2d 572, 574 (Wash. 1989).

298. *Nat'l Fed'n of Retired Persons v. Ins. Comm'n'r*, 838 P.2d 680, 689 (Wash. 1992).

299. *Richmond v. Thompson*, 922 P.2d 1343, 1348-49 (Wash. 1996).

300. *Bering v. Share*, 721 P.2d 918, 931 (Wash. 1986) (enjoining an antiabortion organization from picketing in front of medical building).

301. *Id.*

302. *State v. Coe*, 679 P.2d 353, 360 (Wash. 1984) (invalidating order prohibiting broadcasts of recordings played in open court in prosecution for solicitation of murder).

303. *Sutherland v. Southcenter Shopping Ctr., Inc.*, 478 P.2d 792, 794 (Wash. Ct. App. 1970).

make no law . . . abridging the freedom of speech,")³⁰⁴ article I, section 5 contains no such limitation.

In *Sutherland v. Southcenter Shopping Center, Inc.* 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.³⁰⁵ The Washington Supreme Court addressed the same question in *Alderwood Associates v. Washington Environmental Council*, in a closely divided opinion concerning whether initiative supporters were entitled to gather signatures at a privately owned shopping center.³⁰⁶ In *Alderwood*, a four-member plurality held that both article I, section 5 and the constitution's initiative provision protected signature gathering on private property.³⁰⁷ 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, section 5, since no state action was involved.³⁰⁸

Eight years later, in *Southcenter Joint Venture v. National Democratic Policy Committee*, the supreme court reviewed article I, section 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.³⁰⁹ 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."³¹⁰

In recent years the Washington 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 Commission*, candidate Marilou Rickert challenged incumbent Senator Tim Sheldon in an election for state senate.³¹¹ 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.³¹² Rickert appealed, challenging the law as unconstitutional, and the court of appeals, as well as the supreme court, agreed.³¹³ 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

304. 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 . . ." U.S. CONST. amend. XIV).

305. 478 P.2d at 800.

306. 635 P.2d 108, 110 (Wash. 1981).

307. *Id.* at 117.

308. *Id.* at 120 (Dolliver, J., concurring).

309. 780 P.2d 1282, 1282 (Wash. 1989).

310. *Id.* at 1291.

311. 168 P.3d 826, 828 (Wash. 2007).

312. *Id.* at 828.

313. 119 P.3d 379, 380 (Wash. Ct. App. 2005), *aff'd*, 168 P.3d 826, 832 (Wash. 2007).

further any compelling interests.³¹⁴ “[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.”³¹⁵ 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.”³¹⁶

The supreme court struck down restrictions on placing messages on the doors of public housing units in *Resident Action Council v. Seattle Housing Authority*.³¹⁷ The Seattle Housing Authority operated low-income public housing, with approximately 5,300 units in Seattle.³¹⁸ Tenants agree to abide by certain “house rules” which are incorporated into their leases.³¹⁹ 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.³²⁰ A nonprofit organization of elected tenant representatives sued, alleging the rule violated the United States and Washington Constitutions.³²¹ Justice Charles Johnson, writing for the Washington 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.³²² 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.³²³

Most recently in *Bradburn v. North Central Regional Library District*, the Washington Supreme Court answered a certified question from the United States District Court for Eastern Washington regarding whether a library’s Internet filtering policy violates the free speech protections in the Washington Constitution.³²⁴ The North Central Regional Library District maintained Internet filters on its computers to block websites and images considered “harmful to minors.”³²⁵ 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

314. *Rickert*, 168 P.3d at 830-31.

315. *Id.* at 832.

316. *Id.* at 833 (Madsen, J., dissenting).

317. 174 P.3d 84, 85 (Wash. 2008).

318. *Id.* at 86.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 89.

323. *Id.* at 90 (Madsen, J., dissenting).

324. 231 P.3d 166, 169 (Wash. 2010).

325. *Id.* at 174.

Constitution.³²⁶ Madsen reasoned that the library's filtering policy and practice were not prior restraints on speech.³²⁷

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.³²⁸

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."³²⁹

B. *Invasion of Private Affairs*

Perhaps the most striking difference in the approach to a state constitutional provision, in comparison to the United States 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."³³⁰

Washington courts have not always recognized a significant difference in the state constitution. Despite the marked differences between section 7 and the Fourth Amendment of the United States Constitution, early state decisions tracked closely with federal Fourth Amendment decisions, particularly after the United States Supreme Court held the Fourth Amendment was incorporated against the states in *Mapp v. Ohio*.³³¹ The state supreme court hinted at the need for independent analysis under state constitutional grounds in *State v. Hehman*, 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.³³² The court noted that such arrests may be allowable under federal decisions, but that state courts can afford defendants greater rights.³³³

In 1984 the Washington Supreme Court explicitly noted that the textual difference between the state and federal provisions required separate analyses.³³⁴ Under the Fourth Amendment, the government is only prevented from conducting

326. *Id.*

327. *Id.* at 177.

