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A Series of Missed Opportunities: The Washington Supreme Court's Lapse in Recognizing and Advancing Washington's Due Process Jurisprudence

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I. Introduction

The due process clause protects individuals from arbitrary or unjustified governmental intrusion in their lives.[1] This does not mean citizens are completely free from government intrusion.[2] Rather, the provision guarantees to individuals fair process when their lives, liberty, or property are at stake.[3] Additionally, the provision "provides heightened protection against government interference with certain fundamental rights and liberty interests" even when there is some form of procedural safeguard—this is referred to as "substantive due process."[4]

Substantive due process places an important limitation on state legislatures. Unlike Congress, state legislatures are assumed to have plenary power.[5] Under this assumption, the procedural due process element only requires state legislatures to enact laws to empower the government prior to interfering with its citizens lives as it sees fit.[6] The substantive due process element requires laws to have "a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power [without violating] any direct or positive mandate of the constitution."[7] Essentially, the substantive due process

[1] Daniels v. Williams, 474 U.S. 327, 331 (1986).
[2] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972).
[3] Troxel v. Granville, 530 U.S. 57, 65 (2000).
[4] Washington v. Glucksberg, 521 U.S. 702, 720, (1997); Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1855).
[5] Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 290 (2007).
[6] Yim v. City of Seattle, 194 Wn.2d 682, 688 (2019).
[7] State v. Blake, 197 Wn.2d 170, 178 (2021) (citing Ragan v. City of Seattle, 58 Wn.2d 779, 783 (1961), overruled in part on other grounds).

prohibits laws that intrude on "certain fundamental rights and liberty interests" no matter how fair the legal procedures are.[8]

Even so, government actions that encroach on individuals' fundamental rights sometimes slip into state statutes. Such was the case in Washington with its law against possession of controlled substances—a law enacted in 1971 as part of the Uniform Controlled Substances Act.[9] Under this law, individuals could be convicted with a felony, even when they didn't know they had drugs in their possession. The majority in the Washington State Supreme Court recently found this statute unconstitutional in *State v. Blake.*[10]

The highest courts in a state have the final say in their decisions on constitutional issues when they clearly signal to the United States Supreme Court that their decision was based independently on their own state constitution.[11] In *Blake*, the majority stated that the decision was based on both the federal and state constitution.[12] However, Justice Gordon McCloud, writing for the majority, hinted that the decision could have been based independently on the state's constitution.[13]

By leaving the basis for its decision ambiguous, the *Blake* majority left the decision susceptible to review by the United States Supreme Court. More importantly, it missed an opportunity to rediscover and further develop due process jurisprudence based on the state provision. Fortunately, this missed opportunity did not foreclose the possibility of future decisions being grounded on Washington's due process provision.

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[8] State v. Beaver, 184 Wn.2d 321, 332 (2015); see also Yim, 192 Wn.2d at 688-89.
[9] Laws of 1971, 1st Ex. Sess., ch. 308.
[10] Blake, 197 Wn.2d 170.
[11] Michigan v. Long, 463 U.S. 1032,1041 (1983).
[12] Blake, 197 Wn.2d at 195.
[13] *Id.* at 181.

II. History of State Constitutional Interpretation

While the U.S. Constitution applies to each state, states are sovereign over their own territory, and each state has created its own constitution to structure its state government.[14]

There are important differences between state constitutions and the U.S. Constitution.[15] The focus of the U.S. Constitution is to structure the federal government. Amendments were added later (the Bill of Rights) to limit the federal government's power against individual citizens.[16] While the Federal Constitution also places limits on states against individual citizens, those are only outer limits of protection.[17] States are allowed to further restrict and/or protect their own state citizens as they see fit, so long as they do not directly conflict with a federal constitutional provision.[18]

State constitutions are an important protection of individual rights. Both the founders of the nation and of individual states understood that state constitutions had an important role in the nation's complex government.[19] As a condition of statehood after the ratification of the U.S. Constitution, state candidates generally had to create a constitution to seek admission into the Union.[20] State constitutional development was strong throughout the nineteenth century.[21] By 1920, however, states became less reliant on their constitutions and more focus on the Federal Constitution.[22]

In a Harvard Law Review article in 1977, Justice Brennan encouraged states to begin again to rely more on developing the law of their own state constitutions, even

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[14] U.S. v. Comstock, 560 U.S. 126, 153 (2010) (Kennedy, J., concurring).
[15] G. Alan Tarr, *Understanding State Constitutions*, Temp. L. Rev. (1992).
[16] *Id.* at 1171-72.
[17] State v. Gunwall, 106 Wn.2d 54, 59 (1986).
[18] *Id.* at 59.
[19] Loretta H. Rush, *A Constellation of Constitutions: Discovering & Embracing State Constitutions as Guardians of Civil Liberties*, 82 Alb. L. Rev. 1353, 1355.
[20] *See e.g.*, Enabling Act of 1889.
[21] James A. Henretta, *Forward: Rethinking the State Constitutional Tradition*, 22 Rutgers L. J. 819, 819 (1991).
[22] *Id.* at 836.

when there was a related provision in the United States Constitution.[23] But this encouragement was tempered by the Court majority's instructions to state courts in *Michigan v. Long*.[24] In this case, the majority stated it would assume state courts were following federal law unless they clearly stated that their decisions were based on independent state grounds.[25] Therefore, if a state court analyzed its own constitutional provision and case law, but also discussed the federal counterpart and case law without a clear statement of the decisional basis, the case would be reviewable by the Supreme Court.

Subsequently, state courts began to rely more on their interpretations of their own state constitutions and use *Long's* magic words to insulate their decisions from the Supreme Court.[26] In doing so, state courts took a variety of approaches.[27] In the *primacy* approach, courts prioritized state constitutional analysis, viewing it "as an independent source of rights."[28] The *interstitial* approach was more nuanced—courts relied on state constitutional analysis only when the state provision offered additional or expanded rights from a parallel federal provision.[29] To determine if this was the case, courts looked at textual differences, legislative history, and other factors before relying on independent state grounds for their decision.[30] In the *dual sovereignty* model, courts interpreted both constitutional provisions; the decision would be based on state grounds while the federal constitutional analysis was meant to aid other courts without similar state provisions, thus indirectly

[23] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).
[24] Michigan v. Long, 463 U.S. 1032, (1983).
[25] *Id.* at 1040-41.
[26] Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 Tex. L. Rev. 1025, 1025-26 (1985).
[27] *Id.* at 1027.
[28] *Id.* at 1028
[29] *Id.*
[30] *Id.*

advancing federal jurisprudence.[31] Finally, courts that always followed the Supreme Court's lead took the *lock-step* approach.[32]

Different state judges and courts took different approaches, even within the same state. The approach changed depending on the provision and from case to case, especially depending on the make-up of the court.

This was true in Washington. In *State v. Ringer*, which was decided six months after *Long*, the court found that the search and seizure at issue did not violate the Federal Constitution.[33] However, when looking at Article I, Section 7 of the Washington Constitution, the court held that the provision "pose[d] an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions… ."[34] This view exemplified the *primacy* approach.

