Washington Law Review

Volume 75 | Number 2

4-1-2000

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THE SEARCH FOR A DISTINCT RELIGIOUS-LIBERTY JURISPRUDENCE UNDER THE WASHINGTON STATE CONSTITUTION

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Abstract: Article I, Section 11, of the Washington Constitution, titled "Religious Freedom," provides more protection for free exercise of religion and the separation of church and state than the First Amendment to the U.S. Constitution. Because the state constitution provides broader protection for each right, a natural tension arises between the two rights. However, rather than relying on the text of the state constitution, the Supreme Court of Washington has imposed an entirely federal analysis on free exercise cases brought under Washington law. In addition, the establishment cases under Article I, Section 11, have inconsistently interpreted the language of the state constitutional provision. This Comment argues that the court should adopt a truly distinct analysis under Article I, Section 11, that would rely on the constitutional text and focus on the common goal of individual religious liberty present in both the free exercise and establishment protections. This Comment concludes that a workable framework would involve a synthesis of free exercise and establishment principles into the goal of individual religious freedom, thus alleviating the tension between the two principles.

In 1986, the U.S. Supreme Court reversed the Supreme Court of Washington's decision in *Witters v. State of Washington Commission for the Blind*[1] and held that providing financial aid to a blind student to study for a religious vocation did not violate the Establishment Clause of the First Amendment.[2] The Court remanded the case, noting that "[o]n remand, the state court is of course free to consider the applicability of the 'far stricter' dictates of the Washington State Constitution."[3] On remand, the Supreme Court of Washington did just that and held that despite the constitutionality of the financial aid under federal law, the Washington Constitution's more specific religion provisions forbid the use of state aid for religious instruction.[4] The second *Witters* decision demonstrated the court's willingness to rely on the Washington Constitution where the requirements of that constitution are stronger than those of the federal constitution, and marked the beginning of a period of

1. 102 Wash. 2d 624, 689 P.2d 53 (1984), *rev'd sub nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

2. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 482 (1986).

3. *Id.* at 489 (quoting Witters v. State of Wash. Comm'n for the Blind, 102 Wash. 2d 624, 626, 689 P.2d 53, 55 (1984)).

4. *See* Witters v. State of Wash. Comm'n for the Blind, 112 Wash. 2d 363, 365, 771 P.2d 1119, 1120 (1989).

exploration by the court into the dictates of Article I, Section 11, of the Washington State Constitution, entitled "Religious Freedom."[5]

Three years before *Witters*, the Supreme Court of Washington had developed a six-factor analysis for approaching questions that fall under both the state and federal constitutions, and the court seemed poised to develop a distinct jurisprudence under Article I, Section 11.[6] However, since that time the Supreme Court of Washington has repeatedly expressed its intent to rely on the state constitution in the area of religious liberty[7] and yet failed to produce a distinct jurisprudence under Article I, Section 11, that accounts for the differences between the federal and state constitutions.[8] The court has relied primarily on federal precedent when interpreting the Washington Constitution's language pertaining to free exercise of religion[9] and has inconsistently interpreted the language requiring the separation of church and state.[10] Although the court has announced that the state constitution affords more protection than the federal constitution for both free exercise and establishment rights,[11] it has failed to address the implications of these increased protections on the relationship between the two rights. When taken to their extremes, free exercise and separation of church and state have the potential to lead to contradictory results: a government action that accommodates free exercise may violate the separation of church and state, or a government action that separates church and state may infringe on free exercise rights.[12]

Part I of this Comment introduces the backdrop of the federal constitutional approach to religious liberty.[13] Part II traces the historical development of Washington's Article I, Section 11, and the application of the provision by Washington courts, focusing on developments during the last decade. Part III argues that the Supreme Court of Washington should develop a distinct jurisprudence under Article I, Section 11, that relies on that provision's text and emphasizes the goal of individual

5. *See infra* note 58 and accompanying text.

6. *See* State v. Gunwall, 106 Wash. 2d 54, 61–62, 720 P.2d 808, 812–13 (1986).

7. *See* Maylon v. Pierce County, 131 Wash. 2d 779, 792–97, 935 P.2d 1272, 1279–82 (1997); First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 223, 840 P.2d 174, 185 (1992).

8. *See infra* Part II.C–D.

9. *See infra* Part II.C.

10. *See infra* Part II.D.

11. *See Maylon*, 131 Wash. 2d at 792–97, 935 P.2d at 1279–82; *First Covenant*, 120 Wash. 2d at 223–26, 840 P.2d at 186–87.

12. *See infra* Part I.C.

13. Religious liberty encompasses both free exercise and establishment rights.

religious freedom to resolve the tension between free exercise and establishment.

I. RELIGIOUS LIBERTY UNDER THE FEDERAL CONSTITUTION

The First Amendment to the U.S. Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[14] These two short clauses on religion, the Establishment and Free Exercise clauses respectively, serve as the basis for the relationship between church and state in the United States. The First Amendment applies to the states through the Fourteenth Amendment[15] and provides the "floor" for religious liberty in the state courts.[16] Accordingly, although states may not provide less protection for religious liberty than the federal constitution, they may provide more protection through their state constitutions. Many state constitutions define the parameters of religious liberty more specifically than does the First Amendment.[17]

The First Amendment to the U.S. Constitution has spawned a complex body of case law on religious freedom.[18] Because the First Amendment describes the appropriate relationship between religion and the state in just two short clauses, federal courts have developed detailed tests to guide them in the two distinct areas of jurisprudence concerning religion: establishment and free exercise of religion.[19]

A. The First Amendment's Establishment Clause: The Three-Prong Lemon *Test, the Endorsement Test, and the Coercion Test*

The Establishment Clause prohibits Congress from passing laws "respecting" religious establishment.[20] For guidance as to what constitutes "respect[]," the Supreme Court employs a three-prong test

14. U.S. Const. amend. I.

15. *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Free Exercise Clause).

16. *See* G. Alan Tarr, *Church and State in the States*, 64 Wash. L. Rev. 73, 80 (1989).

17. *See id.* at 76.

18. *See id.* at 74. ("[T]he Supreme Court's jurisprudence under the religion clauses is widely perceived to be in disarray.").

19. *See infra* notes 20–31 and accompanying text.

20. U.S. Const. amend. I.

originally formulated in *Lemon v. Kurtzman*.[21] A government action violates the Establishment Clause under *Lemon* if it (1) does not have a secular purpose, (2) has the principal or primary effect of advancing or inhibiting religion, or (3) fosters "an excessive government entanglement with religion."[22]

In recent years the Court has modified the *Lemon* test to include consideration of other principles. The first of these principles is known as the endorsement principle. In *County of Allegheny v. American Civil Liberties Union*,[23] the Court adopted the endorsement principle, holding that a nativity display on the county courthouse steps would unconstitutionally endorse religion, but that the display of a Jewish menorah alongside a city Christmas tree and a sign saluting liberty would not constitute an unconstitutional endorsement of any particular religion.[24] More recently, the Court has analyzed the Establishment Clause by relying on the principle known as coercion. In *Lee v. Wiseman*,[25] the Court held that a prayer at a public high school graduation violated the Establishment Clause because it coerced the students to support or participate in religion.[26]

B. *The First Amendment's Free Exercise Clause: The "Strict Scrutiny" Test of* Sherbert *and the Neutrality Exception of* Smith

The Free Exercise Clause ensures that Congress cannot pass laws that inhibit the free exercise of religion.[27] In *Sherbert v. Verner*,[28] the Court for the first time protected religious conduct, adding to the existing protection for religious belief,[29] and held that a Seventh Day Adventist could not be denied unemployment compensation because she refused to take a job that required her to work on Saturday, her Sabbath.[30] The "strict scrutiny" test, which the court borrowed from freedom-of-

21. 403 U.S. 602 (1971) (holding public reimbursement of sectarian schools for materials and instructors in secular courses unconstitutional).

