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New Life for the 'Criteria Tests' in State Constitutional Jurisprudence: 'Gunwall is Dead—Long Live Gunwall"

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NEW LIFE FOR THE "CRITERIA TESTS" IN STATE CONSTITUTIONAL JURISPRUDENCE: "*GUNWALL* IS DEAD—LONG LIVE *GUNWALL*!"

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ABSTRACT

When state appellate courts in the early 1980's began to rely more frequently on individual rights provisions of state constitutions, critics asserted that the use of state constitutions was leading to result-oriented decisions based on weak jurisprudence. A number of these state courts, including New Jersey's in State v. Hunt, *and then Washington's in* State v. Gunwall, *responded with the "criteria" or "factor" approach to applying and interpreting state constitutional provisions with federal analogs. That approach was meant to encourage a more thoughtful, methodical use of state constitutions. The criteria method itself was criticized for encouraging over-dependence on the Federal Constitution as interpreted by federal courts. But in Washington State, gradual changes in the composition of its supreme court led to a shift in how the "*Gunwall *factors" were used: those criteria became much less important for deciding whether to apply a state constitutional provision, and more important for deciding how to apply such a provision. At the same time, the court became increasingly comfortable independently applying the state constitution, moving to a "dual sovereignty" technique of relying on the state document first, but simultaneously undertaking a federal analysis. The* Gunwall *factors evolved into a checklist for applying multiple interpretive techniques to a specific constitutional problem. This article observes that the* Hunt *and* Gunwall

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criteria reflect traditional methods of interpreting constitutions. For example, they parallel the six common "modalities of constitutional argument" described by University of Texas Professor Philip Bobbitt. This article shows how, for decades, all six have been regularly applied by Washington's supreme court in addressing questions of constitutional interpretation. In one recent case, Washington Water Jet Workers Ass'n v. Yarborough, *at least five of Bobbitt's six modalities can be observed. This article then argues that despite criticism, the factor approach should not be discarded, but should be embraced, improved upon, and applied as an interpretive guide to assist state appellate courts in the development of state constitutional jurisprudence.*

I. INTRODUCTION

For the past twenty years, legal theory about state constitutions has often been influenced by the "criteria" or "factor" approach, first proposed by New Jersey Justice Alan Handler's concurring opinion in *State v. Hunt*[1] and subsequently adopted by a number of other state high courts, including Washington's in *State v. Gunwall*.[2] However, the criteria method for applying and interpreting state constitutions has been frequently criticized in academic literature by those who view this technique as a barrier to interpreting state constitutional provisions independently from analogous language in the United States Constitution.[3]

This article suggests that the criteria approach has much to offer when it is detached from the debate over the desirability of independent state constitutional jurisprudence. In many jurisdictions, including in Washington, that debate appears settled; one state constitutional provision after another has been interpreted differently from, or applied differently than, its federal analog. State high court judges have become comfortable in their role as the final arbiters of their own basic charters, including the language of provisions corresponding to the United States Constitution. At the same time, the criteria method in Washington State has proven to be a useful step-by-step process for briefing and analyzing *any* state constitutional provision, regardless of whether that provision has a federal analog. This article proposes that when the *Hunt* and *Gunwall* factors are understood to be like,

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1. 450 A.2d 952, 962-69 (N.J. 1982) (Handler, J., concurring); *see infra* notes 27-29 and accompanying text (listing Justice Handler's "standards or criteria").

2. 720 P.2d 808 (Wash. 1986); *see infra* note 30 and accompanying text.

3. *See infra* notes 48-49 and accompanying text.

and are applied like, other recognized guides to constitutional analysis such as Philip Bobbitt's six modalities of constitutional argument,[4] they can be embraced, improved upon, and allowed to make an ongoing contribution to the development of state constitutional jurisprudence.

II. WHICH CONSTITUTION? THE RISE OF THE CRITERIA CONTROVERSY

State supreme courts have been interpreting their own constitutions since each state's early days. Throughout the nineteenth century and until the growth of the national government during and after the New Deal, the focus of American constitutional law was at the state level. It has been observed that nineteenth-century "constitutional law" consisted of a vast array of decisions about both state constitutions and the Federal Constitution, with most of those cases coming from state high courts.[5] Professor Paul Kahn has pointed out that Thomas Cooley, the leading constitutional scholar of the late nineteenth century, "looked to the cases coming from the different state courts to find the common principles of state constitutionalism—and, ultimately, of American constitutionalism."[6]

Washington's supreme court was busy construing the state's new constitution soon after its 1889 adoption. These decisions included the construction of provisions of the declaration of rights with close federal analogs.[7] Well into the twentieth century, the Washington Supreme Court had few reservations about interpreting its own constitution differently from

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4. PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7-8 (1982) [hereinafter BOBBIT, CONSTITUTIONAL FATE]; PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-13 (1991) [hereinafter BOBBIT, CONSTITUTIONAL INTERPRETATION].

5. *See, e.g.*, Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1162-63 (1993); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 28-29 (1989). *But see generally* G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

6. Kahn, *supra* note 5, at 1163.

7. *See, e.g.*, Malim v. Benthien, 196 P. 7, 8-9 (Wash. 1921) (WASH. CONST. art. I, §§ 12, 19—privileges or immunities and equal election rights); State *ex rel.* Dearle v. Frazier, 173 P. 35, 35 (Wash. 1918) (WASH. CONST. art. I, § 11—religious freedom); State *ex. rel.* Wells v. Dykeman, 127 P. 218, 219 (Wash. 1912) (WASH. CONST. art. I, § 4—freedom of assembly); State *ex rel.* Carraher v. Graves, 43 P. 376, 377 (Wash. 1896) (WASH. CONST. art. I, § 22—right to compel and confront witnesses); State *ex rel.* Repath v. Caldwell, 37 P. 669, 669-71 (Wash. 1894) (WASH. CONST. art. I, § 22—speedy trial); State v. Coella, 28 P. 28, 32-34 (Wash. 1891) (WASH. CONST. art. I, § 22—impartial jury); State *ex rel.* Coella v. Fennimore, 26 P. 807, 807 (Wash. 1891) (Dunbar, J., dissenting) (WASH. CONST. art. I, § 22—rights of the accused).

the United States Supreme Court's understanding of the Federal Bill of Rights. For example, in 1949, the court, in *Visser v. Nooksack Valley School District, No. 506*,[8] expressly declined to follow the Supreme Court's holding in *Everson v. Board of Education of Ewing Township*[9] and rejected bus transportation subsidies for parochial schools; the state court held, despite *Everson*, that the Washington Constitution's anti-establishment provisions[10] barred expenditure of public funds for religiously-based education.[11]

State court reticence about diverging from the United States Supreme Court is a fairly recent development—one that appeared in the 1980's as a reaction to state court decisions that accorded broader rights to criminal defendants based on state constitutions. Those rights-protective rulings were a reaction to the Burger Court's backtracking from a number of the Fourth Amendment rulings by the predecessor Warren Court.[12] A notable example in Washington State was *State v. Ringer*,[13] which involved a warrantless car search based on the odor of marijuana from the vehicle. The court rejected Supreme Court decisions that had permitted similar searches under the Fourth Amendment, and instead based its decision on article 1, section 7 of the Washington Constitution.[14] The 7-2 decision took an historical approach, relying on the law of search and seizure as it existed when Washington's 1889 constitution was adopted. A dissent in *Ringer* asserted that the majority was "picking and choosing between state and federal constitutions" to reach a desired result in an unprincipled fashion.[15] This critique echoed a common

8. 207 P.2d 198 (Wash. 1949).

9. 330 U.S. 1, 17-18 (1947) (holding that the Establishment of Religion Clause of the First Amendment does not prohibit a general program under which tax-raised funds pay the bus fares of individuals attending public and other schools).

10. WASH. CONST. art. I, § 11; WASH. CONST. art. IX, § 4.

11. *Visser*, 207 P.2d at 204-05.

12. Reliance on state constitutions in response to the less rights-protective Burger Court is often traced to a 1977 article by Justice William Brennan, Jr. *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *But cf.* Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 929-39 (1968) (suggesting earlier roots of the state constitutional movement); Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV., at vii, xiv-xv (1996) (same).

13. 674 P.2d 1240 (Wash. 1983), *overruled in part by* State v. Stroud, 720 P.2d 436 (Wash. 1986).

14. *Id.* at 1242-43.

15. *Id.* at 1250 (Dimmick, J., dissenting).

1980's attack on independent state constitutional decisions on grounds that reliance on state charters was result-oriented.[16]

A few months after *Ringer*, the Washington Supreme Court decided *State v. Coe*,[17] a free speech case based on the Washington Constitution rather than the First Amendment. In the majority opinion, Justice Robert Utter wrote that "[w]hether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution" because of "the vast differences between the federal and state constitutions and courts" and in order to "grant the proper respect to our own legal foundations and fulfill our sovereign duties."[18] Justice Utter emphasized the need to "develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied."[19]

The two years following *Ringer* and *Coe* brought four new elected members to Washington's supreme court.[20] Three were former prosecutors and all four had run as conservatives on criminal justice issues.[21] After the election, it was unclear whether the court would continue to rely on the state's declaration of rights or would give more deference to United States Supreme Court opinions.[22] However, in 1986, in *State v. Gunwall*, the new Washington Supreme Court reaffirmed that it would continue to independently rely on state constitutional sections similar to provisions in the United States Constitution. But the *Gunwall* opinion, written by the newly elected Justice James Andersen, cautioned that "[m]any of the courts now resorting to state constitutions rather than analogous provisions of the U.S. Constitution simply announce that their decision is based on the state constitution but do not further explain it."[23] Justice Andersen proposed "six nonexclusive neutral criteria . . . relevant to determining whether, in a given

16. George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 987 (1979); *see also* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1006 (1985).