A year later, in *State v. Coe*, the Court based its decision on Washington's freedom of speech provision,[35] rather than the First Amendment of the U.S. Constitution.[36] The Court stated that its decision was based on "adequate and independent" state grounds per *Long*, and gave its reasons for relying on state grounds.[37] In *dual sovereignty* fashion, the court found the prior restraint at issue in the case also violated the federal provision.[38] Both the *dual sovereignty* and *primacy* approach ultimately prioritize the state constitutional interpretation.

III. The Advent of the *Gunwall* Analysis

After *Ringer* and *Coe*, Washington appellate courts began to consistently prioritize state constitution interpretation over the Federal Constitution.[39] But this

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[31] *Id.* at 1029; State v. Coe, 101 Wn.2d 364, 378 (1984).
[32] Hugh D. Spitzer, *New Life for the "Criteria Tests" in State Constitutional Jurisprudence: "Gunwall is Dead—Long Live Gunwall!"*, 37 Rutgers L. J. 1169, 1175 (2006).
[33] State v. Ringer, 100 Wn.2d 686 (1983).
[34] Ringer, 100 Wn.2d at 690.
[35] Const. art. I, § 5.
[36] Coe, 101 Wn.2d at 373.
[37] *Id.* at 373-74, 378.
[38] *Id.* 101 Wn.2d at 378-380.
[39] State v. Gunwall, 106 Wn.2d 54, 59 (1986) citing 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, 499 (1984).

practice quickly became controversial—even among individual justices on the Washington Supreme Court.[40] In order to rein in the practice, the court in *Gunwall* encouraged an *interstitial* approach and suggested six factors courts should consider to determine if there was a clear basis for when to ground their decisions on state constitutional interpretation.[41] Washington courts were to first rely on the federal provision to determine if there was a violation.[42] If there was no violation, then Washington courts could use the analysis to determine if the state provision warranted independent interpretation and if that provision provided more protection than its federal counterpart.[43]

The *Gunwall* factors are nonexclusive and include

1. looking at the relevant text of the state constitution;
2. comparing the differences between the state and federal constitutions;
3. reviewing the state constitution and common law history;
4. examining preexisting state law;
5. considering the structural differences between the two constitutions; and
6. accounting for matters of "particular state interest or local concern" that would outweigh the need for a national uniformity in interpretative law.[44]

These factors were intended to serve as both a briefing guide for litigants, as well as a guide for state courts to make decisions based on "well founded legal reasons" rather than relying on courts' "notion[s] of justice."[45]

After *Gunwall*, courts began considering independent state grounds only if the litigant briefed all six *Gunwall* factors.[46] The supreme court created short-cuts to avoid conducting a redundant *Gunwall* analysis when non-case-specific factors had

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[40] *Id.* at 59-60; *see also* State v. Boland, 115 Wn.2d 571, 583 (1990) (Guy, J., dissenting); State v. Gocken,127 Wn.2d 95, 110 (1995) (Madsen, J., concurring); *Id.* at 113 (Johnson, J., dissenting).
[41] Gunwall, 106 Wn.2d at 62-63.
[42] Gunwall, 106 Wn.2d at 64.
[43] *Id.* at 64-65.
[44] *Id.* at 61-62.
[45] *Id.* at 62-63.
[46] State v. Wethered, 110 Wn.2d 466, 472-73 (1988) (stating that the court would "not consider the question until the issue was adequately presented and argued to [it]" using the Gunwall factors).

already been decided. For example, the *Boland* court adopted the analysis of four of the factors from *Gunwall* because both cases were interpreting the same constitutional provision.[47]

The new *Gunwall* requirement caused controversy as seen when the majority in *Gocken* based its decision on federal constitutional grounds despite previous reliance on the state provision.[48] In *Gocken*, the court found that the Washington Constitution's own double jeopardy clause did not provide broader protection to criminal defendants than the federal double jeopardy clause.[49] Both Justice Madsen (concurring) and Justice Johnson (dissenting) disagreed with the deference to the federal provision because Washington courts had 100 years of state constitutional jurisprudence on double jeopardy issues.[50] Justice Madsen said,

> *Gunwall* was merely intended to be a tool in the development of a principled analysis in cases where an issue is undecided under the state constitution. Where this court has already determined the particular state constitutional issue, *Gunwall* has no application because this court has its own preexisting law to guide its interpretation.[51]

Eventually, Washington courts relied on the Washington Constitution for provisions where it became well established that the state provision was more protective.[52] Washington provisions found to be more protective than the federal counterpart included search and seizure, freedom of religious expression, and some contexts of freedom of speech.[53]

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[47] State v. Boland, 115 Wn.2d 571, 576 (1990) (adopting the first, second, third, and fifth factors analysis as determined in Gunwall because both cases involved interpreting Const. art. I, § 7.
[48] State v. Gocken, 127 Wn.2d 95 (1995).
[49] *Id.*
[50] *Id.* (Madsen, J., concurring); (Johnson, J., dissenting).
[51] *Id.* at 110 (Madsen, J., concurring).
[52] State v. White, 135 Wn.2d 761, 769 (1998) "No Gunwall analysis is necessary in this case because we apply established principles of state constitutional jurisprudence."
[53] *Id.*; City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 641 (2009) ("[W]here 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.") (Citing State v. Reichenbach, 153 Wn.2d 126, (2004)); Collier v. City of Tacoma, 121 Wn.2d 737, 747-48 (1993) (finding the state constitution is more protective of political speech than its federal counterpart).

IV. *Gunwall* and the Due Process Clause

The approach to due process remains a puzzle to the Washington Supreme Court. This is partly because the provisions are very similar to each other. The federal Due Process Clause says that "[n]o state shall…deprive any person of life, liberty, or property, without due process of law…"[54] Washington's parallel provision states, "[n]o person shall be deprived of life, liberty, or property, without due process of law."[55] But textual comparison—the second *Gunwall* factor—is not the only reason for the puzzle. Rather, by not fully fleshing out the entirety of the *Gunwall* analysis, the Washington Supreme Court has stymied its own development of state due process jurisprudence.