22. *Id.* at 612–13.

23. 492 U.S. 573 (1989).

24. *See id.* at 579, 592–94.

25. 505 U.S. 577 (1992).

26. *See id.* at 587.

27. *See* U.S. Const. amend. I.

28. 374 U.S. 398 (1963).

29. *See Developments in the Law—Religion and the State*, 100 Harv. L. Rev. 1606, 1705–08 (1987) [hereinafter *Developments in the Law*].

30. *See Sherbert*, 374 U.S. at 399–402.

expression cases, invalidates any government action that burdens the free exercise of religion unless such action serves a compelling state interest and uses the means least restrictive of religion to achieve that interest.[31]

In 1990, the Supreme Court narrowed *Sherbert*'s strict scrutiny test in *Employment Division, Department of Human Resources v. Smith*.[32] In *Smith*, the Court held that denying unemployment benefits to Native Americans who violated state law by using peyote in their religion did not infringe on the right of free exercise.[33] The Court reasoned that where a law is neutral and generally applicable, it may burden free exercise of religion even if such law is not supported by a compelling state interest.[34] Even though the law in *Smith* prohibiting drug use burdened the free exercise of Native Americans' religion, the Court upheld the law because it was neutral and applied generally to all citizens.[35] In reaction to the Court's narrowing of the strict scrutiny test of *Sherbert*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993,[36] which sought to restore free exercise protections to their pre-*Smith* levels.[37] However, in *City of Boerne v. Flores*,[38] the Supreme Court held that the RFRA unconstitutionally exceeded Congress' enforcement powers under Section 5 of the Fourteenth Amendment.[39] Because Congress' attempt to override *Smith* failed, *Smith* remains good law and governs challenges under the Free Exercise Clause.

C. *The Tension Between the First Amendment's Free Exercise and Establishment Clauses*

The Court's protection of religiously motivated conduct under the Free Exercise Clause, such as the refusal to work on a Saturday in *Sherbert*, reveals the tension between the two religion clauses of the First Amendment.[40] The Free Exercise Clause requires that government refrain

31. *See id.* at 406–09 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

32. 494 U.S. 872 (1990).

33. *See id.* at 890.

34. *See id.* at 884–85.

35. *See id.* at 885.

36. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994)).

37. *See* 42 U.S.C. § 2000bb(a) (1994).

38. 521 U.S. 507 (1997).

39. *See id.* at 532.

40. *See Developments in the Law*, *supra* note 29, at 1717–18. In a concurring opinion in *Sherbert*, Justice Stewart warned that the accommodation of religious conduct could not be reconciled with the

from inhibiting the free exercise of religion, while the Establishment Clause simultaneously requires that government refrain from "respecting" religion. By enacting legislation designed to ensure free exercise, the government risks supporting religion. For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*,[41] the Supreme Court held that a state legislature could not create a special school district for a village populated almost entirely by Orthodox Jews of the Satmar Hasidic sect.[42] Private religious schools, attended by most of the children in the village, could not accommodate disabled students, so these students were forced to attend the public schools where they suffered "panic, fear, and trauma" from being outside of their own community.[43] By designating the special school district, the state legislature sought to accommodate the free exercise of religion of the citizens of Kiryas Joel.[44] However, the Court held that under the Establishment Clause, the legislature could not single out one religion for special treatment.[45] Although the Court invalidated this attempt to accommodate religion, it noted that there is "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[46]

II. RELIGIOUS LIBERTY UNDER THE WASHINGTON CONSTITUTION

Overlaid upon the federal religion clauses and their case law is the Washington State Constitution's corresponding religion provision, Article I, Section 11. Essential to a discussion of the Washington provision is an understanding of the historical context in which it was enacted and an examination of the case law interpreting religious liberty in Washington.

Court's construction of the Establishment Clause. *See* Sherbert v. Verner, 374 U.S. 398, 414–15 (1963) (Stewart, J., concurring).

41. 512 U.S. 687 (1994).

42. *See id.* at 690.

43. *Id.* at 691–92.

44. *See id.* at 699.

45. *See id.* at 701–02.

46. *Id.* at 705 (quoting Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987)).

A. *The Historical Development of the Washington State Constitution's Religion Provisions*

In 1889, the Washington legislature enacted the religion provisions of the Washington State Constitution amidst a national debate over the proper relationship between church and state in education.[47] During the early nineteenth century, Protestants, as the religious majority, started a nationwide movement for common, or public, schools.[48] In response, Roman Catholics created more parochial schools and demanded support from the government.[49] Protestant supporters of common schools worried that Roman Catholics would control the nation's educational system, thereby instilling in children Catholic rather than Protestant views.[50] To prevent this, a Protestant movement began in 1875 to amend the federal constitution to prohibit the states from supporting religion.[51] The "Blaine Amendment," proposed in 1875, would have prohibited the use of state funds for the support of any religious sect, but would have allowed Bible reading in the public schools.[52] Although the amendment failed,[53] the movement to curb state sponsorship of religion continued. In 1889, U.S. Senator William Blair proposed a constitutional amendment that would have prohibited government support of sectarian schools and sectarian teaching in public schools.[54] However, like the Blaine Amendment before it, the proposal failed.[55]

Despite the failure of these proposed federal constitutional amendments, the substance of the proposals survived in the Federal

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47. *See generally* Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 Hastings Const. L.Q. 451 (1988).

48. *See id.* at 464.

49. *See id.*

50. *See id.* at 464–67.

51. *See id.* at 463.

52. *See* 4 Cong. Rec. 205 (1875). The text of the amendment in its final Senate form read:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof.... No public property, and no public revenue of, nor any loan or credit... shall be appropriated to, or made to be used for, the support of any religious or antireligious sect, organization, or denomination or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair the rights of property already vested.

Id.

53. *See* 4 Cong. Rec. 5191, 5595 (1876).

54. *See* 20 Cong. Rec. 2100 (1889); S. 86, 50th Cong. (1888).

55. *See* Utter & Larson, *supra* note 47, at 461–62.

Enabling Act, which served as the instrument for creating new states.[56] Washington joined the Union under the Federal Enabling Act, which required the state constitution to provide for a strict separation between public education and sectarian influence and control.[57] Thus, the Washington Constitution's religion provisions derive from essentially the same intentions as those behind the Blaine and Blair proposed amendments to the U.S. Constitution. As a result, the Washington State Constitution addresses religion more explicitly than the federal constitution. Three separate provisions address the state's role with regard to religion. The broadest of these is Article I, Section 11, titled "Religious Freedom," which states:

> Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.[58]

In addition to this section, the Washington Constitution directly addresses the issue of religion and education in two other provisions.

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56. *See* Frank J. Conklin & James M. Vache, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. Puget Sound L. Rev. 411, 436 (1985).

57. *See* Enabling Act, ch. 180, § 4, 25 Stat. 676, 676–77 (1889). The Act required that the state convention provide for "the establishment and maintenance of a system of public schools, which shall be open to all children . . . and free from sectarian control." Enabling Act, ch. 180, § 4, 25 Stat. at 676–77.