328. *Id.* at 181.

329. *Id.* at 186 (Chambers, J., dissenting).

330. WASH. CONST. art. I, § 7.

331. 367 U.S. 643, 655 (1961).

332. 578 P.2d 527, 528 (Wash. 1978).

333. *Id.* at 529.

334. *State v. Myrick*, 688 P.2d 151, 153 (Wash. 1984).

“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.³³⁵

Two years later in *State v. Gunwall* the supreme court considered whether phone records were obtained from the defendant in a way that violated the Washington Constitution’s guarantee of privacy.³³⁶ 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.³³⁷ 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 affidavit of probable cause.³³⁸ More recently, the court has relied upon a two-part analysis of whether or not article I, section 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.”³³⁹

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 section 7 protects against unwarranted searches of a person’s garbage cans,³⁴⁰ government invasion of bank and telephone records,³⁴¹ and unwarranted searches of vehicles, even those driven by a felon on work release.³⁴²

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.³⁴³ In *Eisfeldt* the defendant left a key to his house for a repairman to fix a diesel spill in the living room.³⁴⁴ The repairman noticed what he thought was marijuana in the garage and called the police.³⁴⁵ When the police arrived he led them through the house and into the garage.³⁴⁶ After observing the marijuana, a police officer obtained a search warrant, leading to the defendant’s arrest and conviction of manufacturing a controlled

335. *Id.* at 153-54.

336. 720 P.2d 808, 809 (Wash. 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. *Id.* at 811.

337. *See supra* text accompanying notes 4 – 6.

338. *Gunwall*, 720 P.2d at 818.

339. *State v. Miles*, 156 P.3d 864, 867-68 (Wash. 2007).

340. *State v. Boland*, 800 P.2d 1112, 1117 (Wash. 1990).

341. *Miles*, 156 P.3d at 872.

342. *State v. Hendrickson*, 917 P.2d 563, 569 (Wash. 1996).

343. *State v. Eisfeldt*, 185 P.3d 580, 584 (Wash. 2008).

344. *Id.* at 583.

345. *Id.*

346. *Id.*

substance.³⁴⁷ 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.³⁴⁸ But Sanders wrote that this doctrine is inapplicable under the Washington Constitution, resulting in a reversal of the defendant's conviction.³⁴⁹

In *State v. Winterstein* the defendant was convicted of unlawful manufacture of methamphetamine after his probation officer conducted a warrantless search of his residence.³⁵⁰ The court of appeals had held that, even if the search was illegal, the evidence was still "admissible under the inevitable discovery doctrine."³⁵¹

Writing for the supreme court's majority, Justice Stephens rejected the overturned inevitable discovery doctrine and reversed the conviction.³⁵² Contrasting cases interpreting the Fourth Amendment to the United States Constitution, Justice Stephens labeled the doctrine "speculative" and incompatible with the state constitution's "nearly categorical exclusionary rule."³⁵³

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. . . ."³⁵⁴ 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 United States Constitution.³⁵⁵

This tendency toward independent interpretation was accelerated by the United States Supreme Court's decision in *Employment Division v. Smith*, in which the Court retreated from the "compelling interest" test that had previously been applied to free exercise cases.³⁵⁶ Instead of requiring the state to show a compelling interest in restricting religious liberty, *Smith* permitted enforcement of neutral laws of general applicability.³⁵⁷ The Washington State Supreme Court found the approach in *Smith*

347. *Id.*

348. *Id.* at 585.

349. *Id.* at 584.

350. 220 P.3d 1226, 1227 (Wash. 2009).

351. *Id.*

352. *Id.* at 1233.

353. *Id.*

354. WASH. CONST. art. I, § 11.

355. *First Covenant Church v. City of Seattle*, 840 P.2d 174, 186 (Wash. 1992).

356. 494 U.S. 872, 884 (1990); *see also* *Open Door Baptist Church v. Clark Cnty.*, 995 P.2d 33, 43-44 (Wash. 2000).