The supreme court has conducted a *Gunwall* analysis for the due process clause relatively few times.[56] In 1991, the court did its first due process *Gunwall* analysis in *Rozner v. City of Bellevue*.[57] The analysis was superficial, likely because the plaintiff failed to brief the *Gunwall* factors.[58] The court found a state interpretation to be unwarranted and deferred to a federal Due Process interpretation.[59]

The next year in *State v. Ortiz*, the majority did a full *Gunwall* analysis on Article I, Section 3 after determining there had been no Fourteenth Amendment violation.[60] The majority quoted the Washington due process clause for the first *Gunwall* factor without any further comment.[61] For the second factor, the majority remarked that the language of the two clauses was "nearly identical."[62] For the third factor the majority found that "no legislative history ha[d] been shown which

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[54] U.S. Const. amend. XIV, § 1.
[55] Wash. Const. art. I, § 3.
[56] Rozner v. City of Bellevue, 116 Wn.2d 342 (1991); State v. Ortiz, 119 Wn.2d 294 (1992); State v. Wittenbarger, 124 Wn.2d 467 (1994); State v. Manussier, 129 Wn.2d 652 (1996); King v. King, 162 Wn.2d 378 (2007); Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695 (2011); *In re* E.H., 191 Wn.2d 872 (2018).
[57] Rozner, 116 Wn.2d 342.
[58] *Id.* at 352.
[59] *Id.*
[60] Ortiz, 119 Wn.2d at 302.
[61] *Id.* at 302-03.
[62] *Id.* at 303.

would provide a justification for interpreting the identical provisions differently."[63] Fourth, the majority found that the cases Ortiz relied on were actually based on the Fourteenth Amendment and not on the state due process provision.[64] Fifth, the majority used the reasoning from *Gunwall*: that the structural differences of the two provisions favor an independent interpretation.[65] Finally, Ortiz argued state law enforcement issues were always a local matter.[66] The majority found this reasoning unhelpful.[67] In a 5-4 split, the *Ortiz* majority ultimately found that the state due process provision was no more protective than the federal provision and so the federal due process interpretation was controlling.[68]

Justice Charles Johnson, writing for the dissent, disagreed with the majority's *interstitial* approach and asserted that the court was "committed to deciding questions of state constitutional law first, before addressing the federal constitution, in order to determine if the state constitution provide[d] greater rights."[69] The dissent referred to Justice Utter's majority opinions in both *O'Day v. King County*, an Article I, Section 5 case, ("[t]his court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own state constitution before turning to federal law")[70] and *City of Seattle v. Mesiani*, an Article I, Section 7 case (the court had a duty to "first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature").[71]

Additionally, the dissent did not agree with the majority's conclusion that the *Vaster* case Ortiz relied on was strictly interpreting the federal Due Process clause.

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[63] *Id.*
[64] *Id.* at 303-04.
[65] Ortiz, 119 Wn.2d at 303.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 305.
[69] *Id.* at 318 (Johnson, J., dissenting).
[70] O'Day v. King County, 109 Wn.2d 796, 801-02 (1988).
[71] City of Seattle v. Mesiani, 110 Wn.2d 454, 456 (1988).

Because the language in *Vaster* was ambiguous, the dissent said the supreme court should have assumed the *Vaster* court based its analysis on the state due process clause and found the decision controlling.[72]

But even without *Vaster,* the dissent believed the court should base its decision on independent state grounds.[73] The dissent conducted its own *Gunwall* analysis. It first declared that even "*identical* provisions should be viewed in light of what the language meant to the framers at the time our constitution was adopted in 1889. They should be interpreted independently unless historical evidence shows the framers intended otherwise."[74] The dissent concluded that because the majority didn't "present any historical evidence" to rely on the federal provision, the first three factors actually favored independent state analysis.[75] The dissent found *Bartholomew* and *Davis* showed that there was preexisting state law favoring the state provision even though those case issues did not match up completely with *Ortiz*.[76] And since the last two *Gunwall* factors favored independent analysis, the *Ortiz* court could base its decision on adequate and independent state grounds.[77]

In subsequent cases where litigants briefed a *Gunwall* analysis, the court made quick work of its own analysis and deferred to interpreting the federal provision.[78] Usually, however, litigants bringing due process violation claims did not brief *Gunwall* so the court would not even consider the issue on state grounds.[79]

In the few cases where litigants included a due process *Gunwall* analysis, the courts followed a pattern: the first and second factors always favored federal interpretation due to similar language; the third factor also favored federal

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[72] Ortiz, 119 Wn.2d at 318 (Johnson, J., dissenting).
[73] *Id.* at 318-19 (Johnson, J., dissenting).
[74] *Id.* at 319 (Johnson, J., dissenting).
[75] *Id.* (Johnson, J., dissenting).
[76] *Id.* at 319-20 (Johnson, J., dissenting).
[77] *Id.* at 320 (Johnson, J., dissenting).
[78] State v. Manussier, 129 Wn.2d 652, 679 (1996) (ruling on the other factors for similar reasons in Ortiz and dismissing the sixth factor because it was neutral).
[79] See appendix for a list of cases where the supreme court pointed out that the litigants failed to include a *Gunwall* analysis in their briefs.

interpretation due to an absence of insightful constitutional history on the subject; and the fifth factor, despite always favoring an independent state analysis regardless of the provision, was considered unimportant to the analysis. Courts spent the most time considering the common law element of the third factor, the fourth factor pertaining to preexisting state law, and the sixth factor pertaining to state and local concerns.

A. The Common Law Element of the Third Gunwall Factor

In *King v. King*, a 2007 dissolution case, the majority looked at the common law element of the third factor.[80] Ms. King, the petitioner, argued that "common law provided for a right to counsel."[81] This was important because "Washington recognized common law principles when it became a state."[82] But the majority found that this was only under certain circumstances and that it was not applicable in dissolution proceedings.[83] Based on this finding and the cursory analyses of the other factors, the majority found no need for independent analysis.[84]

Justice Madsen, joined only by Justice Chambers, wrote an impassioned dissent. It was clear that she was placing herself in the shoes of the indigent mother who had lost custody of her three children to her ex-husband after representing herself pro se in the dissolution proceedings.[85] The dissent found that the majority's constitutional analysis was flawed—that the Washington Supreme Court had already established that the state due process clause was more protective than the Fourteenth Amendment in child custody cases.[86]

The dissent did not focus on the third element but rather the fourth—preexisting state law. The dissent first cited *In re Luscier* (1974), claiming that it established a

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[80] King v. King, 162 Wn.2d 378 (2007).
[81] *Id.* at 392.
[82] *Id.* at 393 (citing RCW 4.04.010).
[83] *Id.*
[84] *Id.*
[85] *Id.* at 403-422 (Madsen, J., dissenting).
[86] *Id.* at 404 (Madsen, J., dissenting).

state due process analysis. In *Luscier*, the court unequivocally stated that "the right to one's children is a 'liberty' protected by the due process requirements of the Fourteenth Amendment and Article I, Section 3.[87] This case predates *Long* and therefore does not contain the language required by the Supreme Court to show its decision was based on independent state grounds. This is significant because in the *Long* dissent, Justice Stevens stated that the majority departed from precedent by "presuming that adequate state grounds are not independent unless it clearly appears otherwise."[88] Prior to *Long*, even when the language in an opinion was ambiguous, the Supreme Court presumed the decision was based on independent state grounds.[89] Therefore, at the time *Luscier* was decided, the decision rested on independent state ground, even if by way of default.