58. Wash. Const. art. I, § 11.

Article IX, Section 4, provides: "All schools maintained or supported wholly or in part by public funds shall be forever free from sectarian control or influence."[59] Article XXVI states in part: "Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state."[60] Article I, Section 11, of the Washington Constitution is similar to the Blaine Amendment,[61] while Article IX, Section 4, and Article XXVI serve the same purposes as the Blair proposal.[62]

B. *Determining Whether to Apply the State or Federal Constitution: The* Gunwall *Criteria*

In Washington, as in every state, both the federal and state constitutions protect religious liberty. While the federal constitution provides minimum standards for religious-freedom rights, states may provide broader protection so long as it does not conflict with federal constitutional guarantees.[63] In the 1980s, the Supreme Court of Washington developed principles and criteria to guide it in defining the relationship between the Washington and federal constitutions. In *State v. Coe*,[64] the court announced what has since been called a "dual sovereignty" approach in cases involving both state and federal constitutional questions.[65] Under this approach, the court first evaluates the state constitutional provision and then conducts an analysis of the federal constitutional protections.[66] However, the dual sovereignty approach applies only where the state constitutional protections differ from the federal constitutional protections. To aid in this analysis, in *State v. Gunwall*,[67] the Supreme Court of Washington laid out six criteria

59. Wash. Const. art. IX, § 4.

60. Wash. Const. art. XXVI. This Comment will not address the latter two provisions but will discuss only Article I, Section 11.

61. *See* Utter & Larson, *supra* note 47, at 468.

62. *See id.* at 458, 469.

63. *See* Tarr, *supra* note 16, at 80.

64. 101 Wash. 2d 364, 679 P.2d 353 (1984).

65. *See* Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 Temple L. Rev. 1153, 1160 (1992).

66. *See id.* This approach has the advantage of providing guidance to courts in other states in the federal analysis of questions not yet presented to the federal courts. *See id.* However, the Supreme Court of Washington does not always provide a discussion of the federal constitution where the state constitution is found to have been violated. *See, e.g.*, Munns v. Martin, 131 Wash. 2d 192, 930 P.2d 318 (1997).

67. 106 Wash. 2d 54, 720 P.2d 808 (1986).

for determining whether the state constitution provides different protections than analogous provisions of the federal constitution and thus demands an independent analysis: (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.[68]

The Supreme Court of Washington has held that under *Gunwall*, Article I, Section 11, provides more protection than the federal constitution for both free exercise of religion[69] and separation of church and state.[70] In *First Covenant Church v. City of Seattle*,[71] the Supreme Court of Washington employed the *Gunwall* criteria in analyzing the free exercise language in Article I, Section 11, and concluded that the protections of Article I, Section 11, are sufficiently different from those of the federal First Amendment to require independent analysis.[72] In applying the *Gunwall* criteria, the court found that the free exercise language in the Washington Constitution is stronger than the language in the First Amendment because Washington "absolutely" protects freedom of worship rather than limiting government action.[73] The court noted that Article I, Section 11, protects individuals from being "disturbed" on the basis of religion and protects all religious conduct so long as it is not "licentious" or inconsistent with public "peace and safety."[74] The court also looked to differences in structure between the federal and state constitutions,[75] as well as the state constitutional and common-law history, to find that Article I, Section 11, provides broader protection for religious freedom than does the First Amendment.[76] Finally, the court noted that a broader interpretation of the state constitution is warranted because while the federal constitution grants limited power to the federal

68. *See id.* at 61–62, 720 P.2d at 812–13.

69. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 223–26, 840 P.2d 174, 186–87 (1992).

70. *See* Maylon v. Pierce County, 131 Wash. 2d 779, 792–97, 935 P.2d 1272, 1279–82 (1997).

71. 120 Wash. 2d 203, 840 P.2d 174 (1992).

72. *See id.* at 226, 840 P.2d at 187.

73. *See id.* at 224, 840 P.2d at 186.

74. *See id.*

75. *See id.* at 225, 840 P.2d at 186.

76. *See id.* at 224–25, 840 P.2d at 186.

government, the Washington Constitution is structured to limit the plenary power of the state.[77]

Turning to the Washington establishment provision, the Supreme Court of Washington again applied the *Gunwall* criteria in *Maylon v. Pierce County*,[78] and concluded that this provision also affords more protection than the First Amendment and should be independently analyzed.[79] Under the first two *Gunwall* criteria, which examine the state constitution's text standing alone and as compared to the analogous federal provisions, the *Maylon* court found that the language of Article I, Section 11, is more specific than that of the Establishment Clause of the First Amendment and that the language differs greatly.[80] The state constitution enumerates four specific purposes for which public money may not be used: religious worship, religious exercise, religious instruction, or the support of any religious establishment.[81] By contrast, the Establishment Clause of the First Amendment simply prohibits laws "respecting the establishment of religion."[82]

The *Maylon* court then examined Washington's constitutional and common-law history and found that while the drafters of the state constitution sought a strict separation of religion and public education, they intended the language to provide for a more flexible accommodation of religion in other arenas.[83] For example, the court pointed out that the constitution explicitly allows the state to pay the salaries of chaplains in public programs.[84] Although the Supreme Court of Washington has concluded under *Gunwall* that the Washington Constitution's protection of religious liberty differs from that of the federal First Amendment, the court's analysis of Article I, Section 11, has not always reflected those differences.

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77. *See id.*

78. 131 Wash. 2d 779, 935 P.2d 1272 (1997).

79. *See id.* at 791–98, 935 P.2d at 1277–81. Justice Utter in his *Witters* dissent criticized the majority for failing to use the *Gunwall* criteria. *See* Witters v. State of Wash. Comm'n for the Blind, 112 Wash. 2d 363, 381–90, 771 P.2d 1119, 1128–33 (1989) (Utter, J., dissenting).

80. *See Maylon*, 131 Wash. 2d at 793, 935 P.2d at 1278.

81. *See id.*

82. U.S. Const. amend. I; *see Maylon*, 131 Wash. 2d at 793, 935 P.2d at 1278.

83. *See Maylon*, 131 Wash. 2d at 795, 935 P.2d at 1280.

84. *See id.* at 797, 935 P.2d at 1280.

C. *Free Exercise Under Article I, Section 11: Government May Burden a Sincere Exercise of Religion Only When Necessary to Serve a Compelling State Interest*

Under the current Article I, Section 11, test for free exercise, the complaining party has the initial burden of showing a coercive[85] effect of the government action on religion.[86] If this burden is met, the government must demonstrate that the action is the least restrictive means of achieving a compelling state interest.[87] In arriving at this test, Washington courts have addressed free exercise rights in a variety of contexts.[88] The historical evolution of free exercise case law under the Washington Constitution illustrates a trend of relying on federal law.[89] A major step in the historical development of the current test came in *State ex rel. Holcomb v. Armstrong*,[90] where the Supreme Court of Washington held that a student at the University of Washington could not refuse on religious grounds to submit to an x-ray examination to screen for tuberculosis.[91] In that case, the court adopted a test allowing the state to restrict citizens' religion-based actions "only to prevent grave and immediate danger to interests which the state may lawfully protect."[92]

85. Coercive effect in this context means placing a burden on free exercise and should be distinguished from the coercion principle in federal establishment-clause jurisprudence as in *Lee v. Wiseman*, 505 U.S. 577 (1992). *See supra* note 25 and accompanying text.

86. *See* Munns v. Martin, 131 Wash. 2d 192, 199, 930 P.2d 318, 321 (1997) (quoting First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Preservation Bd., 129 Wash. 2d 238, 246, 916 P.2d 347, 379 (1996)).

87. *See id.*

88. *See, e.g., id.* at 209–10 (holding that state may not place administrative burden on demolition of church building for reasons of historical preservation); State v. Meacham, 93 Wash. 2d 735, 741, 612 P.2d 795, 799 (1980) (holding that interest of state in blood testing putative fathers outweighed fathers' religious objection to blood testing); Bolling v. Superior Court, 16 Wash. 2d 373, 387, 133 P.2d 803, 809–10 (1943) (holding that state may not compel students to salute American flag if it is contrary to their religious beliefs); State v. Balzer, 91 Wash. App. 44, 64–66, 954 P.2d 931, 941–42 (1998) (holding that state interest in regulating drug use and possession outweighs interest in drug use for religious purposes); State v. Clifford, 57 Wash. App. 127, 130–34, 787 P.2d 571, 573–75 (1990) (holding that state may require driver's license despite religious belief that this places state on same level as God).