17. 679 P.2d 353 (Wash. 1984).

18. *Id.* at 359.

19. *Id.*

20. Washington State's nonpartisan judges are elected to office. *See* WASH. CONST. art. IV, § 3; WASH. REV. CODE § 29A.52.231 (2006).

21. *See* CHARLES H. SHELDON, THE WASHINGTON HIGH BENCH: A BIOGRAPHICAL HISTORY OF THE STATE SUPREME COURT, 1889-1991, at 75, 101, 138-40, 164 (1992); *see also* OFFICE OF THE SEC'Y OF STATE, 1984 VOTERS AND CANDIDATES PAMPHLET 34-35 (10th ed. 1984).

22. See ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 4-8 (2002), for a history of the Washington Supreme Court's evolving thinking during this period.

23. State v. Gunwall, 720 P.2d 808, 811-12 (Wash. 1986).

situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution."[24] The *Gunwall* criteria were written with factors proposed by New Jersey Justice Alan Handler's concurrence in *State v. Hunt*[25] in hand, but the *Gunwall* standards reflect some adjustments.[26] Handler, who desired "some consistency and uniformity between the state and federal governments,"[27] had suggested in a concurring opinion in *Hunt* seven "standards or criteria for determining when to invoke our State Constitution as an independent source for protecting individual rights[:]"[28]

(1) textual language;
(2) legislative history;
(3) preexisting state law;
(4) structural differences between the state and federal constitutions;
(5) matters of particular state interest or local concern;
(6) state traditions; and
(7) public attitudes.[29]

Justice Andersen's criteria for use in Washington State copied three of Handler's standards, split one factor into two, created or reconfigured another factor, and either ignored the other three factors or assumed that they were subsumed in one or more of Andersen's recommended criteria. The *Gunwall* criteria are summarized immediately below and are shown side by side with Handler's in Appendix I to this Article. Andersen's *Gunwall* factors are:

(1) textual language of the state constitution;
(2) significant differences in the texts of parallel provisions of the federal and state constitutions;
(3) state constitutional and common law history;
(4) preexisting state law;
(5) differences in structure between the federal and state constitutions; and
(6) matters of particular state interest or local concern.[30]

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24. *Id.* at 812.

25. 450 A.2d 952 (N.J. 1982).

26. *See Gunwall*, 720 P.2d at 812-13; *see also* UTTER & SPITZER, *supra* note 22, at 7.

27. *Hunt*, 450 A.2d at 964 (Handler, J., concurring); *see also* Alan B. Handler, *Expounding the State Constitution*, 35 RUTGERS L. REV. 202, 204 (1982).

28. *Hunt*, 450 A.2d at 965 (Handler, J., concurring). A majority of the New Jersey Supreme Court adopted Handler's criteria the following year in *State v. Williams*, 459 A.2d 641, 650 (N.J. 1983).

29. *Hunt*, 450 A.2d at 965-67 (Handler, J. concurring).

Handler's version of the standards has been adopted to a greater or lesser extent by high courts in Delaware,[31] Pennsylvania,[32] Texas,[33] and Connecticut, [34] among others. The *Gunwall* version of Handler's criteria, on the other hand, was copied by Wyoming[35] and Michigan.[36] The differences between Handler's and Andersen's criteria are not as important as are their similarities and the fact that each urged states to approach their constitutions cautiously so that state court decisions "will be made for well founded legal reasons and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[37]

The courts adopting the criteria method initially appeared to be taking what has been labeled an "interstitial" approach to state constitutions,[38] with the assumption that they would follow the United States Supreme Court's jurisprudence on similar provisions unless there were gaps ("interstices") or unless the state constitutions firmly dictated a separate line of reasoning.[39] Alternate approaches have been labeled "primacy" (state courts should always consult their own constitutions first),[40] "lock-step" (state courts

30. *Gunwall*, 720 P.2d at 812-13.

31. *See, e.g.*, Jones v. State, 745 A.2d 856, 864-65 (Del. 1999).

32. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887, 895 (Pa. 1991).

33. *See, e.g.*, Tex. Dep't of Transp. v. Barber, 111 S.W.3d 86, 106 (Tex. 2003).

34. *See, e.g.*, State v. Geisler, 610 A.2d 1225, 1232 (Conn. 1992), *abrogated by* State v. Brocuglio 826 A.2d 145 (Conn. 1998).

35. *See, e.g.*, Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993) (Macy, C.J., concurring); O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005).

36. *See, e.g.*, People v. Goldston, 682 N.W.2d 479, 485 (Mich. 2004).

37. State v. Gunwall, 720 P.2d 808, 813 (Wash. 1986).

38. This observation was made soon after the *Gunwall* decision in Linda White Adkins, *Federalism, Uniformity and the State Constitution*—State v. Gunwall, *106 Wn. 2d 54, 720 P.2d 808 (1986)*, 62 WASH. L. REV. 569, 574-75, 582 (1987).

39. *See* 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, 1027-31 (1985) [hereinafter Utter, *Swimming in the Jaws of the Crocodile*] (describing the "interstitial" or "supplemental" approach, together with the other theories of state and federal constitutional interaction); *see also* Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 648-51 (1987); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 206-09 (1998). New Mexico provides an example of a state that has formally adopted the interstitial approach for determining when and how to apply its constitution independently. *See* State v. Gomez, 932 P.2d 1, 7 (N.M. 1997).

40. *See* Utter & Pitler, *supra* note 39, at 647-48.

should always follow the Supreme Court),[41] and "dual sovereignty" or "dual reliance" (state courts should simultaneously apply state and federal constitutions to each case because that leads to the most thoughtful development of constitutional law and assures the strongest constitutional protections).[42]

Whichever theory of state constitutional application is adopted, state courts seem ambivalent in the employment of the selected theory. Empirical studies suggest that "primacy" states do not uniformly adhere to their own constitutions.[43] During the "interstitial decade" after the *Gunwall* decision, Washington State justices often voiced a strong "primacy" commitment to applying their own constitution first, even if they rarely diverged from the United States Supreme Court.[44] One researcher concluded that during the ten years after *Gunwall*, the Washington Supreme Court employed all four theories of state constitutional interpretation in various criminal cases.[45] That study suggested that the *Gunwall* criteria had been applied differently by different judges, depending on the text of the constitutional provision involved, but also based on each judge's predisposition to the interstitial, dual sovereignty, lock-step, or primacy approach.[46] Another study has documented how in New Jersey, the source of the criteria method and ostensibly an "interstitial" state, the state supreme court has applied a variety of theories in applying the state constitution depending on the constitutional provision involved.[47]

The criteria method has been criticized for a tendency to raise the bar for application of state constitutions, with the danger that courts using the *Hunt* or *Gunwall* approach will remain overly dependent on the Federal

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41. *See* David M. Skover, *State Constitutional Law Interpretation: Out of "Lock-Step" and Beyond "Reactive" Decisionmaking*, 51 MONT. L. REV. 243, 243-53 (1990) (analyzing and criticizing the "lock-step" approach); Utter & Pitler, *supra* note 39, at 645-46.

42. Utter, *Swimming in the Jaws of the Crocodile*, *supra* note 39, at 1029-30.

43. *See generally* John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the 'Primacy' States Practice What They Preach?*, 54 U. PITT. L. REV. 1019 (1993). *See also* Van Cleave, *supra* note 39, at 217-18.

44. *See* Hugh D. Spitzer, *Which Constitution? Eleven Years of* Gunwall *in Washington*, 21 SEATTLE U. L. REV. 1187, 1196-1204 (1998).

45. Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since* State v. Gunwall*: "Articulable, Reasonable and Reasoned" Approach?*, 60 ALB. L. REV. 1871, 1880 & n.54 (1997).

46. *See id.* at 1906-08.

47. William F. Cook, *The New Jersey Bill of Rights and a "Similarity Factors" Analysis*, 34 RUTGERS L.J. 1125, 1158 (2003).

Constitution and render their constitutions "a mere row of shadows."[48] Further, it has been observed that the criteria "are a curious mix of interpretive and comparative factors"[49] that have distinct purposes: comparative factors (such as differences in text and differences in constitutional structure) to help determine *whether* to apply a state provision differently than the United States Supreme Court has applied an analogous federal provision; and interpretive factors (textual language, history, pre-existing law, and matters of local concern) to help determine *how* to apply any constitutional provision, state or federal. This is probably due to the fact that in the mid-1980's and early-1990's, many of these state courts were unsure about the propriety of applying their constitutions independently of the United States Constitution, and because for many state constitutional provisions the courts had not actively contributed to their own independent jurisprudence for decades. Thus, judges needed comparative factors to justify independent analysis. But since then, the Washington Supreme Court has become increasingly comfortable with its own constitution and its growing body of jurisprudence. During the 1990's and the first five years of the twenty-first century, what had been comparative factors for deciding *whether* to interpret a state provision independently transformed into factors to guide briefing and to aid the court in determining *how much* weight to accord United States Supreme Court decisions. The Washington court has shifted from the interstitial approach to the dual sovereignty approach, and in doing so the use of the *Gunwall* criteria has changed.