The dissent also referred to *In re Myricks*, a dependency proceeding where a father was facing temporary loss of custody of his son.[90] This case reaffirmed the holding in *Luscier* by inferring that the state due process necessitated the appointment of counsel.[91]

The *King* dissent pointed to *In re Grove* to show that *Luscier* and *Myricks* were, in fact, precedent for interpreting the state due process provision.[92] In *Grove,* the court noted that "an indigent parent in a dependency action has a constitutional right to counsel" based on *Luscier* and *Myricks*, but then compared the rulings from those cases to a Supreme Court case, *Lassiter v. Department of Social Services*, where an indigent parent only had a right to counsel in child termination proceedings in limited circumstances.[93] The *King* dissent asserted that due to this

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[87] *In re* Luscier, 84 Wn.2d 135, 139 (1974).
[88] Michigan v. Long, 463 U.S. 1032, 1066 (1983) (Stevens, J., dissenting).
[89] *Id.* at 1066-67 (Stevens, J., dissenting).
[90] King v. King, 162 Wn.2d 378, 413 (2007) (Madsen, J., dissenting); *In re* Myricks, 85 Wn.2d 252 (1975).
[91] Myricks, 85 Wn.2d at 255 ("the nature of the rights in question and the relative powers of the antagonists, necessitate the appointment of counsel").
[92] King, 162 Wn.2d at 414 (Madsen, J., dissenting).
[93] *In re* Grove, 127 Wn.2d 221, 229 n.6 (1995) (citing Myricks, 85 Wn.2d at 255; Lassiter v. Dep't of Social Servs., 452 U.S. 18, 31 (1981).

counterposition, *Grove* recognized a state due process interpretation in *Luscier* and *Myricks*, and therefore reaffirmed that precedent.[94]

Finally, like the *Ortiz* dissent, the *King* dissent pointed to *Bartholomew* as another example of precedent where the Washington Supreme Court based its decision on adequate and independent state grounds when interpreting the state due process provision.[95] In that case, the court found that "the reliability of evidence standard embodied in the state constitution's due process clause provides broader protection than federal due process."[96] Given these precedents, the *King* dissent found that the majority's Gunwall analysis was flawed and that the state due process provision was definitively applicable.[97]

B. Fourth Factor: Preexisting State Law

The court majority turned its attention to the fourth *Gunwall* factor in 2011 in *Bellevue School District v. E.S.*[98] The respondent claimed that the relevant Washington statute assigned a right of counsel to minors in cases regarding involuntary commitment.[99] But the court did not find the statute was adequately related to truancy proceedings at issue in the case.[100] The court reasoned that a statute must be directly related to the issue at hand, with clear messaging from the legislature, in order to utilize the fourth factor to establish independent state grounds.[101]

Justice Chambers, the same justice who joined Justice Madsen's dissenting opinion in *King*, wrote the dissent in *E.S.* He was joined by Justice Sanders. The

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[94] King, 162 Wn.2d at 414 (Madsen, J., dissenting).
[95] *Id.* (Madsen, J., dissenting).
[96] *Id.* (Madsen, J., dissenting) (citing State v. Bartholomew, 101 Wn. 2d 631, 639-640, 641 (1984).
[97] *Id.* at 422 (Madsen, J., dissenting).
[98] Bellevue Sch. Dist. v. E.S., 171 Wash.2d 695, 711 (2011).
[99] *Id.* at 711.
[100] *Id.*
[101] *Id.* at 711-12.

dissent conducted a subtle *Gunwall* analysis to show that the state provision was more protective than the federal provision in initial truancy hearings.[102]

First, the dissent found that there was a relevant constitutional provision that amplified the state due process protections—this is a second *Gunwall* factor consideration.[103] "[B]ecause the court may order a truant child to change schools, attend private school, or enter into alternative education programs" which may implicate a child's right to education, Article IX, Section 1 required additional procedures to safeguard a child's constitutionally protected educational interests.[104]

The dissent found that there was preexisting case law (fourth *Gunwall* factor) to support a more protective due process law because a child's physical liberty and privacy interests were at stake.[105] Because a truant child may potentially be held in contempt, the dissent found that both *Luscier* and *Myricks*—cases where an individual's fundamental liberty interests were potentially at stake—were applicable.[106] Next, the dissent found that because a truant child may be ordered to take a drug or alcohol test, *York v. Wahkiakum School* District—a state case holding that subjecting a child to drug and alcohol testing implicated the child's privacy interests—was applicable.[107]

The dissent also found that there was statutory law (fourth *Gunwall* factor) to support the claim that children need additional procedural safeguards in certain circumstances which should extend to initial truancy proceedings.[108] The dissent

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[102] *Id.* at 715-16 (Chambers, J., dissenting).
[103] *Id.* at 716 (Chambers, J., dissenting).
[104] *Id.* at 721. Const. art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.").
[105] *Id.* at 718-21 (Chambers, J., dissenting).
[106] *Id.* at 718-20 (Chambers, J., dissenting).
[107] *Id.* at 715-16 (Chambers, J., dissenting); York v. Wahkiakum Sch. Dist. No. 200, 163 Wn.2d 297, 307 (2008).
[108] *Id.* at 722-23 (Chambers, J., dissenting).

reasoned that "[w]ithout the benefit of legal counsel, a child's ability to assert her rights is severely limited and the risk of error is high."[109]

Furthermore, the dissent found that the majority's concern in its sixth *Gunwall* factor lacked evidence (that financial costs would increase if children in truancy proceedings were entitled to counsel).[110] The dissent pointed to 30 states that provided counsel at all stages of truancy proceedings, suggesting that the extra procedural protection was likely not especially burdensome.[111]

From this analysis, the dissent concluded that the *Gunwall* factors did support an independent analysis of the state due process provision.[112]

C. Sixth Factor: Particular State Interest or Local Concern

The pattern of the Washington Supreme Court's sixth factor analyses has usually included a restatement of the litigant's claim for why the issue is a matter of local concern. Subsequently, the court has usually dismissed the claim as irrelevant. For example, in *Ortiz*, Ortiz claimed that law enforcement was a local matter so the factor should weigh in favor of state interpretation.[113] But the court simply stated that the factor did not "aid in the analysis of this particular question."[114] In *E.S.*, based on the respondent's claim, the court determined that even though Washington was very protective of a child's right to education, that claim was irrelevant to a student's right to counsel in a truancy proceeding.[115]

D. There is potential for a different result.

Despite the supreme court's consistent findings that an independent state interpretation of the due process clause was unwarranted, the court has remained open to a different finding. For example, the *Tellevik* court in 1992 seemed

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[109] *Id.* at 723 (Chambers, J., dissenting).
[110] *Id.* at 725-26 (Chambers, J., dissenting).
[111] *Id.* at 725 (Chambers, J., dissenting).
[112] *Id.* at 715-16, 726 (Chambers, J., dissenting).
[113] State v. Ortiz, 119 Wn.2d 294, 303 (1992).
[114] *Id.*
[115] E.S., 171 Wash.2d at 714.

disappointed that the litigants failed to brief a *Gunwall* analysis.[116] The court encouraged future litigants to conduct a *Gunwall* analysis focusing on prior constitutional and statutory law to see if the relevant ex parte procedure met due process standards.[117] Additionally, the *King* court did not conclude its *Gunwall* analysis.[118] Rather, it hypothetically applied a more protective due process standard under the state constitution to consider the petitioner's arguments.[119] And finally, more recently in *In re E.H.*, the court based its decision on the federal interpretation of the Due Process Clause but still conducted an analysis based on the state due process clause.[120] The *E.H.* court found that the Mathew's test (from federal case law) was sufficiently protective of a child's right to counsel under the state due process clause.[121]