89. *See, e.g.*, First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226–27, 840 P.2d 174, 187 (1992); City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 8, 639 P.2d 1358, 1362 (1982); State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952).

90. 39 Wash. 2d 860, 239 P.2d 545 (1952).

91. *See id.* at 266, 239 P.2d at 549.

92. *Id.* at 864, 239 P.2d at 548 (citing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).

This test derived from federal First Amendment case law.[93] In *City of Sumner v. First Baptist Church*,[94] the court modified this test, asking first whether the state interest involved outweighed the free exercise claim, and second, if the state interest could have been satisfied in a way not infringing on religious liberty.[95] The *Sumner* case involved the use of a church basement as a school in violation of a building code and zoning ordinance.[96] Since *Sumner*, the court has modified the test for free exercise to ask whether a government action that burdens religion is the least restrictive means of achieving a compelling state interest.[97]

1. The Supreme Court of Washington Has Relied on Federal Analysis in Its Interpretation of the Free Exercise Language of Article I, Section 11

Despite the Supreme Court of Washington's conclusion under the *Gunwall* criteria that Article I, Section 11, provides more protection than the First Amendment and should be analyzed separately,[98] the court's current test is virtually identical to the federal strict scrutiny test under *Sherbert*.[99] The Supreme Court of Washington's recent free exercise discourse under Article I, Section 11, has centered around restrictions on the use and development of church property.[100] The court has repeatedly recognized the state constitutional right of churches to be exempt from historic-preservation ordinances that restrict changes to buildings.[101] Applying a test that mirrors the federal strict scrutiny test for free

93. *See id.*

94. 97 Wash. 2d 1, 639 P.2d 1358 (1982).

95. *See id.* at 9, 639 P.2d at 1363.

96. *See id.* at 1, 639 P.2d at 1358.

97. *See* Munns v. Martin, 131 Wash. 2d 192, 199, 930 P.2d 318, 321 (1997).

98. *See supra* notes 71–76 and accompanying text.

99. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 234, 840 P.2d 174, 191 (1992) (Utter, J., concurring). Although the court in *First Covenant* did not cite *Sherbert*, it cited *Witters*, which relied on *Sherbert* in discussing free exercise. *See id.* at 226, 840 P.2d at 187 (citing Witters v. State of Wash. Comm'n for the Blind, 112 Wash. 2d 363, 371, 771 P.2d 1119, 1122–23 (1989)).

100. *See generally Munns*, 131 Wash. 2d 192, 930 P.2d 318; First United Methodist Church v. Hearing Exam'r for the Seattle Landmarks Preservation Bd., 129 Wash. 2d 238, 916 P.2d 374 (1996); *First Covenant*, 120 Wash. 2d 203, 840 P.2d 174; *Sumner*, 97 Wash. 2d 1, 639 P.2d 1358; Open Door Baptist Church v. Clark County, 1998 WL 341968 (Wash. Ct. App. June 26, 1998).

101. *See Munns*, 131 Wash. 2d at 209–10, 930 P.2d at 326; *First United Methodist*, 129 Wash. 2d at 251–52, 916 P.2d at 381; *First Covenant*, 120 Wash. 2d at 229–30, 840 P.2d at 189.

exercise under *Sherbert*,[102] the court has found that historic-landmark preservation is not a compelling state interest.[103] Under the same test, however, the court has recognized the state's interest in requiring churches to submit to a permitting process for zoning purposes.

In *First Covenant Church v. City of Seattle*, the Supreme Court of Washington held that enforcing a landmark-preservation ordinance that restricted churches from making any changes to their buildings violated the right of free exercise of religion secured by both the state and federal constitutions.[104] The court analyzed the ordinance under Article I, Section 11, by asking whether the ordinance was narrowly tailored to serve a compelling state interest—the question asked under federal strict scrutiny.[105] While the test used in *First Covenant* resembles the *Sumner* test, *First Covenant* explicitly adopted the terminology of the federal strict scrutiny test where *Sumner* had not.[106]

Applying this test, the *First Covenant* court found that although the ordinance did not totally restrict changes in places of worship, the First Covenant Church was nevertheless burdened in freely exercising its religion because it was required to obtain the approval of the Landmarks Preservation Board before making any such changes.[107] The court found that the city's interest in restricting the changes was not compelling enough to justify the burden on religion[108] and held that the ordinance as applied to First Covenant violated the state constitution.[109]

In *Munns v. Martin*,[110] the court provided an even more complete formulation of the test for free exercise of religion under the Washington Constitution. This test is based primarily on *First Covenant*'s use of federal analysis.[111] The first question asked under the *Munns* test is whether the burdened party sincerely holds the religious belief.[112] The party must prove that the beliefs allegedly infringed upon are central to

102. *See supra* note 31 and accompanying text.

103. *See Munns*, 131 Wash. 2d at 209, 930 P.2d at 326; *First United Methodist*, 129 Wash. 2d at 247, 916 P.2d at 379; *First Covenant*, 120 Wash. 2d at 227, 840 P.2d at 188.

104. *See First Covenant*, 120 Wash. 2d at 229–30, 840 P.2d at 188–89.

105. *See id.*

106. *See id.*; City of Sumner v. First Baptist Church, 97 Wash. 2d 1, 9, 639 P.2d 1358, 1363 (1982).

107. *See First Covenant*, 120 Wash. 2d at 226–27, 840 P.2d at 187.

108. *See id.*

109. *See id.* at 228, 840 P.2d at 188.

110. 131 Wash. 2d 192, 930 P.2d 318 (1997).

111. *See id.* at 199, 935 P.2d at 321.

112. *See id.*

his or her religious convictions, regardless of the reasonableness of those beliefs.[113] Second, the aggrieved party must show an actual burden or coercive effect on free exercise of religion as a result of the challenged law or action.[114] Finally, the court asked whether the burden is justified by a compelling state interest and whether the state employed the least restrictive means possible to achieve its goal.[115] The court noted that under Article I, Section 11, the compelling state interests that have been recognized are limited to those that protect public health, peace, and welfare.[116] Because the Washington State Register of Historic Places listed the church's school building,[117] the City of Walla Walla was authorized by law to issue a waiting period for negotiation of up to fourteen months before issuing a demolition permit.[118] The court held that this administrative burden, delaying the issuing of a demolition permit to the church, unlawfully infringed on the right of free exercise under Article I, Section 11.[119]

Most recently, in *Open Door Baptist Church v. Clark County*,[120] the court held that the county could require the church to apply for a conditional use permit and pay the attendant fees without violating Article I, Section 11.[121] Relying on the *Munns* test, the court found that the permit process did not impose a burden on Open Door's free exercise of religion.[122] Although the county could potentially deny the permit to Open Door, the court held that this potential burden is not sufficient for purposes of the test, noting that the church was allowed to continue its activities until the resolution of the permit application.[123] The court

113. *See id.* at 199–200, 930 P.2d at 321.

114. *See id.* at 200, 930 P.2d at 321.

115. *See id.* at 200–01, 930 P.2d at 321–22.

116. *See id.* at 200, 930 P.2d at 321. Although recognizing only compelling state interests that protect "public health, peace, and welfare" is similar to the state constitutional provision that allows the government to limit religious activity that is "inconsistent with the peace and safety of the state," the court in *First Covenant* based its analysis on *State ex rel. Holcomb v. Armstrong*, which relied on First Amendment interpretation. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 840 P.2d 174 (1992) (citing State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 864, 239 P.2d 545, 548 (1952)).