357. *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997).

incompatible with the Washington Constitution and continued to employ the compelling interest standard.³⁵⁸

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.³⁵⁹ The supreme court held that the state must demonstrate it has a compelling interest in taking action that burdens the exercise of religion.³⁶⁰ 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.³⁶¹ “A facially neutral, even-handedly enforced statute that does not directly burden free exercise may, nonetheless, violate article 1, section 11, if it indirectly burdens the exercise of religion.”³⁶²

Then in 2000 the court apparently experienced a conversion of sorts, upholding a county’s burdensome permitting process for churches in rural areas.³⁶³ Clark County adopted a land use plan that required churches, among other nonconforming uses, to obtain a special conditional use permit to operate.³⁶⁴ 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.³⁶⁵ Writing for the majority, Justice Alexander held that the free exercise protection in the Washington Constitution was not offended by the requirement that churches apply for a conditional use permit.³⁶⁶ 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.”³⁶⁷

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.”³⁶⁸

358. *First Covenant Church*, 840 P.2d at 182.

359. *Id.* at 177.

360. *Id.* at 187.

361. *Munns v. Martin*, 930 P.2d 318, 319 (Wash. 1997).

362. *Id.* at 321 (quoting *First Covenant Church*, 840 P.2d at 187).

363. *Open Door Baptist Church v. Clark Cnty.*, 995 P.2d 33, 46 (Wash. 2000).

364. *Id.* at 34.

365. *Id.* at 55 (Sanders, J., dissenting).

366. *Id.* at 48 (majority opinion).

367. *Id.* at 47 (quoting *First Covenant Church v. City of Seattle*, 787 P.2d 1352, 1364 (Wash. 1990), *vacated*, 499 U.S. 901 (1991)).

368. *Open Door Baptist Church*, 995 P.2d at 49 (Sanders, J., dissenting).

The court reached a result more accommodating to religious liberty in *City of Woodinville v. Northshore United Church of Christ*,³⁶⁹ 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.³⁷⁰ The church agreed and submitted an application to the City of Woodinville for a temporary permit.³⁷¹ A short-term moratorium on temporary use permits was currently in place, and the city refused to process the application.³⁷² 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.³⁷³

[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, section 11 of our constitution.³⁷⁴

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.”³⁷⁵

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.³⁷⁶

D. *The Right to Bear Arms*

Academics have long debated whether the Second Amendment to the United States Constitution established an individual or corporate right to keep and bear arms.

369. 211 P.3d 406 (Wash. 2009).

370. *Id.* at 408.

371. *Id.*

372. *Id.*

373. *Id.* at 411.

374. *Id.*

375. *Id.* at 413 (Sanders, J., concurring).

376. See, e.g., *Witters v. State Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989); *Weiss v. Bruno*, 509 P.2d 973 (Wash. 1973), *overruled in part by Gallwey v. Grimm*, 48 P.3d 274 (Wash. 2002).

The United States 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*.³⁷⁷

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.”³⁷⁸

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, section 24 is subject to “reasonable regulation.”³⁷⁹ 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.”³⁸⁰ 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.³⁸¹ The Second Amendment Foundation and a group of licensed handgun owners challenged the municipal ordinance.³⁸² 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.³⁸³

In *State v. Spencer*, the appeals court reviewed a state law that prohibited carrying a weapon in a fashion that would cause alarm.³⁸⁴ 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.³⁸⁵ The defendant argued the law constituted an effective ban on carrying weapons as it is unclear which weapons might cause alarm.³⁸⁶ The court ruled that the statute was “narrowly drawn, and it promotes a substantial public interest,” while balancing the individual right to bear arms.³⁸⁷

377. 128 S. Ct. 2783 (2008).

378. WASH. CONST. art. I, § 24.

379. *State v. Krantz*, 164 P.2d 453, 454 (Wash. 1945).

380. *Second Amendment Found. v. City of Renton*, 668 P.2d 596, 597 (Wash. Ct. App. 1983).

381. *Id.*

382. *Id.*

383. *Id.* at 598.

384. 876 P.2d 939, 941 (Wash. Ct. App. 1994) (reviewing WASH. REV. CODE § 9.41.270 (1994)).

385. *Spencer*, 876 P.2d at 940.

386. *Id.* at 941.

387. *Id.* at 942.