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48. State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring). New Jersey Justice Morris Pashman took issue with and critiqued Handler's criteria approach. *See* State v. Hunt, 450 A.2d 952, 958 (N.J. 1982) (Pashman, J., concurring). Pashman expressed concerns about devaluing a state's own constitution, history, and jurisprudence, and he argued that a stronger reliance on state constitutions would strengthen constitutional safeguards within the federal system. *Id.* at 960-62. Likewise, academics have critiqued the factor approach. *See, e.g.*, Dennis J. Braithwaite, *An Analysis of the "Divergence Factors": A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 31-32 (2001); James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1110-12 (1991); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1063 (1997) [hereinafter Williams, *In the Glare of the Supreme Court*]; Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 385-89 (1984) [hereinafter Williams, *In the Supreme Court's Shadow*].

49. Talbot, *supra* note 48, at 1108; *see also* Van Cleave, *supra* note 39, at 200.

III. THE SHIFT IN HOW THE *GUNWALL* CRITERIA ARE APPLIED

The *Gunwall* opinion was itself inconsistent about the court's purpose in adopting the criteria approach. Justice Andersen wrote that the court sought a basis for determining when "to resort to independent state constitutional grounds to decide a case, rather than *deferring* to comparable provisions of the United States Constitution as interpreted by the United States Supreme Court."[50] He asserted that many courts were, without adequate explanation, relying on state constitutions rather than analogous provisions of the United States Constitution, adding that "[t]he difficulty with such decisions is that they establish no principled basis for *repudiating federal precedent* and thus furnish little or no rational basis for counsel to predict the future course of state decisional law."[51] Those statements suggest Justice Andersen felt that federal court decisions had precedential value with respect to a state constitution, or at least that state high courts should "defer" to federal courts absent a particularly strong reason to rely on their state charters.[52] But later in *Gunwall*, where Justice Andersen formally stated the purposes of the criteria approach, he emphasized its value to lawyers and judges in the development of state constitutional jurisprudence and its value as an interpretive tool:

> Thus, the foregoing six criteria are aimed at: (1) suggesting to counsel *where briefing might appropriately be directed* in cases wherein they are urging independent state constitutional grounds; and (2) helping to insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria *to the end that our decision will be made for well founded legal reasons* and not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court.[53]

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50. State v. Gunwall, 720 P.2d 808, 810 (Wash. 1986) (emphasis added).

51. *Id.* at 812 (emphasis added).

52. It should be noted that when this author interviewed former Justice Andersen to discuss the history and context of the *Gunwall* case and the criteria method, he expressed surprise that he had used the words "federal precedent" and that he had ever suggested that the federal court decisions were binding on state supreme courts when an issue involved solely a state constitutional question. Interview with James A. Andersen, Wash. Supreme Court Justice (retired), in Seattle, Wash. (July 14, 1997).

53. *Gunwall*, 720 P.2d at 813 (emphasis added).

In subsequent opinions, different Washington State justices characterized the purpose of the *Gunwall* criteria in markedly different ways, depending on whether they viewed the factors as a high bar over which lawyers and judges must leap to gain access to the state constitution, or, alternatively, as a set of useful interpretive devices to better discern the meaning of a state constitution that was to be readily applied. These views corresponded to whether individual judges preferred the "interstitial" approach to state constitutional provisions (to be relied upon only where there were gaps in the federal constitution or jurisprudence), or whether they leaned toward the primacy or dual sovereignty approaches (where the state constitution would be looked to first, or analyzed simultaneously with the federal constitution).

Justice Utter, who took a primacy stand in *State v. Coe*,[54] came to support dual sovereignty.[55] Given the advocacy of the criteria method by backers of the interstitial approach, Utter's push for dual sovereignty may have been meant to provide an appropriate place for federal jurisprudence while maintaining the lead role for home-grown doctrines based on text, history, structure, and other peculiarities of individual state constitutions. Accordingly, Utter used the Washington Supreme Court's opinion in *State v. Wethered*[56] to underscore what he viewed as *Gunwall's* principal function: to provide interpretive guidelines. In *Wethered*, the court declined to consider a state constitutional claim raised by a criminal defendant because his attorney had not briefed the state constitutional issues using the *Gunwall* criteria.[57] In doing so, Justice Utter, with a nod to primacy, stated that the court "would normally *first* consider Wethered's claimed violation of his individual rights under the provisions of the Washington Constitution."[58] He said that the initial focus on the state constitution was dictated by *Coe* in 1984 "to enable us to create a principled body of state constitutional law."[59] Having identified *Coe* as the lodestar, Utter said that "[a]s a further aid to developing a sound basis for our state constitutional law, in *State v. Gunwall* . . . we developed

54. 679 P.2d 353 (Wash. 1984).

55. *See* Utter, *supra* note 5, at 46-49; Utter, *Swimming in the Jaws of the Crocodile*, *supra* note 39, at 1041-50. One might characterize Justice Utter's version of dual sovereignty as "primacy with benefits"; i.e., a state court should first look to its own constitution, but then evaluate a case under the federal charter in order to help develop national constitutional law and to ensure that litigants receive the highest constitutional protections available. One of my students, Adam Ake, has jokingly labeled the dual sovereignty approach as "primacy with more work."

56. 755 P.2d 797 (Wash. 1988).

57. *Id.* at 800-01.

58. *Id.* at 800 (emphasis added).

59. *Id.* (citation omitted).

nonexclusive criteria to use *as interpretive principles* of our state constitution."[60]

Justice Utter was attempting to steer Washington's court toward using the *Gunwall* criteria as interpretive tools rather than as a magic key to the walled kingdom of the state constitution. Initially, it was not clear whether the court would accept his suggested direction. Indeed, *Wethered* was repeatedly used as the basis to *block* access to state constitutional arguments because lawyers had not adequately briefed the issues using the *Gunwall* factors.[61] During the eleven years following *Gunwall*, in thirty-nine cases where state constitutional issues were fully briefed, the Washington court reached a different result from federal constitutional analysis only eight times.[62]

In a 1995 double jeopardy case, *State v. Gocken*,[63] the debate over the meaning and application of *Gunwall* broke out in dueling opinions. The lead opinion was authored by Justice Richard Guy, who was never an enthusiast for independent application of the state constitution.[64] Justice Guy asserted that Washington state courts "ha[d] consistently held [that] the double jeopardy clause of the Fifth Amendment and the double jeopardy clause in article 1, section 9 are virtually identical."[65] He then marched through the *Gunwall* criteria, dismissing the defendant's analysis in five out of six factors and concluding that those "factors do not support Mr. Gocken's contention that the state double jeopardy clause provides broader protection to criminal defendants than the [F]ederal [D]ouble [J]eopardy [C]lause."[66] In his analytical approach, Justice Guy was worlds away from Justice Utter's assumption that state constitutional analysis takes precedence. Instead, Justice Guy said that *whether* the state constitution provides broader protection than the United States Constitution is determined by the six *Gunwall* factors.[67] He assumed that the federal courts' rulings under the United States Constitution were the starting point, and that a heavy burden was placed on the party raising a state constitutional argument and on the

60. *Id.* (emphasis added).

61. During the eleven years following *Gunwall*, 65% of the Washington Supreme Court cases that cited that case resulted in a decision based on the United States Constitution alone, in part due to attorneys failing to brief the relevant provision of the Washington State Declaration of Rights. Spitzer, *supra* note 44, at 1209.

62. *Id.* at 1200.

63. 896 P.2d 1267 (Wash. 1995).

64. *See* Silva, *supra* note 45, at 1907, 1909 & n.281, 1912 nn.303-04.

65. *Gocken*, 896 P.2d at 1270-71 (citations omitted).

66. *Id.* at 1273.

67. *Id.* at 1270.

party applying the *Gunwall* factors to gain access to that argument.[68] In a lively concurring opinion, Justice Barbara Madsen took issue with Justice Guy's analytical method, charging that he had not only ignored Washington State's preexisting, independent analysis of double jeopardy, but that he was treating "*Gunwall* as a talisman, to be invoked simply because the parties raise an issue under the state constitution."[69] Mimicking Justice Andersen's words in *Gunwall*,[70] Justice Madsen declared: "The fact that the parties present a *Gunwall* analysis . . . should not be an open invitation to substitute our current notion of justice, or the notion currently embraced by the United States Supreme Court, for that of our predecessors."[71] She then emphasized:

> The 2-pronged aim of *Gunwall* is to assist this court in assuring (1) adequate briefing from counsel where a decision based on independent state constitutional grounds is urged, and (2) that where such independent grounds are appropriate, the resulting decisions "will be made for well founded legal reasons."[72]

She wrote, "[I]ndependent state constitutional analysis is lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than our own state courts,"[73] concluding that the Washington court should "preference independent resolution of state constitutional questions under a longstanding body of state law."[74] Dissenting Justice Charles Johnson added a warning against the "shifting sands of federal jurisprudence" and faulting the majority's "notion . . . that our constitution should be interpreted no differently from the [F]ederal [C]onstitution."[75]

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68. *See id.* at 1270-73.

69. *Id.* at 1274 (Madsen, J., concurring in part, dissenting in part).

70. *See supra* text accompanying note 37.

71. *Gocken*, 896 P.2d at 1274 (Madsen, J., concurring in part, dissenting in part).

72. *Id.* (quoting State v. Gunwall, 720 P.2d 808 (Wash. 1986)). Justice Madsen also warned that state court reliance on federal constitutional law would cause judicial efficiency to be lost "because every time the Supreme Court changes its mind, this court will be called to revisit the issue." *Id.*

73. *Id.* at 1274-75.

74. *Id.* at 1275.