117. *See Munns*, 131 Wash. 2d at 197, 930 P.2d at 320.

118. *See id.* at 203, 930 P.2d at 323.

119. *See id.* at 209–10, 930 P.2d at 326.

120. 140 Wash. 2d 143, 995 P.2d 33 (2000).

121. *See* 995 P.2d at 48.

122. *See* 995 P.2d at 40–43.

123. *See* 995 P.2d at 42.

distinguished *Munns*, which had found a potential waiting period to be a burden on free exercise.

> [T]o the extent that the justiciability bar has been lowered in article I, section 11 cases with regard to potential harm, it has been lowered only in a fact-specific context—where an imposition is placed upon a church's free exercise of religion entirely for cultural or aesthetic (e.g., historical landmark designation), and not compelling, reasons.[124]

Without expressly saying so, the court implied that the county had a compelling state interest in zoning as an exercise of the police power, and that there was no less restrictive means of achieving the interest than requiring Open Door to comply with the permitting process.[125]

2. *The Washington Court of Appeals Has Held That the Only Compelling State Interests That Justify a Burden on Free Exercise of Religion Are Interests in the Peace and Safety of the State*

The Washington Court of Appeals has relied more specifically than the Supreme Court of Washington on the text of the state constitution to hold that government may infringe on free exercise rights only to preserve the "peace and safety of the state."[126] In *State v. Norman*,[127] a court of appeals panel held that parents' religious beliefs could not justify their refusal to provide medical treatment to their children.[128] The court reasoned that the state's interest in the health of the state's children qualifies as an interest within the "peace and safety of the state," as required by the constitutional language.[129] In *State v. Balzer*,[130] a court of appeals panel found that Article I, Section 11, did not protect the use and possession of marijuana for religious purposes because the state's interest in regulating drug possession and use is in the interest of the

124. 995 P.2d at 41–42.

125. 995 P.2d at 46–47.

126. Wash. Const. art. I, § 11; *see* State v. Key, No. 16415-2-III, 1999 WL 172663, at *3 (Wash. Ct. App. Mar. 30, 1999); State v. Balzer, 91 Wash. App. 44, 57–58, 954 P.2d 931, 937–38 (1998); State v. Norman, 61 Wash. App. 16, 23, 808 P.2d 1159, 1163 (1991); State v. Clifford, 57 Wash. App. 127, 132, 787 P.2d 571, 574 (1990).

127. 61 Wash. App. 16, 808 P.2d 1159 (1991).

128. *See id.* at 24, 808 P.2d at 1163.

129. *See id.* at 23, 808 P.2d at 1163.

130. 91 Wash. App. 44, 954 P.2d 931 (1998).

"peace and safety of the state."[131] Most recently, in *State v. Key*,[132] a court of appeals panel held that the state could require a convicted felon to provide a random urine sample, even if it meant that the individual had to break a religious fast to do so.[133] The court found that the state's compelling interest in monitoring the drug use of a convicted felon constitutes an interest within the "peace and safety of the state" and could be achieved only by requiring urine samples for drug testing on demand.[134]

D. *Separation of Church and State Under Article I, Section 11: Public Money or Property May Not Be Appropriated for Religious Worship, Exercise, Instruction, or Establishments*

The current test for separation of church and state under the Washington Constitution asks first whether public money or property is involved in the challenged action, and if so, whether that money is being "appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[135] The Supreme Court of Washington first announced this test in *Washington Health Care Facilities Authority v. Spellman*,[136] where it upheld the use of public bonds to provide financial assistance to the health-care facility of a religious organization.[137] However, the two major recent separation-of-church-and-state cases, *Witters v. State of Washington Commission for the Blind*[138] and *Maylon v. Pierce County*,[139] illustrate an inconsistency in applying the test. *Witters* ignored the *Health Care Facilities* test and gave the separation-of-church-and-state language of the state constitution a strict interpretation.[140] In contrast, *Maylon* followed the structure of the test and yet gave the constitution's establishment language a loose interpretation.[141]

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131. *Id.* at 56–65, 954 P.2d at 937–41.

132. No. 16415-2-III, 1999 WL 172663 (Wash. Ct. App. Mar. 30, 1999).

133. *See id.* at *2.

134. *See id.* at *3.

135. Washington Health Care Facilities Auth. v. Spellman, 96 Wash. 2d 68, 71, 633 P.2d 866, 867 (1981) (citing Wash. Const. art. I, § 11).

136. 96 Wash. 2d 68, 633 P.2d 866 (1981).

137. *See id.* at 72, 633 P.2d at 868.

138. 112 Wash. 2d 363, 771 P.2d 1119 (1989).

139. 131 Wash. 2d 779, 935 P.2d 1272 (1997).

140. *See Witters*, 112 Wash. 2d at 367–70, 771 P.2d at 1121–22.

141. *See Maylon*, 131 Wash. 2d at 799–803, 935 P.2d at 1282–84.

1. Witters v. Washington State Commission for the Blind: *Religious Instruction*

In *Witters*, the Supreme Court of Washington ultimately relied on the Washington Constitution to prohibit public aid for religious education even when the federal constitution permitted it.[142] The State of Washington Commission for the Blind denied vocational rehabilitation assistance[143] to Witters, a blind student, on the grounds that providing assistance to study to become a pastor would violate the state constitution's requirement of separation of church and state.[144] When he applied for assistance, Witters was enrolled at a Bible College where his coursework focused on the Bible, ethics, speech, and church administration.[145]

The Supreme Court of Washington affirmed the decision of the Commission denying the aid, but initially relied on the federal constitution, finding that providing aid would have the primary effect of advancing religion.[146] The U.S. Supreme Court reversed and found that because the money would not be paid directly to the college but to the student who would then make a decision where to spend it, the aid did not violate the First Amendment's Establishment Clause.[147]

On remand, the Supreme Court of Washington held that providing aid to Witters under the program violated Article I, Section 11, of the Washington Constitution because public money would be applied to religious "instruction" as specifically prohibited by the constitutional provision.[148] The court concluded that the Washington State Constitution "prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree."[149]

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142. *See Witters*, 112 Wash. 2d 363, 771 P.2d 1119; *see supra* notes 1–4 and accompanying text.

143. *See* Wash. Rev. Code § 74.16.181 (1981) (providing that legally blind persons qualify to receive vocational assistance, including education and training).

144. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483–84 (1986).

145. *See id.* at 483.

146. *See* Witters v. State of Wash. Comm'n for the Blind, 102 Wash. 2d 624, 629, 689 P.2d 53, 55 (1984) *rev'd sub nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 483–84 (1986).

147. *See Witters*, 474 U.S. at 488–89.

148. Witters v. State of Wash. Comm'n for the Blind, 112 Wash. 2d 363, 365, 771 P.2d 1119, 1120 (1989).

149. *Id.*

In its reconsideration of the case under the state constitution, the court relied on *Calvary Bible Presbyterian Church v. Board of Regents*,[150] which defined "religious instruction" as that which "resembles worship" and is "devotional in nature and designed to induce faith and belief in the student."[151] The *Witters* court found that Witters' religious instruction was "designed to prepare him for a career promoting Christianity" and necessarily involved the "indoctrination" of Christian beliefs.[152] The *Witters* court concluded that Bible study and church courses were by definition "devotional in nature and designed to induce faith and belief in the student."[153] However, the dissent noted that the record lacked evidence that Witters' course work involved religious instruction of the sort envisioned by *Calvary*.[154]

After determining that aid to Witters would violate the state constitution's establishment prohibition, the court asked whether the denial of aid created tension between establishment and free exercise by encroaching on Witters' rights to freely exercise his religion.[155] The court reasoned that because Witters was not being pressured or forced to violate any tenet of his religious beliefs, the denial did not violate his free exercise rights.[156] The court also asked whether the denial of funds violated the Equal Protection Clause of the Fourteenth Amendment to the federal constitution.[157] It concluded that the compelling state interest in ensuring the stricter separation of church and state set forth in the Washington Constitution justified the denial of aid and did not violate equal protection.[158]

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150. 72 Wash. 2d 912, 436 P.2d 189 (1967) (holding University of Washington did not violate state constitution by offering course in Biblical literature).