V. Another Missed Opportunity: *State v. Blake*

Fast forward to 2021. In *Blake*, the majority in the Washington Supreme Court returned to pre-*Gunwall* times and explicitly based its decision on both the Fourteenth Amendment and the Article I, Section 3 without making any reference to *Gunwall* or even clarifying if the decision was based independently on state grounds.[122]

The *Blake* defendant was convicted of possessing a controlled substance despite her unknowing possession—a felony conviction.[123] That felony conviction was based on a statute enacted in 1971.[124] The statute criminalized possession of a controlled

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[116] Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 77 (1992).
[117] *Id.* at 77.
[118] King v. King, 162 Wn.2d 378, 393 (2007).
[119] *Id.*
[120] *In re* E.H., 191 Wn.2d 872, 885 (2018).
[121] *Id.* at 887.
[122] State v. Blake, 197 Wn.2d 170 (2021).
[123] *Id.* at 175; Shannon Blake was arrested when police executed a search warrant seeking evidence of stolen vehicles. She was on the property with the stolen vehicles at the time of the search. An officer searched Blake and found a tiny packet of methamphetamine in the small pocket of her jeans. Blake had gotten the jeans from a friend who had bought them secondhand. Blake was gifted the jeans a couple days before the arrest. Blake testified that she had never used methamphetamine and had no idea the drug was in her pocket. Her testimony was corroborated by others.
[124] Laws of 1971, 1st Ex. Sess., ch. 308.

substance but did not contain a written mens rea element.[125] While many other states have similar statutes, those states' courts have found an implied mens rea element within the relevant statute, consistent with common law interpretations of criminal law.[126] Unlike other state courts, the Washington Supreme Court, in *State v. Cleppe* in 1981, found that possession of a controlled substance was a strict liability crime—one that did not require any proof of knowledge or intent as part of the element of the crime.[127] The court reinforced this holding a couple decades later in *State v. Bradshaw*.[128] The *Bradshaw* court decided that since the legislature did not correct the statute after the court's *Cleppe* decision, the *Cleppe* court had correctly interpreted the statute.[129] After *Bradshaw*, there was no attempt by the legislature to correct the court's interpretation.[130]

The *Blake* majority found two fundamental principles that were implicated in the *Cleppe* and *Bradshaw* decisions: "(1) the principle that the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Angle-American criminal jurisprudence and (2) the rule that the government cannot criminalize essentially innocent conduct." [131] This latter issue was a violation of an individual's substantive due process rights.[132]

The majority invalidated the statute but did not expressly overturn *Cleppe* and *Bradshaw*.[133] This decision, authored by Justice Gordon McCloud, represented a bare majority. Justice Stephens concurred with the plaintiff's outcome but believed the court should have overturned *Cleppe* and *Bradshaw* instead of invalidating a

[125] Blake, 197 Wn.2d at 175.
[126] *Id.* at 196 (Stephens, J., concurring).
[127] *Id.* at 206 (Stephens, J., concurring); State v. Cleppe, 96 Wn.2d 373 (1981).
[128] State v. Bradshaw, 152 Wn.2d 528 (2004).
[129] *Id.* at 537.
[130] Blake, 197 Wn.2d at 174.
[131] *Id.* at 179 (internal quotations omitted).
[132] *Id.* at 179-80.
[133] *Id.* at 195.

statute.[134] The dissent, authored by Justice Johnson (and joined by Justices Madsen and Owens), found that neither case precedent nor statute should be overturned.[135]

A. Constitutional Interpretation of the Due Process Clause

It is unclear whether the *Blake* majority's decision was based on the federal or state due process clause. In *Michigan v. Long*, the U.S. Supreme Court informed state courts that it would find their decisions were based on federal law when their decisions were "interwoven with the federal law."[136] Here, the *Blake* majority did not declare the magic words prescribed by *Long* to establish that the justices were deciding the case on independent state grounds. Nor did the *Blake* majority engage in a *Gunwall* analysis. Therefore, it is likely that if *Blake* were on appeal to the Supreme Court, it would find that the *Blake* decision was based on federal constitutional law.[137]

At the beginning of its opinion, the *Blake* majority stated that "[t]he due process clauses of the state *and* federal constitutions, along with controlling decisions of this court and the United States Supreme Court, compel us to conclude" that the statute in question "exceeds the State's police power."[138]

Throughout the entire opinion, the majority referred to both the state and federal constitutions interchangeably. By interweaving the federal case law into its opinion, the *Blake* majority signaled that the decision was not based on independent state grounds.

However, after discussing *Lambert v. California* and *Papachristou v. City of Jacksonville* [139]—both Supreme Court cases—the *Blake* majority stated, "[o]ur state constitution's due process clause provides even greater protection of individual

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[134] *Id.* at 196 (Stephens, J., concurring in part and dissenting in part).
[135] *Id.* at 216-17 (Johnson, J., dissenting).
[136] Michigan v. Long, 463 US 1032, 1040 (1983).
[137] The statute was subsequently amended to include the word "knowingly" before "possess a controlled substance" so the issue is likely moot. *See* 2021 Wash. Sess. Laws 17.
[138] Blake, 197 Wn.2d at 173 (emphasis added, internal footnotes omitted).
[139] Lambert v. California, 355 U.S. 225 (1957); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

rights in certain circumstances."[140] This is where one would expect to see a *Gunwall* analysis or some other analysis underpinning the assertion of "greater protection." There was none.

Instead, the majority discussed *City of Seattle v. Pullman*,[141] a 1973 Washington Supreme Court case very similar to *Lambert* and *Papachristou*.[142] In *Pullman*, the majority (a 6-3 split) found that a curfew statute criminalized innocent conduct and was therefore unconstitutional.[143] The *Blake* majority reasoned that "this court's precedent also enforces the constitutional due process limit on the reach of the State's police power (though often without specifying the specific constitutional source of that limit)."[144]

The majority failed to back up its assertion that the Washington due process clause provided extra Article I, Section 3 protections. Furthermore, the parenthetical in the quote above weakens that assertion. Instead of reenforcing its decision on state grounds, the majority ended its discussion of *Pullman* by reiterating that the statute violated the due process clause of the state *and* federal constitutions.[145]

By leaving out a *Gunwall* analysis or any evidence of why the state due process clause was more protective of individual rights than the federal provision, and by referring to both due process clauses, the majority did not meet the requirement set out by *Long*. Thus, the *Blake* decision is susceptible to review by the United States Supreme Court.

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[140] Blake, 197 Wn.2d at 181.
[141] City of Seattle v. Pullman, 82 Wn.2d 794 (1973).
[142] Blake, 197 Wn.2d at 181.
[143] *Id.* at 182.
[144] *Id.* at 181.
[145] *Id.* at 182-83.