Another statutory provision allows sentence enhancements when a defendant is armed with a deadly weapon during commission of the crime,³⁸⁸ and these enhancements are not unconstitutional.³⁸⁹ The defendant is considered armed during commission of a crime if a weapon is “easily accessible and readily available for use.”³⁹⁰ The State must establish a nexus between the weapon, the defendant, and the crime.³⁹¹ Recently, however, the supreme court has allowed a looser application of the nexus rule.³⁹² In *State v. Schelin*, 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.³⁹³ After his arrest, police discovered a loaded weapon approximately six to ten feet from where he had first been seen.³⁹⁴ A divided supreme court held that close proximity to the weapon at the time of arrest justified an enhanced sentence.³⁹⁵

Justice Sanders dissented in *Schelin*, disagreeing with the majority’s claim that that the right guaranteed in article I, section 24 was subject to “reasonable regulation.”³⁹⁶ He reasoned that the existing limitations in article I, section 24 were the only limitations that the framers of the state constitution were willing to impose.³⁹⁷ By including some limitations they presumably rejected others.³⁹⁸ 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,³⁹⁹ the Washington Constitution leaves no room for abridgement in the name of the police power.⁴⁰⁰

388. WASH. REV. CODE § 9.94A.125 (2010).

389. *State v. Caldwell*, 734 P.2d 542, 543-44 (Wash. Ct. App. 1987).

390. *State v. Valdobinos*, 858 P.2d 199, 206 (Wash. 1993).

391. *State v. Schelin*, 55 P.3d 632, 636 (Wash. 2002).

392. *Id.* at 639.

393. *Id.* at 634.

394. *Id.*

395. *Id.* at 639.

396. *Id.* at 646 (Sanders, J., dissenting).

397. *Id.* at 647.

398. *Id.* at 646 (“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.”).

399. *E.g.*, 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 power to prescribe the manner in which arms may be borne.”); 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.”); 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.”).

400. *Schelin*, 55 P.3d at 647 (Sanders, J., dissenting).

More recently *State v. Sieyes* presented the court with an opportunity to recalibrate its analysis of gun regulations.⁴⁰¹ Christopher Sieyes, age seventeen, 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 eighteen from possessing firearms.⁴⁰² 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 United States and Washington Constitutions.⁴⁰³

The Washington Supreme Court, with Justice Sanders writing for the majority, held that the Second Amendment applies to the states.⁴⁰⁴ Justice Sanders also noted that the Washington Constitution explicitly guarantees the right to bear arms.⁴⁰⁵

The court then turned to the question of the constitutionality of the prohibition on a minor's possession of firearms.⁴⁰⁶ 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.⁴⁰⁷ “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.”⁴⁰⁸ 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.⁴⁰⁹

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*.⁴¹⁰ Thus, the court declined to address the constitutionality of the law.⁴¹¹ “In sum appellant offers no convincing authority supporting his argument that Washington's limit on childhood firearm possession

401. 225 P.3d 995, 998 (Wash. 2010).

402. WASH. REV. CODE § 9.41.040(2)(a)(iii) (2009).

403. The United States Supreme Court addressed the question of Second Amendment incorporation in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), holding that the individual right to keep and bear arms is incorporated against the states through the Fourteenth Amendment to the United States Constitution.

404. *Sieyes*, 225 P.3d at 1003.

405. *Id.*

406. *Id.* at 1004.

407. *Id.* at 1005.

408. *Id.*

409. *Id.* at 1005 n.20 (citing *City of Seattle v. Montana*, 919 P.2d 1218, 1222 n.1 (Wash. 1996) (plurality); *id.* at 1227 (Durham, C.J., concurring)).

410. *Id.* at 1005.

411. *Id.*

violates the United States or Washington Constitutions. Accordingly we keep our powder dry on this issue for another day.”⁴¹² The case was remanded for consideration of additional issues.⁴¹³

Justice James Johnson dissented, writing that “the majority disregards our long-standing national tradition allowing younger citizens to bear arms,”⁴¹⁴ and he argued strict scrutiny is the appropriate standard of review for a challenge to a statute restricting one’s constitutional rights.⁴¹⁵ Using this analysis, Justice Johnson would have invalidated the law.⁴¹⁶

CONCLUSION

The purpose of this article was to illuminate the way in which the Washington Supreme Court has addressed the independent application of the Washington State Constitution. By examining three broad areas in which the court has resolved questions as to the meaning and application of the state constitution, we hope to have clarified the extent to which the state constitution places 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 areas where the direction of the state constitution is relatively clear, one would hope that future decisions will more faithfully adhere to what the constitution requires. In areas where the meaning or application of the state constitution is subject to a variety of plausible interpretations, one would hope for better direction as to how the court will exercise its authority.

412. *Id.*

413. *Id.*

414. *Id.* at 1006 (J.M. Johnson, J., dissenting).

415. *Id.* at 1008.

416. *Id.* at 1010.