75. *Id.* at 1275-76 (Johnson, J., dissenting). An example of Justice Charles Johnson's advocacy of dual sovereignty is his opinion in *State v. Young*, where the court decided a warrantless search case under article 1, section 7 of the Washington Constitution, but he nevertheless evaluated the case under the Fourth Amendment "for the purpose of providing guidance to other courts on the subject of sense-enhanced surveillance of a home." 867 P.2d 593, 601 (Wash. 1994).

Although the supporters of the "interstitial" approach to state constitutional jurisprudence won the battle in the 1995 *Gocken* case, the dual sovereignty advocates won the war during the following decade. This was caused, in part, by changes in court personnel. Two of the justices who sided with Justice Guy in *Gocken* had already retired and were serving *pro tempore* in that case.[76] Justices Durham and Guy, the strongest proponents of the interstitial approach,[77] retired in 1999 and 2001, respectively.[78] By the end of 2002, the entire *Gocken* majority, as well as Justice Utter, had left the court.[79] They were replaced by new members who, based on the results of subsequent decisions, appear to subscribe to either the primacy or the dual sovereignty philosophy of Justices Madsen and Charles Johnson (the only two remaining members of the *Gocken* bench). This change was reflected in an evolving view of how the *Gunwall* criteria were to be applied.

In the years after *Gocken* was decided, the Washington Supreme Court held that because it had thoroughly analyzed article 1, section 7 of the state constitution in the context of search cases, only two of the *Gunwall* factors needed to be used to address factors that are "unique to the context in which the interpretation question arises."[80] In *State v. Hendrickson*,[81] the Washington court in 1996 analyzed a search case solely under the Washington Constitution and did not even mention *Gunwall* except in a footnote regarding procedure.[82] In the 1998 case of *State v. White*,[83] Justice Charles Johnson proclaimed that the Washington Supreme Court had "often diverged from the United States Supreme Court's Fourth Amendment jurisdiction [sic]"[84] in search warrant cases, adding that "in this case we have an analytical advantage because we know article I, section 7 provides more

76. Justice Andersen and Justice Robert Brachtenbach had both retired at the beginning of 1995. OFFICE OF THE CLERK, WASH. SUPREME COURT, CHRONOLOGICAL HISTORY: WASHINGTON STATE SUPREME COURT 5 (2005) (on file with author).

77. *See supra* notes 64-68 and accompanying text.

78. OFFICE OF THE CLERK, *supra* note 76, at 5.

79. *Id.*

80. State v. Johnson, 909 P.2d 293, 301-02 (Wash. 1996); *see also* State v. Ferrier, 960 P.2d 927, 930 (Wash. 1998). Justice Durham dissented in *Ferrier* and in doing so complained about the new majority's inclination to first address state constitutional issues independently "rather than deferring to comparable federal constitutional provisions," which Durham asserted was necessary unless a complete *Gunwall* analysis provided *access* to the state constitution. *Ferrier*, 960 P.2d at 935 (Durham, C.J., dissenting). Justice Guy concurred in his dissent. *Id.* at 936.

81. 917 P.2d 563 (Wash. 1996).

82. *Id.* at 567 n.1.

83. 958 P.2d 982 (Wash. 1998).

84. *Id.* at 985.

protection to individuals from searches and seizures than the Fourth Amendment."[85] Importantly, Justice Johnson wrote: "Once we agree that our prior cases direct the analysis to be employed in resolving the legal issue, a *Gunwall* analysis is no longer helpful or necessary."[86] In a footnote, Justice Johnson stated that a *Gunwall* analysis was required "in cases where the legal principles are not firmly established, and certainly a *Gunwall* analysis is helpful in determining *the scope of the broader protections* provided in other contexts."[87] Only Chief Justice Durham dissented from Justice Johnson's approach to *Gunwall*.[88]

Thus, in a few short years after *Gocken*, a changed Washington court adjusted course and accepted Justice Madsen's view that *Gunwall* was not meant to be a "talisman"[89] or a key to the magic kingdom of the state constitution. Likewise, the jurists moved to her position, shared with Justice Charles Johnson and initially spearheaded by retired Justice Utter, that in keeping with a primacy or a dual sovereignty approach, *Gunwall* was to serve as an interpretive tool to assure better briefing by lawyers and the more thoughtful development of state constitutional jurisprudence. During an eleven-year period after *Gunwall* was decided, Washington's supreme court had declined to consider state constitutional arguments 108 times for lack of adequate briefing under the *Gunwall* criteria.[90] By contrast, however, during the eight years after that, only two opinions cited *Wethered* and rejected state constitutional assertions for lack of briefing under the *Gunwall* factors.[91] The striking reduction in the number of cases where state constitutional

85. *Id.* at 986.

86. *Id.*

87. *Id.* at 986 n.7 (emphasis added).

88. *Id.* at 987-90 (Durham, C.J., dissenting). Justice Alexander dissented separately based on the application of article 1, section 7 of the Washington Constitution to the facts of the case. *Id.* at 990.

89. *See* State v. Gocken, 896 P.2d 1267, 1274 (Wash. 1995) (Madsen, J., concurring in part, dissenting in part). But see *Anderson v. King County*, 438 P.3d 963, 972 (Wash. 2006), where Justice Madsen's lead opinion, signed by only three of the court's nine members, gave deference to federal equal protection analysis in interpreting Washinton's privileges and immunities clause (WASH. CONST. art I, § 12). Her interstitial approach in that same-sex marriage case seems at odds with her advocacy in *Gocken* of a presumptively independent analysis of the state's constitution.

90. Spitzer, *supra* note 44, at 1196-97. The survey period for that study covered June 12, 1986 through June 12, 1997.

91. *See* State v. Dhaliwal, 79 P.3d 432, 441 (Wash. 2003); State v. Bustamante-Davila, 983 P.2d 590, 597-98 (Wash. 1999). During the same recent eight-year period, six appellate court decisions rejected state constitutional arguments for lack of *Gunwall* briefing, compared with ninety-six rejections during the previous eleven years.

arguments were rejected reflects vastly improved briefing as well as a shift in the court's attitude toward the state constitution.[92]

When *Hunt* and *Gunwall* brought the criteria method into the forefront, the factor approach had been criticized in academic journals as both confusing and damaging to the development of independent state constitutional jurisprudence.[93] Critics urged state courts to drop the criteria approach as being incompatible with the full respect accorded to state constitutions under the primacy and dual sovereignty theories of state constitutional law.[94] But is it necessary to throw out the *Hunt* and *Gunwall* baby with the interstitial bathwater? The answer is "no," because courts are demonstrating that the criteria method can be an effective tool under both the primacy and the dual sovereignty approaches. As described below, the criteria or factor approach can help both attorneys and judges systematically analyze a challenging question from a variety of angles that courts have always used, consciously or unconsciously, to evaluate cases.

IV. *HUNT*, *GUNWALL*, AND BOBBITT'S SIX MODALITIES OF CONSTITUTIONAL ARGUMENT

It is helpful to recognize that factors like the *Hunt* and *Gunwall* criteria did not spring full-grown from the heads of Justices Handler and Andersen. Instead, those criteria shadow standard techniques that courts have long applied when debating or determining the meaning of a particular constitutional provision, regardless of whether state and federal constitutional provisions are being compared. This is underscored by matching the *Hunt* and *Gunwall* factors to University of Texas Professor Philip Bobbitt's frequently-cited list of six "modalities" of constitutional

92. The Washington court's increased focus on its state constitution, and the importance of knowledge about that document among lawyers, is underscored by the permanent inclusion of a state constitutional law question on the Washington State bar exam, commencing in the early 1990's. The addition of state constitutional law to the exam was at the suggestion of one or more members of the Washington Supreme Court. Telephone Interview with Frank V. Slak, Jr., Former Chair, Wash. State Bar Exam'rs Comm. (March 7, 2006); *see also* Washington State Bar Association, The Bar Exam, What are the Test Subjects?, http://www.wsba.org/lawyers/licensing/barexam.htm#9 (last visited Oct. 20, 2006).

93. *See* Atkins, *supra* note 38, at 584-86; Braithwaite, *supra* note 48, at 31-32; Talbot, *supra* note 48, at 1110; Williams, *In the Glare of the Supreme Court*, *supra* note 48, at 1022; Williams, *In the Supreme Court's Shadow*, *supra* note 48, at 385.

94. *See* Atkins, *supra* note 38, at 573-74; Braithwaite, *supra* note 48, at 31-32; Talbot, *supra* note 48, at 1110-12; Williams, *In the Glare of the Supreme Court*, *supra* note 48, at 1063; Williams, *In the Supreme Court's Shadow*, *supra* note 48, at 385-89.

argument. [95] Bobbitt describes them as six "ways in which legal propositions are characterized as true from a constitutional point of view."[96] Those modalities, which can also be thought of as six approaches to constitutional argument or interpretation, are: (1) textual (looking to the meaning of the words of a constitution alone, as they would be interpreted by the average contemporary community member); (2) historical (relying on the intentions of the framers and ratifiers of a constitution and their forerunners); (3) structural (inferring rules from the relationships that a constitution creates among citizens and governments); (4) doctrinal (applying rules generated by prior court decisions or academic commentary); (5) ethical (deriving rules from the basic principles or moral commitments of the political ethos that are embodied in a constitution); and (6) prudential (seeking to wisely balance the costs and benefits of a particular interpretation or court action, in the context of political and economic circumstances).[97]

Professor Bobbitt's modalities of constitutional argument are essentially the same array of interpretive approaches that we see in the *Hunt* and *Gunwall* factors, *i.e.*, interpretations based on a constitution's: text (*Hunt* criterion 1, *Gunwall* criteria 1 and 2), history (*Hunt* criterion 2 and *Gunwall* criteria 3 and 4), structure (*Hunt* criterion 4, *Gunwall* criterion 5), prior doctrine (*Hunt* criteria 3 and 6, *Gunwall* criterion 3), ethical considerations (*Hunt* criteria 2 and 6, *Gunwall* criterion 3), and prudential considerations (*Hunt* criteria 5 and 7, *Gunwall* criterion 6). This can be more easily

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95. For a discussion about Bobbit's modalities, see BOBBIT, CONSTITUTIONAL FATE, *supra* note 4, at 7-93; BOBBIT, CONSTITUTIONAL INTERPRETATION, *supra* note 4, at 11-22.

96. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 4, at 12. Bobbitt's first book is dedicated entirely to laying out these six common approaches to constitutional argument and interpretation and showing how they are used. *See generally* BOBBIT, CONSTITUTIONAL FATE, *supra* note 4.

97. BOBBIT, CONSTITUTIONAL FATE, *supra* note 4, at 7-93; BOBBIT, CONSTITUTIONAL INTERPRETATION, *supra* note 4, at 11-22. These methodological approaches can be observed in other formulations for interpreting statutes and constitutions. For example, Justice Stephen Breyer has recently noted that judges, by "their professional training and experience," normally examine the following six factors that also closely compare to Bobbitt's list: language (textual), history (historical), tradition (ethical), precedent (doctrinal), purpose (historical and ethical), and consequences (prudential). STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 110 (2005). Breyer's construct does not appear to include an analogy to the structural approach. In a 1989 law review article, the late Washington State Supreme Court Justice James M. Dolliver proposed a "four major factor" approach including text, framers' intent, the climate of the times when constitutional provisions were adopted, and judicial doctrine prior to adoption. James M. Dolliver, *Condemnation, Credit and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers' Views Been Followed?*, 12 U. PUGET SOUND L. REV. 163, 165-68 (1989).

observed in Appendix I to this Article, which displays the *Hunt* and *Gunwall* criteria side by side with Bobbitt's modalities.

Some judges, on both the federal and state benches, assert in court opinions,[98] confirmation hearings,[99] or on the campaign trail[100] that they apply a single philosophy of constitutional interpretation. For example, one often hears a judicial candidate declare his or her firm commitment to "strict constructionism" (usually associated with textualism)[101] or "original intent" (a component of the historical approach to constitutional interpretation).[102] But the fact is that appellate courts, as well as individual judges, routinely draw upon *all six* of Professor Bobbitt's modalities of constitutional argument. Judges move back and forth between these interpretive approaches, consciously or unconsciously, depending on the facts of each case and the context and nature of the issues presented. When we observe a court calling upon lawyers to brief constitutional issues using the *Hunt* or *Gunwall* criteria, we see that tribunal asking attorneys to bring each of the principal interpretive approaches to bear so that judges can more effectively analyze the case. A cynic might claim that jurists want to view the elephant in every conceivable way so that they can pick and choose the perspectives that lead to the result they seek. But that would not be fair, because most lawyers and judges, most of the time, use most, if not all, of these approaches to make an effective argument or to come to a legally sound decision.

The use of these multiple interpretive methods is not exclusive to a formal *Hunt* or *Gunwall* analysis in a case where analogous state and federal constitutional provisions are in play. We can easily identify all of Bobbitt's modalities being used by the Washington Supreme Court during the past 125

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98. *See, e.g.*, Burlington N. & Santa Fe Ry. Co. v. Ariz. Corp. Comm'n, 12 P.3d 1208, 1210 (Ariz. Ct. App. 2000); Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 914 (Ky. 1984); HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth., 121 P.3d 1166, 1186 (Wash. 2005).

99. *See, e.g.*, Ethan J. Leib, *Three Surprises from Alito's Testimony: Surprise Witness*, THE NEW REPUBLIC ONLINE, Jan. 11, 2006, s://ssl.tnr.com/p/docsub.mhtml?i=w060109&s=leib011106; U.S. SENATE, REPUBLICAN POLICY COMM., JUDGE ALITO—IN HIS OWN WORDS (2006), http://rpc.senate.gov/_files/Jan1906AlitoSD.pdf.

100. *See, e.g.*, GEORGETOWN UNIV. LAW CENTER, ENVTL. POLICY PROJECT, CHANGING THE RULES BY CHANGING THE PLAYERS: THE ENVIRONMENTAL ISSUE IN STATE JUDICIAL ELECTIONS 18 (2000), http://www.law.georgetown.edu/gelpi/sjelect/judicial_elections.pdf.

101. *Id.*

102. *See* League of Women Voters of North Carolina, North Carolina Court of Appeals Seat 1, http://www.lwvnc.org/leagueinfo2004/courtofappeals1.html (quoting Bill Parker, in his unsuccessful 2004 campaign to unseat North Carolina Court of Appeals Judge Linda McGee, as saying that he would "rule upon the law as it was meant to be applied, according to the original intent of the legislature").

years, including instances in the last twenty years that both do and do not cite the *Gunwall* tests. For instance, in a 2004 decision, *Grant County Fire Protection District No. 5 v. City of Moses Lake*,[103] the court used four of the six tests in a case applying the state's privileges and immunities clause. The court had already decided in an earlier decision in the same case that article I, section 12 of Washington's constitution was to be interpreted based on its distinct text, history, doctrines and local interests and concern.[104] In another recent case, *Washington Water Jet Workers Ass'n v. Yarbrough*,[105] the members of that court used at least five of those six interpretive techniques in their opinions.[106] Below, we focus on the use of the six modalities operating in *Washington Water Jet Workers Ass'n*, and provide additional examples from other Washington State decisions during the past century.

A. Text

On its face, the textual approach to interpreting constitutions is simple: members of the court read a provision, and, assuming that the individual justices' understanding of vocabulary and syntax is relatively similar, the "plain meaning" is agreed upon and the provision is applied.[107] "It is a cardinal principle of judicial review and interpretation that unambiguous statutes and constitutional provisions are not subject to interpretation and construction," Washington Justice Robert Finley intoned in 1952. [108]
In *Washington Water Jet Workers Ass'n*, which held that a prison job training program violated a constitutional ban on contracting out convict labor,[109] Washington's supreme court gave deference to this common technique for addressing a constitutional clause: "When interpreting

103. 83 P.3d 419 (Wash. 2004).

104. Prot. Dist. No. 5 v. City of Moses Lake, 42 P.3d 394, 408 (Wash. 2002), *rev'd on other grounds on reconsideration*, 83 P.3d 419 (Wash. 2004).

105. 90 P.3d 42 (Wash. 2004), *cert. denied*, 543 U.S. 1120 (2005).

106. *See id.* at 45-56.

107. *See* Paul Brest, *The Misconceived Quest For the Original Understanding*, 60 B.U. L. REV. 204, 206 (1980).

108. State *ex rel.* Evans v. Bhd. of Friends, 247 P.2d 787, 794 (Wash. 1952); *see also* State *ex rel.* Anderson v. Chapman, 543 P.2d 229, 230 (Wash. 1975) ("The first rule of constitutional construction which we should consider is the rule that if a constitutional provision is plain and unambiguous on its face, then no construction or interpretation is necessary or permissible.").

109. The Washington Constitution states, in part: "[T]he labor of convicts of this state shall not be let out by contract to any person, copartnership, company or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state." WASH. CONST. art. II, § 29.

constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation."[110] But whether a constitutional provision or statute is "plain" and "unambiguous" is in the eye of the beholder. Even if judges agree that text is the first place to look to understand a clause's meaning in a specific case, they often disagree on how the text is to be "plainly" read. Are words to be interpreted the way that the "common person" today understands them? The way common people understood the words 125 years ago? The way a constitution's drafters themselves understood them? For example, in *State ex rel. State Capitol Commission v. Lister*,[111] the Washington Supreme Court, in 1916, interpreted the word "debt" in the state's constitution. Justice John Main wrote:

> Constitutions being the result of the popular will, the words used therein are to be understood ordinarily in the sense that such words convey to the popular mind. The meaning to be given to the language used in such instruments is that meaning which a man of ordinary prudence and average intelligence and information would give. Generally speaking, the meaning given to words by the learned and technical is not to be given to words appearing in a Constitution.[112]

In 1998, Washington Justice Richard Sanders suggested a different approach to reading text in *Gerberding v. Munro*:[113]

> Many of our framers were lawyers and appreciated the nuances of language. In matters of constitutional construction, courts prefer a construction which will render every word operative, rather than one which may make some words idle and nugatory.[114]

Even the same judge might apply a different approach to text in different cases. In the passage from his *Gerberding v. Munro* dissent quoted above, Justice Sanders urged a technical and nuanced reading of constitutional text.[115] In another case, *Weden II v. San Juan County*,[116] he used a different approach, citing "that self-evident rule of constitutional interpretation which

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110. *Wash. Water Jet Workers Ass'n*, 90 P.3d at 45.
111. 156 P. 858 (Wash. 1916).
112. *Id.* at 859-60.
113. 949 P.2d 1366 (Wash. 1998).
114. *Id.* at 1379 (Sanders, J., dissenting) (footnote omitted).
115. *See id.* at 1378.
116. 958 P.2d 273 (Wash. 1998).

requires us to construe the constitution by its *ordinary* language as understood at the time of its ratification."[117] Assuming that the language seems clear enough to the justices, there should be little need to proceed to more complicated methods of understanding the provision's meaning. But agreement on the "plain meaning" of a text can be elusive, and the "right" theory of reading text can be elusive as well.