VI. A *Gunwall* analysis of *Blake* shows the state due process clause is more protective than the Fourteenth Amendment.

If the court wanted to set a strong precedent for interpreting its own due process clause, it could have conducted a *Gunwall* analysis. Washington's due process clause warrants independent interpretation, specifically because it is more protective than the federal Due Process Clause.

1. The textual language of the state constitution

The state due process provision states that "[n]o person shall be deprived of life, liberty, or property, without due process of law. "[146]

This provision focuses on Washington citizens' individual procedural and substantive due process rights. First, there is no state action requirement. No one can interfere with Washington citizens' life, liberty, or property interests without procedural safeguards that prevent "unreasonable, arbitrary, or capricious" actions.[147] The legislature can enact laws that limit citizens' "fundamental rights and interests" only if those laws are directly related to a legitimate government interest, including the well-being of its citizenry.[148]

The substantive element of the due process clause further limits the legislature. There are certain fundamental rights that the state cannot interfere with, even if there is a "procedural safeguard" in place.[149]

While the U.S. Constitution similarly protects the procedural due process interests of individuals in general, there is a question as to how protective it is of individuals' substantive due process interests. The United States Supreme Court recently held that only those rights referred to in the Constitution in some way or which are "'deeply rooted in this Nation's history and tradition'" are protected by

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[146] Const. art. I, § 3.
[147] Petstel, Inc. v. King Cnty., 77 Wash. 2d 144, 152, (1969) (quoting Nebbia v. New York, 291 U.S. 502 (1934)).
[148] Blake, 197 Wn.2d 170, 181 (2021).
[149] Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1855).

the substantive due process clause of the federal constitution.[150] But the placement and absolutism (not requiring state action) of Washington's due process clause suggests that it does not have the same limitations as the federal Due Process Clause. The right to be free from overbearing police power is broadly declared and deeply rooted in Washington history.[151] To protect the erosion of substantive due process rights, this factor should favor an independent state interpretation.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions

The Fourteenth Amendment Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law…." The only textual difference between the two clauses is that the Fourteenth Amendment expressly contains a state action requirement, while the Washington version is presented in passive voice. Other than this difference, the texts of the parallel provisions are virtually the same—this is a conclusion that the Washington Supreme Court has consistently made.[152] However, *Gunwall* suggests that "other relevant provisions of the state constitution may require that the state constitution be interpreted differently" even when the parallel texts are the same.[153]

Article I, Section 32 presents a relevant provision: "[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Interpretation of this provision is sparse in Washington case law, but that does not preclude using it in connection with the state's due process clause.[154]

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[150] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, (2022).
[151] Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WALR 669, 671 (1992).
[152] *In re* E.H., 191 Wn.2d 872, 885 (2018); State v. Wittenbarger, 124 Wn.2d 467, 480 (1994); State v. Ortiz, 119 Wn.2d 294, 302-03 (1992).
[153] State v. Gunwall, 106 Wn.2d 54, 61 (1986).
[154] Westlaw Case Citing References shows that the article has only been included in 45 Washington cases.

The petitioner in *In re Echeverria* attempted to advance this line of reasoning but the court did not fully consider the argument because the court went straight to dismissing the merits of the petitioner's claim.[155] Therefore, there is an opportunity for the Washington Supreme Court to consider this issue afresh.

In *State v. Howell*, the court recognized this provision, the fundamental principles clause, to mean that the court was "directly charged…with a duty to be mindful of [Washington citizens'] sovereign rights."[156] Later, the supreme court reinforced this sentiment but also added that it "is not in any sense an inhibition on legislative power."[157] Rather it is an "admonition" to "keep in mind the fundamentals of our republican form of government."[158] More recently the supreme court warned that this provision does not provide "substantive rights in and of itself,[159]" but the provision *is* meant to be read in connection with the rights provided in the previous thirty-one Washington Bill of Rights provisions.[160] The due process provision is the third of those provisions. Therefore, in conjunction with the due process clause, the fundamental principles clause emphasizes the importance of individual due process rights—both procedural and substantive.[161]

Because the fundamental principles clause strengthens due process protections and there is no federal counterpart, the state due process clause both warrants an independent state interpretation and is more protective than its federal counterpart.

3. State constitutional and common law history

The pre-constitutional history and common law history both favor an independent state interpretation of the due process clause.

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[155] *In re* Echeverria, 141 Wn.2d 323, 336 (2000) (finding the trial court's denial of the petitioner's right of allocution did not result in actual prejudice against the petitioner during his sentencing).
[156] State v. Howell, 107 Wn. 167, 171 (1919).
[157] Wheeler Sch. Dist. No. 152 v. Hawley, 18 Wn.2d 37, 48 (1943).
[158] Hawley, 18 Wn.2d at 48.
[159] Brower v. State, 137 Wn.2d 44, 69 (1998).
[160] *Id.* at 69.
[161] Doe v. Puget Sound Blood Ctr., 117 Wash.2d 772, 780–81, (1991).

a. *Pre-constitutional history*

While the constitutional history of the due process clause does not reveal anything particularly useful, the idea of due process predates the U.S. Constitution.[162] In fact, it has been around for at least 800 years. [163] In the *Magna Carta*, the concept was referred to as the "law of the land."[164] In 1354, the British parliament expounded on the phrase in six newly enacted statutes and coined the term "due process of law."[165] A few hundred years later, the terms were connected by the famous British jurist, Sir Edward Coke.[166] Colonists then brought this idea over to the American Colonies.[167]

The Due Process Clause was not part of the original Constitution. It was added later as the Fifth Amendment in 1791, but only as a limitation on the national government.[168] Much later in 1868, it was made applicable to the states through the Fourteenth Amendment.[169] The Fourteenth Amendment serves "as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States."[170]

Washington, on the other hand, included its due process provision at the beginning of its constitution upon becoming a state in 1889.[171] It did this even though the Fourteenth Amendment applied to each state in the Union. Because the language of the federal and state provisions is similar, the Washington Supreme Court historically has followed federal interpretation of the Due Process Clause.

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[162] B. Rosenow, *Journal of the Washington State Constitutional Convention, 1889* § 3, at 495–96 (1962); Munn v. Illinois, 94 U.S. 113, 123–24 (1876).
[163] Munn, 94 U.S. at 123–24.
[164] Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911).
[165] The Library of Congress, *Magna Carta: Muse and Mentor; Due Process of Law*, https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/due-process-of-law.html (last visited Nov. 5, 2022).
[166] Corwin, 24 Harv. L. Rev. at 368.
[167] The Library of Congress, *Magna Carta: Muse and Mentor; Due Process of Law*.
[168] Munn, 94 U.S. at 124.
[169] *Id.* at 124.
[170] *Id.* at 124.
[171] Washington Constitution

However, since the idea of due process transcends the U.S. Constitution, unending adherence is not warranted when considering the actual origin of the provision.