151. *Id.* at 919, 436 P.2d at 194.

152. *Witters*, 112 Wash. 2d at 369–70, 771 P.2d at 1122.

153. *Id.* at 369, 771 P.2d at 1122 (citing Calvary Bible Presbyterian Church v. Board of Regents, 72 Wash. 2d 912, 919, 436 P.2d 189, 194 (1967)).

154. *See id.* at 378, 771 P.2d at 1126 (Utter, J., dissenting).

155. *See id.* at 370–71, 771 P.2d at 1122–23. The court addressed this question in terms of the free exercise rights ensured by the federal Constitution rather than by the Washington Constitution. *See id.* However, the tension between free exercise and establishment rights is present in the Washington Constitution as well as the federal Constitution. *See infra* note 182 and accompanying text.

156. *See Witters*, 112 Wash. 2d at 371–72, 771 P.2d at 1122–23.

157. *See id.* at 372–73, 771 P.2d at 1123–24.

158. *See id.*

2. Maylon v. Pierce County: *Religious Exercise*

In *Maylon v. Pierce County*,[159] the court held that a sheriff's department volunteer chaplaincy program did not violate the Washington separation-of-church-and-state provision because the money appropriated to the program served secular purposes.[160] The Pierce County Sheriff's Department ran a volunteer chaplaincy program to aid and counsel victims of crime, as well as law enforcement officers and their families.[161] The program appropriated no funds to compensate the volunteers,[162] but chaplains received insurance coverage, radios, and office space for the coordination of their services.[163] Although the nature of the chaplains' work was secular, the volunteers were pastors of local congregations and occasionally their work as chaplains involved some discussion of religious subjects.[164] Maylon, a citizen and taxpayer in Pierce County, brought suit alleging that the chaplaincy program violated the separation-of-church-and-state requirements of both the state and federal constitutions.[165]

Applying the test of *Washington Health Care Facilities Authority v. Spellman*,[166] the court asked whether public money had been "appropriated for" or "applied to" one of the four religious purposes listed in Article I, Section 11: "[R]eligious worship, exercise or instruction, or the support of any religious establishment."[167] The court concluded that the chaplaincy program appropriated items, such as radios and insurance, for a secular rather than a religious purpose.[168] The court also found that a volunteer chaplain's religious exercise with a victim who initiates that exercise did not violate the state constitution.[169] According to the court, such expressions of personal convictions are not what the state

159. 131 Wash. 2d 779, 935 P.2d 1272 (1997).

160. *See id.* at 814, 935 P.2d at 1289. The court also found that the program did not violate the establishment clause of the First Amendment. *See id.*

161. *See id.* at 787, 935 P.2d at 1275.

162. *See id.*

163. *See id.*

164. For example, the chaplains at times were faced with a family member of a deceased person who sought answers of a religious nature as to why the death had occurred. *See id.* at 789, 935 P.2d at 1276.

165. *See id.* at 784, 935 P.2d at 1274.

166. 96 Wash. 2d 68, 71, 633 P.2d 866, 867 (1981).

167. *Maylon*, 131 Wash. 2d at 799–800, 935 P.2d at 1282.

168. *See id.*

169. *See id.* at 802–03, 935 P.2d at 1283–84.

constitution was designed to guard against.[170] The court explained that the state constitution does not remove volunteers' freedom to express their religion simply because they are working in concert with the state to achieve a secular objective.[171]

In reaching its decision, the court noted that Article I, Section 11, must be examined in its entirety and in the context of its title, "Religious Freedom."[172] Under this contextual approach, the court found that because Article I, Section 11, assures that chaplaincy programs will not be prohibited for state "institutions" or public hospitals,[173] the provision could not be interpreted to prohibit a volunteer chaplain from engaging in religious discussion with a crime victim or a law enforcement officer.[174] The court asserted that the state constitution's list of exceptions could not be read to imply that all other chaplaincy programs are to be specifically prohibited.[175] To the contrary, the court read the list to imply that the specific exemptions demonstrate an intent to exempt other chaplaincy programs from the requirements of Article I, Section 11.[176] The court concluded that "Mr. Maylon has simply not been compelled to furnish contributions of money to propagate opinions with which he disagrees."[177]

The Supreme Court of Washington has held that Article I, Section 11, of the Washington Constitution provides greater protection than the First Amendment of the U.S. Constitution for both free exercise rights[178] and establishment rights.[179] However, recent case law under Article I, Section 11, illustrates that despite the court's professed intentions to give the state constitution independent analysis, the court has not consistently done so. The current Article I, Section 11, free exercise jurisprudence is nearly indistinguishable from the federal strict scrutiny test of *Sherbert*, and has not been consistently applied.[180] Establishment jurisprudence

170. *See id.*

171. *See id.* at 803, 935 P.2d at 1284.

172. *See id.* at 800, 935 P.2d at 1282.

173. *See* Wash. Const. art. I, § 11.

174. *See Maylon*, 131 Wash. 2d at 800–01, 935 P.2d at 1282–83.

175. *See id.*

176. *See id.*

177. *Id.* at 803, 935 P.2d at 1284.

178. *See* First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 226, 840 P.2d 174, 187 (1992).

179. *See* Witters v. State of Wash. Comm'n for the Blind, 112 Wash. 2d 363, 368, 771 P.2d 1119, 1121 (1989).

180. *See* Munns v. Martin, 131 Wash. 2d 192, 199–200, 930 P.2d 318, 321 (1997).

under the Washington Constitution, while less dependent on federal analysis, has inconsistently interpreted the text of Article I, Section 11, and has not always applied or followed the court's articulated test.

III. WASHINGTON COURTS SHOULD EXTEND THEIR APPLICATION OF THE *GUNWALL* FACTORS TO DEVELOP A DISTINCT RELIGIOUS-LIBERTY JURISPRUDENCE UNDER THE WASHINGTON CONSTITUTION

The Supreme Court of Washington, having determined under the *Gunwall* criteria that Article I, Section 11, provides more protection for free exercise and establishment rights than the federal constitution,[181] needs to develop an analysis that accounts for that greater protection. Because the language of the Washington provision is broader than that of the First Amendment, the potential for tension between Washington free exercise and establishment rights is magnified.[182] The need for Washington courts to develop a distinct analysis of Article I, Section 11, that accounts for this tension is therefore all the more important. To address this tension, Washington courts should develop a distinct Washington religious-freedom analysis that relies primarily on the rich text of Article I, Section 11.

Gunwall provides a set of criteria to guide the briefing of a court on state constitutional issues.[183] Analysis under *Gunwall* leads to one of two conclusions: either the state constitution provides more protection than the federal constitution in a particular area and therefore requires a separate analysis, or it does not.[184] Although the *Gunwall* analysis does not necessarily dictate the actual application of a state constitutional provision, the court adopted the criteria in part to guide interpretation of the state constitution.[185] Thus, a complete application of Article I, Section 11, should include the *Gunwall* considerations. However, Washington

181. *See supra* Part II.B.

182. *But see* Tarr, *supra* note 16, at 78 (arguing that because state constitutions are often more specific in their treatment of religion, tension between free exercise and establishment principles is less likely to arise than in federal context).