When judges and lawyers do agree on the same theory about reading text, there is no guarantee that they will see eye to eye on the meaning of the words themselves. In *State v. Norman*,[118] the Washington court wrestled with a fluke of nineteenth-century surveying. Defendants in a drug possession case had been arrested just south of the United States-Canadian boundary, but *north* of the forty-ninth parallel. Because of mid-nineteenth-century surveying errors, the boundary had been placed above the parallel that was meant to demarcate the line between the two countries.[119] Yet in 1889, the Washington Constitution's drafters expressly placed the state's northern boundary at the forty-ninth parallel,[120] so the defendants urged that they were in a federal "no man's land" beyond the jurisdiction of Washington State courts. The dissent agreed with the defendants' argument that the framers meant what they said when they referred to the forty-ninth parallel and that the words "reflect[ed] the framers' intent and [was] not subject to judicial interpretation."[121] But the majority opinion upheld the convictions, agreeing with the prosecution that there were "at least seven different systems for locating the [forty-ninth] parallel," which created "a latent ambiguity" in an otherwise obvious term.[122]

B. History

When language that seems "plain" on its face is opaque in application, courts quickly move to other interpretive techniques for assistance. In *Washington Water Jet Workers Ass'n v. Yarbrough*, Washington's high court moved first to the historical approach for help when it was unable to reach consensus on the "plain" meaning of the words.[123] The language was just not

117. *Id.* at 296 (Sanders, J., dissenting) (emphasis added).
118. 40 P.3d 1161 (Wash. 2002).
119. *Id.* at 1166-67.
120. WASH. CONST. art. XXIV, § 1.
121. *Norman*, 40 P.3d at 1167.
122. *Id.* at 1168 n.7.
123. 90 P.3d 42, 45 (Wash. 2004), *cert. denied*, 543 U.S. 1120 (2005). In addition, judges sometimes find that a provision's clear meaning is just too hard to swallow, or they simply desire to supplement a text-based understanding with another interpretive technique to

plain enough, so the court decided that it would "also examine the historical context of the constitutional provision for guidance."[124] The opinion then proceeded with a massive treatise on late nineteenth century prison labor, the political movement to halt the misuse of imprisoned workers, and the resulting language in federal law and state constitutions on that topic.[125] The majority concluded that a prison work training program violated Washington's constitution.[126] The dissent countered with an equally detailed historical analysis leading to an opposite conclusion.[127] In an earlier case, *Sofie v. Fibreboard Corp.*,[128] the Washington court had also used a heavily historical approach, stating: "Our basic rule in interpreting article I, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889."[129] Perhaps because Washington State's constitution was adopted recently enough for there to have been extensive newspaper coverage of the convention's proceedings, and because other contemporary sources are available,[130] Washington's high court has had a strong tendency toward an historical approach when interpreting the state's basic document.[131] In *State ex rel. Mason County Logging Co. v. Wiley*,[132] the court said: "Constitutions are to be construed as the people construed them in their adoption, if possible; and the *public history of the times* should be consulted, and should have weight in arriving at that construction."[133] The court has also held that when interpreting a constitutional amendment, it may examine the legislative history and the official voters' pamphlet, as well as "the extrinsic evidence of the circumstances that gave rise to the amendment."[134] Numerous decisions, including *Washington Water Jet*

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ensure that the meaning as well as the text make sense. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 435 (1985).

124. *Wash. Water Jet Workers Ass'n*, 90 P.3d at 45.

125. *Id.* at 46-49.

126. *Id.* at 53.

127. *See id.* at 58-62 (Chambers, J., dissenting).

128. 771 P.2d 711 (Wash.), *amended by* 780 P.2d 260 (Wash. 1989).

129. *Id.* at 716.

130. *Cf.* G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1186 (1992) ("[T]he more recent the constitutional provision, the more likely that there is an extensive documentary record . . . bearing on its meaning. The greater availability of these materials . . . facilitates the discovery of original intent.").

131. *See generally* Dolliver, *supra* note 97 (displaying Washington judges' focus on the historical approach).

132. 31 P.2d 539 (Wash. 1934).

133. *Id.* at 543 (emphasis added) (internal quotation marks omitted) (quoting People *ex rel.* Bay City v. State Treasurer, 23 Mich. 499 (1871)).

134. Zachman v. Whirlpool Fin. Corp., 869 P.2d 1078, 1080 (Wash. 1994).

Workers Ass'n, have recounted the influence of rising nineteenth-century populism on Washington State's constitution, and have interpreted provisions based on the court's understanding of populist aims.[135]

C. Structure

But text, history, and drafters' intent are not the only keys to interpreting a specific provision. As Judge (and Professor) Richard Posner has observed: "It is extraordinarily difficult to ascertain the intent of a document drafted two hundred years ago or . . . even one hundred years ago. The cultural, political, and even linguistic setting is so altered . . . ."[136] Hence there are still more tools that judges must use to understand and apply constitutional provisions, including structure. A constitution's allocation of powers among branches,[137] its rules governing the exercise of power by a branch,[138] and other basic aspects of a constitution's character, all provide assistance to interpretation. Structural differences between the federal and state constitutions is one of the *Hunt* and *Gunwall* criteria that is often cited in decisions that interpret state constitutional provisions differently than federal

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135. Wash. Water Jet Workers Ass'n v. Yarbrough, 90 P.3d 42, 50-51 (Wash. 2004), *cert. denied*, 543 U.S. 1120 (2005); *see also* Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 83 P.3d 419, 426 (Wash. 2004); Manufactured Housing Communities of Wash. v. State, 13 P.3d 183, 210-11 (Wash. 2000) (Talmadge, J., dissenting); Gerberding v. Munro, 949 P.2d 1366, 1387 (Wash. 1998) (Sanders, J., dissenting).

136. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 283 (1982).

137. For example, the Washington Constitution provides: "The judicial power of the state shall be vested in a supreme court, superior courts . . . and such inferior courts as the legislature may provide." WASH. CONST. art. IV, § 1. This expression of separation of powers has been the touchstone for a number of important Washington state constitutional decisions. *See, e.g.*, Wash. State Farm Bureau Fed'n v. Reed, 115 P.3d 301, 311 (Wash. 2005); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 88-89 (Wash. 1978).

138. For example, Washington State constitutional provisions constraining the legislature's exercise of its powers were enacted to prevent legislative "logrolling" and to keep the legislature accountable to the public. WASH. CONST. art. II, § 19 (providing that any legislative bill shall contain only one subject, which must be reflected in its title). This underlying purpose of encouraging public disclosure and public control over elected legislators has been the analytical basis for a number of decisions and has also affected the outcome of decisions that were not expressly based on that specific section of the state's constitution. *See, e.g.*, Wash. State Legislature v. Lowry, 931 P.2d 885, 889-90 (Wash. 1997); Wash. Toll Bridge Auth. v. State, 304 P.2d 676, 679 (Wash. 1956); Power, Inc. v. Huntley, 235 P.2d 173, 177 (Wash. 1951); Blaine v. City of Seattle, 114 P. 164, 165 (Wash. 1911).

analogs.[139] For example, in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, in which the Washington Supreme Court reaffirmed its intention to interpret and apply the state's privileges and immunities clause differently than the similar provision of the Fourteenth Amendment, the opinion stated:

> The structural difference between the federal and state constitutions is apparent. Where the [F]ederal [C]onstitution is a grant of enumerated powers, the state constitution serves to limit the sovereign power, which directly lies with the residents and indirectly lies with the elected representatives. Therefore, structural differences support an independent analysis.[140]

As the court has observed, structural differences between the national and state constitutions are always present.[141] Consequently, the criterion is not very useful in helping a court decide whether to interpret a Washington constitutional provision differently than the federal courts interpret similar sections of, and amendments to, the United States Constitution. But, regardless of whether or not there is a similar federal provision, Washington's court does regularly use structural factors in the way Bobbitt describes (i.e., inferring rules from the relationships that a constitution creates among citizens and governments) when it decides how to read and apply specific state constitutional provisions. For example, the simple fact that the Declaration of Rights is the *first* section of the state's constitution has been cited for the proposition that the primary purpose of the document is to protect individual rights against government intrusion.[142] In *Washington Water Jet Workers Ass'n*, proponents of a prison labor program argued (unsuccessfully) that because the relevant provision of the state constitution was *not* located in the Declaration of Rights, "it should not be interpreted to

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139. *See, e.g.*, City of Seattle v. Mighty Movers, Inc., 96 P.3d 979, 992 (Wash. 2004) ("Ordinary rules of textual and constitutional interpretation, *as well as the logic of federalism,* require that meaning be given to the differences in language between the Washington and U.S. Constitutions, and that even identically worded provisions be interpreted independently . . . ." (emphasis added) (quoting UTTER & SPITZER, *supra* note 22, at 10)).

140. 83 P.3d at 428 (citations omitted).

141. *See, e.g.*, State v. Young, 867 P.2d 593, 596 (Wash. 1994) ("The fifth *Gunwall* factor, structural differences . . . will always point toward pursuing an independent state constitutional analysis . . . ."). *See also* Braithwaite, *supra* note 48, at 38.