As for the constitutional history of Article I, Section 32, this provision was proposed by George Turner, who was a proponent of *natural law*.[172] This is the "idea that behind every written constitution there resides an unwritten constitution, based in part on natural rights."[173] Many of Turner's peers shared his belief that "constitutional interpretation often required a return to natural law principles beyond the four corners of the constitution."[174] While a few other states have similar provisions, Washington's is unique in that it connects "fundamental principles with individual rights."[175]

The term "fundamental principles" was likely meant to include liberty, democracy, natural law, and federalism.[176] The federalism principle is particularly relevant in constitutional interpretation as this leads to the conclusion that by pairing the fundamental principles clause with the due process clause, there is a need to interpret "the state constitution independently of the Federal Constitution."[177]

Courts should not hesitate to use the fundamental principles clause in conjunction with the due process clause when they find that a fundamental right is at stake. Here, the *Blake* majority found that unknowing drug possession was equivalent to innocent nonconduct.[178] In discussing its decision, the majority quoted *City of Seattle v. Drew* stating that "[t]he right to be let alone is inviolate; interference with that right is to be tolerated only if it is necessary to protect the rights and the welfare of others."[179]

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[172] Brian Snure, *A Frequent Recurrence to Fundamental Principles: Individual Rights, Free Government, and the Washington State Constitution*, 67 WALR 669, 673 (1992).
[173] Snure 67 WALR at 673.
[174] *Id.* at 674 (citing 32 CONG. REC. 783, 785, 789 (1899) (statements of Senator Turner against United States imperialism in the Philippines)).
[175] *Id.* at 676.
[176] *Id.* at 681-89.
[177] *Id.* at 689.
[178] State v. Blake, 197 Wn.2d 170, 183 (2021).
[179] Blake, 197 Wn.2d at 181 (quoting City of Seattle v. Drew, 70 Wn.2d 405,408 (1967)).

Blake is distinguishable from other cases where the Washington Supreme Court has declined to apply the fundamental principles clause. For example, in *Seeley,* the court found that the respondent's asserted right—to use marijuana or to choose a particular medical treatment—was not a natural right.[180] In *Blake*, however, the majority found that the "right to be let alone" when one's conduct was innocent and passive was inviolate.[181] Therefore, the fundamental principles clause can be used to advance Washington's due process jurisprudence.

b. *Common law history*

Common law history in relation to the possession of controlled substances statute also supports an independent state analysis of the due process clause. "The legislature has also directed the courts to look to the common law in identifying individual rights."[182] The Washington Supreme Court has a history of reading "mens rea elements into statutes where the legislature omitted them."[183] But since the court faced a 40-year history of "precedent and legislative acquiescence," the majority found that it must overturn the controlled substances statute to meets its common law statutory duty.[184] By prioritizing common law principles which value individual rights, the *Blake* court demonstrated that the common law element of the third factor supports an independent interpretation of the due process clause.

4. Preexisting state law

Washington does, in fact, have a history of interpreting the state due process clause. Recall in *King*, the dissent relied on *Luscier* and *Myricks*. Two dissents also pointed to *Bartholomew*. In *Bartholomew*, the majority found that the state's due process clause was more protective regarding allowable jury instructions in capital

[180] Seeley v. State, 132 Wash. 2d 776, 812 (1997).
[181] Blake, 197 Wn.2d at 183.
[182] Suppl. Br. of Pet'r at 17, (citing RCW 4.04.010).
[183] State v. Anderson, 141 Wash.2d 357, 366 (2000) "(interpreting a mens rea element into an unlawful firearm possession statute); State v. Boyer, 91 Wash.2d 342, 344 (1979) (interpreting a mens rea element into the unlawful delivery of a controlled substance statute)".
[184] Blake, 197 Wn.2d at 174.

punishment trials.[185] [186] *Bartholomew* was on remand from the United State Supreme Court, which had instructed the Washington Supreme Court to reconsider its previous holding in light of a subsequent case decided after the Washington Supreme Court's first *Bartholomew* decision.[187] The *Bartholomew II* majority, authored by Justice Pearson, based its decision on Washington's due process clause and declared that it was "not constrained to the Supreme Court's interpretation of the…Fourteenth Amendment[]."[188] Further on, the majority said that "in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause."[189]

More recently in *State v. Vander Houwen*, the petitioner claimed that he had a due process right under the state constitution to protect his property from wildlife damage.[190] The court agreed and did not refer to the Fourteenth Amendment at all.[191] [192]

5. Differences in structure between the federal and state constitutions.

The Washington Supreme Court has established that "the fifth *Gunwall* factor will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power."[193]

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[185] State v. Bartholomew, 101 Wash.2d 631, 638-39 (1984).
[186] This case was decided before the Gunwall decision in 1986.
[187] Bartholomew, 101 Wash.2d at 633, 639-41 (1984).
[188] Bartholomew, 101 Wash.2d at 639 (1984).
[189] *Id.* at 639, (citing Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wash.2d 418 (1973); Petstel, Inc. v. Cnty. of King, 77 Wash.2d 144 (1969).
[190] State v. Vander Houwen, 163 Wn.2d 25, 32-33 (2008).
[191] *Id.*
[192] Here is an example where the state was not the actor depriving someone of their fundamental rights. Rather, it was wild animals.
[193] State v. Gocken, 127 Wn.2d 95, 105 (1995) (citing State v. Young, 123 Wn.2d 173, 180 (1994); *see also* Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695, 713 (2011); King v. King, 162 Wash.2d 378, 393 (2007).

6. Matters of particular interest or local concern

The framers of the Washington Constitution were meticulous in creating a document that would prioritize the rights of state citizens and insulate them from undue government intrusions. They crafted a unique fundamental principles clause to further protect individual rights. Maintaining the strength of these deliberate safeguards is an interest that far outweighs national uniformity of similarly worded due process clauses.

7. The X-Factor

The *Gunwall* factors are not exclusive so Washington Courts can consider other factors.[194] The court considered an extra factor in *First Covenant Church v. Seattle*.[195] The goal of the *Gunwall* analysis, after all, was for courts to provide well-founded legal reasons for relying on state constitutional provisions. Additionally, the United States Supreme Court merely required that state courts clearly state that their decisions were based on "bona fide separate, adequate, and independent grounds" in order to have the final say on their decision.[196]

The facts in *Blake* warrant extra considerations beyond the six *Gunwall* factors. First, it is relevant that Washington was the only state at the time to criminalize possession of a controlled substance (PCS) without any mens rea element. Second, the statute was decades old and affected thousands of individuals' lives, including individuals who were incarcerated with a PCS conviction at the time of the decision. The court had a duty to correct such a persistent error with wide-reaching

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[194] First Covenant Church v. Seattle, 120 Wn.2d 203, 208 (1992).

[195] First Covenant Church, 120 Wn.2d at 208-10, 225-26. This case was on remand from the Supreme Court with instructions to reconsider its previous holding in light of (then) recently decided federal case: Smith II. The majority here based its extra factor on its finding that Smith II was "uncertain." The majority found that Smith II departed from a "long history of established law…" where it "place[d] free exercise in a subordinate, instead of preferred, position." The majority then declared that it "rejected the idea that a political majority may control a minority's right of free exercise through the political process."