183. *See* State v. Gunwall, 106 Wash. 2d 54, 61–63, 720 P.2d 808, 812–13 (1986); *see also* Utter, *supra* note 65, at 1161.

184. *See* Utter, *supra* note 65, at 1162.

185. *See id.* at 1161.

courts have yet to fully integrate the *Gunwall* criteria into Washington religious-liberty jurisprudence.[186]

The *Gunwall* criteria can help frame a distinct Washington analysis that considers not only the specifics of the constitutional text but also the overarching goal of individual religious freedom common to both the free exercise and establishment provisions. In evaluating Article I, Section 11, the court should use *Gunwall* and look to the fundamental differences between the state and federal constitutions, the history of the state constitution, the structure of the state constitution, and most importantly, the language in the text of the provision.[187]

A. Courts Should Adopt an Analysis Acknowledging That Article I, Section 11, Is Fundamentally Different from the First Amendment

In its discussion of the second *Gunwall* factor's application to Article I, Section 11, the Supreme Court of Washington has acknowledged that the state constitutional provision on religious freedom is more specific than its federal counterpart.[188] In the free exercise context, the state provision protects not only the "free exercise of religion,"[189] but also "freedom of conscience in all matters of religious sentiment, belief and worship."[190] Thus, as the court has noted, the language of the provision protects both belief and conduct.[191] By contrast, although the U.S. Supreme Court has held that the First Amendment protects both belief and conduct,[192] the actual language in the federal Free Exercise Clause does not address both belief and conduct.[193] Under the Washington constitution, protection of religious belief is "absolute," and cannot be compromised for any reason; however, protection for religious conduct springing from belief is not absolute.[194] While the federal test allows government action to limit free exercise when necessary to serve a

186. *See, e.g.*, First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 224–28, 840 P.2d 174, 186–87 (1992).

187. These are *Gunwall* factors two, three, five, and one, respectively. *See Gunwall*, 106 Wash. 2d at 61–62, 720 P.2d at 812–13.

188. *See* Maylon v. Pierce County, 131 Wash. 2d 779, 793, 935 P.2d 1272, 1278–79 (1997); *First Covenant*, 120 Wash. 2d at 224, 840 P.2d at 186.

189. U.S. Const. amend. I.

190. Wash. Const. art. I, § 11.

191. *See First Covenant*, 120 Wash. 2d at 224, 840 P.2d at 186.

192. *See* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963).

193. *See* U. S. Const. amend. I.

194. Munns v. Martin, 131 Wash. 2d 192, 199–200, 930 P.2d 318, 321 (1997).

compelling state interest,[195] the Washington provision allows *no* compromise of belief and allows limitations on conduct only when the conduct is "licenticious" or "inconsistent with the peace and safety of the state."[196]

In the context of establishment, the state constitution ensures the separation of church and state by prohibiting the use of public money or property for "religious worship, exercise or instruction, or the support of any religious establishment."[197] In contrast, the language of the First Amendment is much less specific and simply prohibits laws "respecting" religion.[198] In light of the fundamental differences between the Washington Constitution and the federal constitution, Washington courts should develop a distinct religious-liberty jurisprudence.

B. Courts Should Look to the History of Article I, Section 11, to Develop a Distinct Religious-Freedom Jurisprudence

The history of Article I, Section 11, examined under the third *Gunwall* factor[199] shows that the framers intended the state provision to provide different protections from those of the First Amendment.[200] The framers of the Washington Constitution drafted the document during a period of great national debate over religion and education,[201] and the framers specifically sought to insulate the state from sectarian influences in education.[202] By contrast, the framers of the First Amendment were concerned with preventing the national government from meddling in state religion.[203] The framers of the First Amendment intended that religion remain in the domain of the states and that the federal government not have the ability to regulate religious activity.[204] The framers of Article I, Section 11, had a distinctly different focus than the framers of the Bill of Rights when they sought to secure religious liberty

195. *See supra* note 31 and accompanying text.

196. Wash. Const. art. I, § 11.

197. Wash. Const. art. I, § 11.

198. U.S. Const. amend. I; *see also* Maylon v. Pierce County, 131 Wash. 2d 779, 793, 935 P.2d 1272, 1278–79 (1997).

199. *See* State v. Gunwall, 106 Wash. 2d 54, 61, 720 P.2d 808, 812 (1986).

200. *See Maylon*, 131 Wash. 2d at 794, 935 P.2d at 1279.

201. *See supra* Part II.A.

202. *See* Utter & Larson, *supra* note 47, at 467–68.

203. *See Maylon*, 131 Wash. 2d at 794–95, 935 P.2d at 1279–80.

204. *See id.*

in Washington.[205] Accordingly, Washington courts should develop a distinct religious liberty jurisprudence.

C. *Courts Should Focus on the State Constitution's Structure, Which Secures Religious Liberty in Terms of the Rights of Citizens Rather Than the Limits on Lawmakers*

The fifth *Gunwall* factor, which looks at the structure of the state constitution,[206] shows that Article I, Section 11, affirmatively creates rights for citizens rather than creating rights indirectly by limiting government power as the federal Bill of Rights does.[207] This structural argument is supported by another provision of the state constitution, Article I, Section 1, which indicates that the state constitution exists to protect the rights of individuals: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain *individual* rights."[208] While the federal constitution bars Congress and the states from restricting free exercise,[209] the Washington provision generates an absolute positive right for citizens. This affirmative statement of an individual right is stronger than one created by the limitation of a power of Congress.[210]

The establishment provision in Article I, Section 11, also is intended to create individual rights. Although the establishment provision is concerned with the separation of church and state, it nevertheless was placed under the heading of "Religious Freedom."[211] In prohibiting the application of "*public* money or property"[212] to religion, the provision focuses on protecting the religious freedom of the individual by ensuring that people are not forced to support the "religious worship, exercise or instruction, or . . . any religious establishment" of a religion in which they do not believe.[213] The structure of the federal Establishment Clause,

205. *See id.* at 795, 935 P.2d at 1280.

206. *See* State v. Gunwall, 106 Wash. 2d 54, 66–67, 720 P.2d 808, 815 (1986).

207. *See* First Covenant Church of Seattle v. City of Seattle, 120 Wash. 2d 203, 235, 840 P.2d 174, 192 (1992) (Utter, J., concurring).

208. Wash. Const. art. I, § 1.

209. *See* U.S. Const. amend. I.

210. *See First Covenant*, 120 Wash. 2d at 235, 840 P.2d at 192.

211. Wash. Const. art. I, § 11.

212. Wash. Const. art. I, § 11 (emphasis added).

213. State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 370, 173 P. 35, 36 (1918) (quoting 1 Op. Att'y Gen. 142).

by contrast, focuses on prohibiting government actions "respecting" religious establishment.[214] The structure of the state constitution shows that courts should center religious-liberty jurisprudence under Article I, Section 11, on the rights of individuals.

D. Washington Courts Should Rely on the State Constitution's Text and Focus on the Goal of Individual Religious Freedom, Lessening the Tension Between Free Exercise and Establishment

The first *Gunwall* factor provides the best tool for courts to use in construing the requirements of religious liberty in Washington: the text of Article I, Section 11.[215] In the establishment cases, the courts already have developed a framework for a textual analysis and now must strive for consistency in applying that framework and interpreting the language of the Washington Constitution. In the free exercise context, clear reliance on the text of the Washington Constitution will eliminate confusion with federal analysis. In addition, although the text of Article I, Section 11, creates a tension between free exercise and separation of church and state, examination of the text in light of the structure of the Washington Constitution also provides a way to lessen that tension. By focusing on the constitution's stated goal of individual religious freedom, courts can reconcile the competing interests of free exercise and separation of church and state.