142. State v. Schelin, 55 P.3d 632, 648 (Wash. 2002) (Sanders, J., dissenting).

protect the interest of free labor or business."[143] Separation of powers, and checks and balances between the legislative and judicial branches,[144] and between the executive and legislative branches,[145] has been a recurring theme in decisions. For example, in *Washington State Legislature v. Lowry*,[146] a case involving the veto power, the court's opinion spoke of the need to prevent the legislature from using appropriations bills "to derive political advantage against the executive, thereby upsetting the constitutional framework of checks and balances."[147] Other opinions have relied upon the fact that Washington's constitution divides power within the executive branch among a number of independently elected officials with different assigned tasks.[148]

D. Doctrine

The doctrinal approach to determining the meaning of a particular constitutional clause requires examination of the rules generated by prior court decisions and commentary, and their application to the case at hand. In our common law system, judicial decisions based on precedent and the reasoning of sister courts, is the most commonly used method of interpreting constitutional provisions when the text is not sufficiently clear.[149] For example, in *Washington Water Jet Workers Ass'n*, the court devoted long sections to evaluating case law from California, Illinois, and many other states.[150] Accepted doctrine leads to judges applying the rule of *stare decisis*,

143. Wash. Water Jet Workers Ass'n v. Yarbrough, 90 P.3d 42, 49 n.6 (Wash. 2004), *cert. denied*, 543 U.S. 1120 (2005); *see also* Southcenter Joint Venture v. Nat'l Democratic Policy Comm., 780 P.2d 1282, 1296 (Wash. 1989) (Utter, J., concurring) ("[The] reasons inherent to the structure of our state constitution argue against a generalized state action requirement in state constitutional jurisprudence.").

144. *See, e.g.*, *In re* Salary of Juvenile Dir., 552 P.2d 163, 169-71 (Wash. 1976) (noting that courts have inherent power to intervene in the operation of the other branches, and also have inherent power to compel funding if lack of resources threaten its ability to carry out its basic functions).

145. *See, e.g.*, Young v. State, 54 P. 36, 37 (Wash. 1898).

146. 931 P.2d 885 (Wash. 1997).

147. *Id.* at 896; *see also* Wash. State Motorcycle Dealers Ass'n v. State, 763 P.2d 442, 446 (Wash. 1988).

148. State v. Sponburgh, 525 P.2d 238, 244 (Wash. 1974) (Hale, J., concurring).

149. Washington courts have turned not only to sister states for assistance in interpretation, but also to other common law jurisdictions such as England and Canada. *See, e.g.*, Zvolis v. Condos, 352 P.2d 809, 813 (Wash. 1960); Spangler v. Tyler (*In re* Tyler's Estate), 250 P. 456, 458-59 (Wash. 1926).

150. Wash. Water Jet Workers Ass'n v. Yarbrough, 90 P.3d 42, 53-58 (Wash. 2004), *cert. denied*, 543 U.S. 1120 (2005).

even when they disagree with the earlier and controlling decision.[151] Advocates of dual sovereignty, such as Washington's retired Justice Utter, assert that the doctrinal study and application of both federal and state court decisions not only assist a state court in understanding a specific provision, but also contribute to the development of national constitutional jurisprudence.[152]

E. Ethical Perspective

This analytical approach focuses on basic moral and ethical commitments of a political culture that are entrenched in a constitution. In a thoughtful application of Bobbitt's ethical mode to state constitutional interpretation, Emory University Professor Robert Schapiro has observed: "When the people set forth ideals . . . in broadly worded constitutional text, they create an overall system of principles that invites interpretation by reference to the larger value structure that the constitution creates."[153] For example, in *Washington Water Jet Workers Ass'n*, the majority opinion drew upon some of the basic political and philosophical underpinnings of the state

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151. *See, e.g.*, CLEAN v. City of Spokane, 947 P.2d 1169, 1179-80 (Wash. 1997) (Sanders, J., concurring). Justice Sanders wrote:

> Reluctantly I concur with the majority. . . . But this result is compelled by the majority decision in *CLEAN v. State*, wherein this court virtually repealed the citizens' constitutional right to referendum by allowing the Legislature to inoculate itself against referendums through conclusory emergency clauses not subject to meaningful judicial review, as well as *King County v. Taxpayers of King County*, which emasculated Const. art. VIII, § 7's prohibition against gifts of public funds to private persons by adopting a "legally sufficient" consideration test. As my objections to both decisions were stated for naught in the accompanying dissents, I concur this case is within the four corners of those majorities and agree stare decisis requires like result in all other cases unless or until these decisions are appropriately overruled to restore that measure of constitutional protection our citizens are justly entitled.

Id. (Sanders, J., concurring) (citations omitted).

152. Utter, *Swimming in the Jaws of the Crocodile*, *supra* note 39; *see also* Kahn, *supra* note 5, at 1167-68; State v. Young, 867 P.2d 593, 601 (Wash. 1994).

153. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 453 (1998); *see also* Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 88 (2001) ("[Q]uestions of interpretive legitimacy must always be resolved by appeals to a theory of the substantive values of the constitution.").

constitution in explaining the meaning of the prison labor contracting clause.[154] The court stated:

> Central among the populist ideals was the protection of the individual from unfair advantages created by coalitions between big government and politically connected big businesses. The populists wished to protect personal, political, and economic rights from both the government and [big] corporations, and they strove to place strict limitations on the powers of both. To achieve this, the populists strove to erect a fire wall between the public and private sectors.[155]

The quoted section is more than an example of the historical interpretative method. It is an "ethical" approach because it digs deeper, into the underlying political ethos that the framers built into a basic document that was then approved by the voters. This includes what the late Washington Justice James M. Dolliver called "the atmosphere or temper of the times surrounding the constitutional convention."[156] Other frequent examples of basic moral and ethical commitments entrenched in Washington State's constitution include the state supreme court's recognition of the fundamental importance of personal privacy,[157] private property,[158] sexual equality,[159]

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154. 90 P.3d at 50; *see also* Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 42 P.3d 394, 407 (Wash. 2002) ("[T]he reference to corporations in our state constitution reflects concerns by the framers regarding undue political influence exercised by those with large concentrations of wealth . . . ."), *vacated in part on reh'g*, 83 P.3d 419 (Wash. 2004).

155. *Wash. Water Jet Workers Ass'n*, 90 P.3d at 50 (alteration in original) (citations omitted) (internal quotation marks omitted).

156. Dolliver, *supra* note 97, at 166. As former Oregon State Supreme Court Justice (and Professor) Hans Linde has observed, a constitution is a record of political action as well as a document to interpret. Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927, 929-31 (1993).

157. *See, e.g.*, State v. Ferrier, 960 P.2d 927, 932-34 (Wash. 1998) (requiring police without warrant to expressly state homeowner's right to refuse officer's entry); State v. Young, 867 P.2d 593, 596-98 (Wash. 1994) (holding that the use of an infrared thermal device violates defendant's privacy rights, noting that WASH. CONST. art. I, § 7 "clearly recognizes an individual's right to privacy with no express limitations" (internal quotation marks omitted) (quoting State v. Simpson, 622 P.2d 1199, 1205 (Wash. 1980))); State v. Boland, 800 P.2d 1112, 1114-16 (Wash. 1990) (finding a privacy right in garbage).

158. *See, e.g.*, Manufactured Housing Communities v. State, 13 P.3d 183, 189 (Wash. 2000) (noting the framers' strong concern about protecting private property from governmental taking or interference).

159. *See, e.g.*, Darrin v. Gould, 540 P.2d 882, 892-93 (Wash. 1975) (requiring admission of young women onto football team, and emphasizing overriding and compelling interest in equal rights entrenched by equal rights amendment to state constitution).

universal education,[160] and the separation of church and state while vigorously protecting personal religious freedoms.[161]

F. Prudential

Judges often balance the social, economic, and/or political costs and benefits of a particular understanding of a constitutional provision. Some theorists, notably Judge Richard A. Posner, argue that a pragmatic approach to interpreting and applying constitutional provisions is a positive good.[162] A number of United States Supreme Court justices (e.g., Holmes and Frankfurter) have, in deciding cases, explicitly applied "balancing tests" and openly taken into account practical considerations, a concern about outcomes, and the need to accommodate competing social forces within society.[163] Posner notes that Justice Robert Jackson, who "had a rich background of involvement in high-level political questions, was not bashful in drawing upon his extrajudicial experience for guidance to the content of constitutional doctrine."[164] In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*),[165] Justice Jackson provided a classic example of the prudential approach:

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160. *See, e.g.*, Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 83-86 (Wash. 1978) (holding that public K-12 education "is the paramount duty of the state" (internal quotation marks omitted) (quoting WASH. CONST. art 9, § 1)).

161. *See, e.g.*, First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992) (emphasizing freedom of conscience and holding that application of historical preservation laws to church structures constitutes impermissible government intrusion into liturgy); Witters v. Comm'n for the Blind, 771 P.2d 1119, 1130-31 (Wash. 1989) (Utter, J., dissenting) (noting 1889 newspaper editorial warning that religious instruction "means a gradual retrogression to the union of church and state, and this union means a tyrannical government and a corrupt priesthood"); Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973) (emphasizing "absolute" constitutional prohibition on use of public funds for religious education), *overruled by* State *ex rel.* Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002).

162. *See* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 3-4 (1996) [hereinafter Posner, *Pragmatic Adjudication*]; *see also* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 13 (2003) ("[T]he pragmatic judge aims at the decision that is most reasonable, all things considered, where 'all things' include both case-specific and systemic consequences, in their broadest sense . . . .").

163. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952-63 (1987); Morton J. Horwitz, *Holmes in American Legal Thought*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 31, 56-57 (Robert W. Gordon ed., 1992); FELIX FRANKFURTER, *The Judicial Process and the Supreme Court*, *in* OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER 31, 39 (Philip Elman ed., 1956).

164. Posner, *Pragmatic Adjudication*, *supra* note 162, at 10.

165. 343 U.S. 579 (1952).

> That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal advisor to a President in time of transition and public anxiety. While an interval of detached reflection may temper teachings of that experience, they probably are a more realistic influence on my views than the conventional materials of judicial decision which seem unduly to accentuate doctrine and legal fiction.[166]

Bobbitt describes the prudential approach as a "constitutional argument which is accentuated by the political and economic circumstances surrounding the decision. Thus prudentialists generally hold that in times of national emergency even the plainest of constitutional limitation can be ignored."[167] However, it is rare to find the prudential method of interpretation being expressly applied in a Washington Supreme Court decision, perhaps because the court's commitment to strong (sometimes "absolute") rights protections[168] makes it hesitant to balance individual liberties against the power of government.[169] For example, the prudential approach does not make an appearance in *Washington Water Jet Workers Ass'n*, a case that involved rights of both prisoners and free workers. Furthermore, the Washington court actively defers to the Washington legislature in policy matters, and has often declined to "fix" statutory or constitutional problems. Thus, in *State ex rel. Washington Toll Bridge Authority v. Yelle*,[170] the state supreme court rejected a statute permitting state acquisition of private ferries because the legislation covered multiple subjects in violation of a constitutional prohibition. The opinion stated:

> A wholesome statute, if declaratory of a subject not within the title, must fall before it, for it is general in its application. While it is intended as a guard against the bad in legislation, it is also intended as a herald of the true intent and purpose of the law. It is not within the power of the courts to declare a law which is passed in contravention of this mandate wholesome because it

166. *Id.* at 634 (Jackson, J., concurring).

167. BOBBITT, CONSTITUTIONAL FATE, *supra* note 4, at 61.

168. *E.g.*, Weiss v. Bruno, 509 P.2d 973, 978 (Wash. 1973), *overruled in part by* State *ex rel.* Gallwey v. Grimm, 48 P.3d 274 (Wash. 2002).

169. *See, e.g.*, *In re* Request of Rosier, 717 P.2d 1353, 1358-59 (Wash. 1986), *superseded by statute*, WASH. REV. CODE § 42.17.330 (1987), *as recognized in* Progressive Animal Welfare Soc'y v. Univ. of Wash., 884 P.2d 592, 601 (Wash. 1994), *recodified as* WASH. REV. CODE § 42.56.040 (2005).

170. 200 P.2d 467 (Wash. 1948).

> is so. If this power were exercised, it would result in a direct violation of the constitutional mandate and a usurpation of the functions of the Legislature on the part of the courts. Laws would be sustained or defeated by considerations of present policy rather than by reference to the Constitution.[171]

Notwithstanding the state supreme court's reluctance to balance policy concerns that are better left to legislators, practical considerations are rarely far away when judges are faced with a controversial case. The prudential approach does appear from time to time in opinions. For example, Justice Stephen J. Chadwick, one of the court's most sophisticated jurists, used a classic prudential method in *State v. Mountain Timber Co.*,[172] a 1913 case upholding industrial insurance legislation against a challenge on substantive due process grounds. Justice Chadwick wrote:

> The police power which may be invoked to protect the health, property, welfare, and morals, of citizens is an inherent attribute of sovereignty, the exercise of which is necessary to secure good government and promote the public welfare. Circumstances and occasions calling for its exercise have multiplied with marvelous rapidity in recent years, by reason of the well-recognized fact that modern, social, and economic conditions have called into existence agencies previously unknown, many of which so vitally affect the health and physical condition of laborers, and especially female laborers, that legislation of the character here involved has been sustained with greater liberality than was formerly evinced under less exacting conditions.
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> . . . .
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> . . . The scope of the police power is to be measured by the legislative will of the people upon questions of public concern, not in acts passed in response to sporadic impulses or exuberant displays of emotion, but in those enacted in affirmance of established usage or of such standards of morality and expediency as have by gradual processes and accepted reason become so

171. *Id.* at 473 (internal quotation marks omitted) (quoting State *ex rel.* Arnold v. Mitchell, 104 P. 791 (Wash. 1909)); *see also In re* Parentage of L.B., 122 P.3d 161, 182 (Wash. 2005) (Johnson, J., dissenting) (stating that an unambiguous statute is subject to a judicial interpretation of legislative intent and the statute's purpose), *cert. denied*, Britain v. Carvin, 126 S. Ct. 2021 (2006); State *ex rel.* State Capitol Comm'n v. Lister, 156 P. 858, 859-60 (Wash. 1916).

172. 135 P. 645 (Wash. 1913).

> fixed as to fairly indicate the better will of the people in their social, industrial, and political development.[173]

In *Maple Leaf Investors, Inc. v. State Department of Ecology*,[174] a more recent case involving the application of the police power to the use of private property, the court again engaged in a formal balancing act, stating:

> There is no single, simple test to use in dealing with the taking issue. The court, guided by broad general principles, must decide each case on its own facts. . . . The question essentially is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interests of private landowners not to be encumbered by restrictions on the use of their property.[175]

V. CONCLUSION: APPLYING ALL AVAILABLE METHODS, ALL THE TIME

Although individual jurists may on occasion state a preference for one method of constitutional interpretation over another, the fact is that most courts use any or all of the available approaches to help them understand and apply specific provisions. In its request that lawyers use the *State v. Gunwall* factors to help brief constitutional cases, and in its members' use of those criteria in its opinions, the Washington Supreme Court has explicitly recognized the usefulness of viewing the state constitutional elephant from all points of view. By shifting its focus from using the *Gunwall* tests as barriers to be overcome when independently interpreting the state constitution, to using those criteria principally as briefing and interpretive devices, the court has given new life and utility to the "criteria" or "factor" approach first proposed in 1982 by New Jersey Justice Alan Handler in *State v. Hunt*.[176]

The criteria approach has been criticized for mixing comparative and interpretive factors and for denigrating the importance of state

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173. *Id.* at 648-49 (internal quotation marks omitted) (quoting State v. Somerville, 122 P. 324, 326 (Wash. 1912)).

174. 565 P.2d 1162 (Wash. 1977).

175. *Id.* at 1164. For other examples of cases that consciously balanced the public's need for governmental regulation against individual property rights, see Presbytery of Seattle v. King County, 787 P.2d 907, 912-13 (Wash. 1990); Orion Corp. v. State, 747 P.2d 1062, 1077-78 (Wash. 1987).

176. *See supra* notes 25-29 and accompanying text.

constitutions.[177] But when courts such as Washington's use the *Hunt* and *Gunwall* factors as checklists to ensure that attorneys argue (and the court evaluates) difficult constitutional questions from all angles, they are methodically using interpretive techniques that scholars such as Philip Bobbitt have shown to have been applied by judges for decades. The *Hunt* and *Gunwall* factors should not be limited to cases in which the court has a choice of following federal court decisions. Instead, lawyers should formally be asked to analyze *all* novel interpretive issues by application of the *Hunt* or *Gunwall* criteria. This will improve the quality and usefulness of briefing and help courts make more informed and thoughtful decisions. Furthermore, when the *Hunt* and *Gunwall* factors are no longer used as hurdles to application of a state constitution when there is a federal analog, the "problem" of mixing comparative and interpretive factors dissolves. The activity of comparing a state constitutional provision to a similar section of the United States Constitution, another state constitution, or even the constitution of another country, is a key component of the doctrinal method of interpretation and may also be part of applying the structural and ethical approaches. Put another way, to a state appellate court interpreting its own constitution, United States Supreme Court decisions about the Constitution simply represent another source of doctrine—often a useful source—to consider when the state judges are engaged in construing their jurisdiction's basic charter.

Consequently, state appellate courts should not jettison the "criteria" or "factor" approach, as some have suggested. Instead, those courts should ask lawyers to follow the criteria in their briefing, and should continue to apply those factors in all challenging interpretive situations, regardless of whether or not the provision concerned is similar to a section of the United States Constitution. Those courts should also continue to refine the criteria so that they become even more useful. For example, the Washington court might consider collapsing the first two textual factors into one, and adding the "public attitudes" criterion from the *Hunt* list or adding a "balancing" criterion (thus making explicit two prudential factors that have been used in practice but not formally recognized). By continuing to improve upon their interpretive methods, appellate courts will carry out their responsibilities more effectively and will be better able to sustain the constitutions and the communities they are pledged to serve.

177. *See supra* notes 48-49 and accompanying text.

APPENDIX I

COMPARING THE *HUNT* AND *GUNWALL* CRITERIA TO BOBBITT'S INTERPRETIVE MODALITIES

State v. Hunt	*State v. Gunwall*	*Bobbitt's Modalities of Constitutional Argument*
1.Textual Language	1. Textual Language	1. Textual
* * * * * * *	2. Significant Differences in Texts	1. Textual
2. Legislative History	3. State Constitutional and Common Law History	2. Historical 5. Ethical
3. Preexisting State Law	4. Preexisting State Law	4. Doctrinal
4. Structural Differences Between Federal and State Constitutions	5. Structural Differences between Federal and State Constitutions	3. Structural
5. Matters of Particular State Interest or Local Concern	6. Matters of Particular State Interest or Local Concern	6. Prudential
6. State Traditions	3. State Constitutional and Common Law History	5. Ethical 4. Doctrinal
7. Public Attitudes	* * * * * * *	6. Prudential