[196] Michigan v. Long, 463 U.S. 1032,1033 (1983).

implications. Finally, the court had an interest in protecting that decision to quickly correct the convictions and sentences of the affected individuals.

The Washington Supreme Court had the authority to interpret Washington's own due process clause in *Blake* and to base its decision on independent state grounds. As shown above, there was room to conduct a *Gunwall* analysis that favored a state due process interpretation. Thus, the court could have established an important precedent in finding that Washington's due process clause was more protective compared to its federal counterpart.

VII. The *Gunwall* analysis has its own limitations.

First, when litigants fail to include a *Gunwall* analysis in their brief, the supreme court typically does not consider a state constitutional analysis. This limitation has an obvious solution: litigants should include a *Gunwall* analysis in their case briefs. By briefing a *Gunwall* analysis in due process cases, litigants may be able to persuade the court to finally advance Washington's due process jurisprudence.

Second, in many cases, the supreme court seems to look for a majority of *Gunwall* factors pushing the decision in one way or the other. This is a problem because there are an even number of factors. And while some factors are comparative, and others are interpretive, it is not apparent how much weight should be given to individual factors. The supreme court does not weigh in on how to do this in any of the due process *Gunwall* cases.

Third, provisions with similar language to federal provisions start out disadvantaged, despite many authorities claiming that similarity in language is not dispositive.

Fourth, the supreme court seems to readily dismiss the fifth factor just because it never changes and always favors an independent state interpretation. If anything, this factor should be given more weight considering that the framers were extra cognizant of individual rights when crafting the state constitution.

Additionally, the framers of the United States Constitution envisioned federalism as being an important safeguard for citizens within their own states.

Fifth, on issues where there is no state precedent, the absence of prior case law is self-perpetuating. But society and values change. There should be a way to set precedent.

Sixth, reasons for prioritizing one interpretation over the other may not fit neatly into the *Gunwall* factors. Prior to *Gunwall*, the *Coe* court listed five reasons for basing its decision on independent state grounds. *First Covenant* had an additional reason for choosing to interpret Washington's own free exercise clause. *Blake* had several reasons outside of the traditional *Gunwall* analysis for why its decision could have been based on independent state grounds.

Finally, the *Gunwall* analysis is fundamentally subjective and dependent on the composition of the court and the worldviews of the various members. In cases where the majority conducted a *Gunwall* analysis and ended up on one side, dissenting justices often conducted their own *Gunwall* analysis showing a different result, or pointed out the flaws of certain factor analyses.

VIII. Conclusion

Despite the analysis' limitations, and even when litigants fail to include the analysis in their case briefs, courts can still use it as a starting point to advance state due process jurisprudence. Notwithstanding, litigants can and should play an important role to frontline Washington's due process clause using the *Gunwall* analysis.

The framers of the constitution prioritized its citizen's individual rights not only by placing a bill of rights at the beginning of the constitution but also through Article I, Section 32—which reinforces the bill of rights provisions. Many courts since the constitution's creation have recognized such prioritization and based their decisions regarding due process issues on independent state grounds. Therefore, there is precedent to do so.

At a time when the United States Supreme Court is stripping away unwritten substantive due process protections, it is time for the Washington Supreme Court to rediscover Washington's own due process jurisprudence.

IX. Appendix

Cases where the court pointed out that litigants failed to brief the *Gunwall* factors:	**Cases where litigants briefed the *Gunwall* factors and/or Court conducted a *Gunwall* Analysis:**
State v. Worrell, 111 Wn.2d 537 (1988)	
State v. Herzog, 112 Wn.2d 419 (1989)	
State v. Carver, 113 Wn.2d 591 (1989)	
City of Spokane v. Douglass, 115 Wn.2d 171 (1990)	
State v. Straka, 116 Wn.2d 859 (1991)	
	Rozner v. City of Bellevue, 116 Wn.2d 342 (1991)
Conard v. Univ. of Wash., 119 Wn.2d 519 (1992)	
	State v. Ortiz, 119 Wn.2d 294 (Jun 1992)
Tellevik v. Real Prop. 120 Wn.2d 68 (Oct. 1992)	
Margola Assocs. v. City of Seattle, 121 Wn.2d 625 (1993)	
State v. Olivas, 122 Wn.2d 73 (1993)	
State v. Halstien, 122 Wn.2d 109 (1993)	
State v. Norby, 122 Wn.2d 258 (1993)	
State v. Talley, 122 Wn.2d 192 (1993)	
State v. Furman, 122 Wn.2d 440 (1993)	
State v. Kenyon, 123 Wn.2d 720 (1994)	
	State v. Wittenbarger, 124 Wn.2d 467 (1994)
	State v. Brett, 126 Wn.2d 136 (1995) (The *Gunwall* factors were briefed, but the court said the claim that the state provision was more protective had already been rejected).
State v. Myles, 127 Wn.2d 807 (1995)	
State v. Fortune, 128 Wn.2d 464 (1996)	
	State v. Manussier, 129 Wn.2d 652 (1996)
State v. Thorne, 129 Wn.2d 736 (1996)	
State v. Lively, 130 Wn.2d 1 (1996)	
In Re Boot, 130 Wn.2d 553 (1996)	
State v. Blank, 131 Wn.2d 230 (1997)	
State v. Valentine, 132 Wn.2d 1 (1997)	
Gossett v. Farmers Ins. Co. of Wash., 133 Wn.2d 954 (1997)	
State v. Lee 135 Wn.2d 369 (1998)	
In re Gronquist, 138 Wn.2d 388 (1999)	
	In re Echeverria, 141 Wn.2d 323 (2000) (The petitioner did a comprehensive *Gunwall* brief

	but the court didn't reach the issue before dismissing the case on the merits).
State v. Greiff, 141 Wn.2d 910 (2000)	
	In re Matteson, 142 Wn.2d 298 2000
In re Meyer, 142 Wn.2d 608 (2001)	
State v. Sullivan, 143 Wn.2d 162 (2001)	
In re Dyer, 143 Wn.2d 384 (2001)	*In re* Dyer, 143 Wn.2d 384 (2001) (The petitioner failed to brief *Gunwall* but the court did an analysis anyway to show the two provisions were co-extensive).
	State v. Clark, 143 Wn.2d 731 (2001) (The state briefed *Gunwall* but the court found it unpersuasive. It found *Bartholomew* was controlling).
State v. Wheeler, 145 Wn.2d 116 (2001)	
	City of Bremerton v. Widell, 146 Wn.2d 561 (2002) (The petitioners superficially briefed *Gunwall*, but the court found the argument unpersuasive).
City of Sumner v. Walsh, 148 Wn.2d 490 (2003)	
Anderson v. King Cnty., 158 Wn.2d 1 (2006)	
	King v. King, 162 Wn.2d 378 (2007)
	Bellevue Sch. Dist. v. E.S., 171 Wn.2d 695 (2011)
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