1. Washington Courts Should Adhere to the Health Care Facilities *Test in Establishment Cases and Consistently Interpret the Constitutional Text*

Washington courts need to adhere to the language of the Washington Constitution in establishment cases. The *Health Care Facilities* test carefully follows the language of the state constitution and provides a good framework for consistent adjudication of separation-of-church-and-state challenges under Article I, Section 11.[216] Although establishment cases under the Washington Constitution have followed an independent analysis as required by *Gunwall*,[217] courts have been inconsistent in their

214. U.S. Const. amend. I.

215. *See* State v. Gunwall, 106 Wash. 2d 54, 65, 720 P.2d 808, 814 (1986).

216. *See* Washington Health Care Facilities Auth. v. Spellman, 96 Wash. 2d 68, 71, 633 P.2d 866, 867 (1981).

217. *See Gunwall*, 106 Wash. 2d at 60–62, 720 P.2d at 812–13.

application of the *Health Care Facilities* test.[218] Where Washington cases have provided guidance in interpreting the actual language of Article I, Section 11, Washington courts should carefully adhere to that precedent, as the fourth *Gunwall* factor indicates.[219] In accordance with the *Health Care Facilities* test, inquiry should focus on whether public money or property is appropriated or applied to religious worship, exercise, or instruction, or the support of any religious establishment.[220]

2. *Washington Courts Should Modify the Existing Test for Free Exercise to Rely on the Text of Article I, Section 11, Rather Than on First Amendment Analysis*

Washington courts should abandon their complete reliance on the First Amendment when deciding cases under the free exercise language of Article I, Section 11, and should change the test to reflect the language of the Washington Constitution. The current test for free exercise, which allows government to restrict religious conduct when necessary to serve a compelling state interest, is derived not from the language of the text of Article I, Section 11, but from federal case law unrelated to the Washington Constitution.[221] According to the state constitution's text, the only limit on "absolute" freedom of belief is for religious conduct that is "licentious[]"or "inconsistent with the peace and safety of the state."[222] Washington courts should deliberately depart from the federal strict scrutiny terminology. Nowhere does Article I, Section 11, use the term "compelling state interest." Even if courts were to limit compelling state interests to those concerning the "peace and safety of the state," use of federal terminology risks confusion with the very distinct First Amendment provision.

Washington courts should develop a free exercise jurisprudence under Article I, Section 11, that reflects the text of the provision itself. To start with, Washington courts should adopt an analysis that more resembles the one employed by the courts of appeals in *State v. Norman*,[223] *State v.*

218. *See supra* notes 138–41 and accompanying text.

219. The fourth *Gunwall* factor looks to "preexisting state law." *See Gunwall*, 106 Wash. 2d at 66, 720 P.2d at 815.

220. *See Health Care Facilities*, 96 Wash. 2d at 71, 633 P.2d at 867.

221. *See supra* Part II.C.1.

222. Wash. Const. art. I, § 11.

223. 61 Wash. App. 16, 808 P.2d 1159 (1991).

Balzer,[224] and *State v. Key*,[225] which relies on the constitutional text to prohibit government action restricting religious conduct only when the conduct compromises the "peace and safety of the state."[226] Under the current test for free exercise, the complaining party first must show that the government action has had a coercive effect on his or her free exercise of religion.[227] Courts should clarify what constitutes a coercive effect on free exercise of religion by using the text to ask whether an individual has been "denied absolute freedom of conscience in all matters of religious sentiment, belief and worship" or is being "molested or disturbed on account of religion."[228] The second step of the current test for free exercise asks whether the government regulation is necessary to serve a compelling state interest. Courts should modify this step of the test by relying on the state constitution to ask whether the exercise of the religion in question is "licentious[]" or "inconsistent with the peace and safety of the state."[229] Put differently, courts should ask whether the religious activity endangers the community or individuals. If not, courts should invalidate the government action.

Applied to *Open Door Baptist Church v. Clark County*, these proposed modifications of the current free exercise test under Article I, Section 11, would have dictated a different result. In *Open Door*, the court found that requiring the church to submit to a permitting process for a conditional use of its property placed only an incidental burden on the church.[230] However, under the language of the state constitution, the church was being denied "[a]bsolute freedom of conscience in all matters of religious . . . worship,"[231] because its freedom to use its property to provide church services was being threatened. In addition, the church was being "molested or disturbed in . . . property on account of religion,"[232] because its use of its property for religious purposes could be limited by the hearings examiner. According to Article I, Section 11, the imposition of such a burden can be justified only by an interest in

224. 91 Wash. App. 44, 954 P.2d 931 (1998).

225. No. 16415-2-III, 1999 WL 172663 (Wash. Ct. App. Mar. 30, 1999).

226. *See supra* Part II.C.2.

227. *See* Munns v. Martin, 131 Wash. 2d 192, 199, 930 P.2d 318, 321 (1997) (citing First United Methodist Church v. Hearings Exam'r for the Seattle Landmarks Preservation Bd., 129 Wash. 2d 238, 246, 916 P.2d 347, 379 (1996)).

228. Wash. Const. art. I, § 11.

229. Wash. Const. art. I, § 11.

230. *See* Open Door Baptist Church v. Clark County, 140 Wash. 2d 143, 995 P.2d 33, 46 (2000).

231. Wash. Const. art. I, § 11.

232. Wash. Const. art. I, § 11.

preventing "acts of licentiousness" or protecting "the peace and safety of the state."[233] As the dissent in *Open Door* pointed out, the county's zoning power, which was its justification for the permit requirement, cannot justify such a burden on religion, as it does not address acts of licentiousness or threats to the peace and safety of the state.[234] Thus, under the proposed test, the county could not require the church to submit to the permitting process.

3. *The Tension in the Washington Constitution Between Free Exercise and Establishment Can Be Reduced by Focusing on the Goal of Individual Religious Freedom*

To minimize the tension between free exercise and separation of church and state in Article I, Section 11, Washington courts must not construe the constitutional text pertaining to one religious freedom in a way that infringes on the other. In the past decade, the Supreme Court of Washington has been developing its free exercise and establishment analyses in isolation from one another and has yet to arrive at a synthesis of the two principles.[235] The solution to the tension between free exercise and separation of church and state can be found in the text of Article I, Section 11: the common goal of individual religious freedom.

While it might seem obvious that the goal of both the federal and state religion provisions is to protect religious freedom, the framers of the state constitution deliberately provided the title "Religious Freedom" where the federal framers had not.[236] Article I, Section 11, when compared with the First Amendment, is more appropriately titled "Religious Freedom" because the framers structurally designed it to create affirmative individual rights rather than to prohibit government action.[237]

When presented with a challenge that falls under Article I, Section 11—either free exercise or establishment—courts must be mindful of the goal of individual religious freedom. Washington courts must look at religious liberty as an *individual* right, as specifically stated in Article I,

233. Wash. Const. art. I, § 11.

234. *See Open Door*, 995 P.2d at 60 (Sanders, J., dissenting).

235. *But see* Maylon v. Pierce County, 131 Wash. 2d 779, 802–03, 935 P.2d 1272, 1283–84 (1997) (discussing free exercise).

236. Wash. Const. art. I, § 11; *see also Maylon*, 131 Wash. 2d at 800, 935 P.2d at 1282.

237. *See supra* notes 208–13 and accompanying text.

Section 1, rather than as a public right.[238] Courts should strive for the course that best protects the religious liberty of the individual without hindering the religious liberty of others. To preserve the common goal of religious freedom, every case that comes before a Washington court, whether a free exercise case or an establishment case, should be examined under the entirety of Article I, Section 11, to ensure that the state walks the fine line between neither promoting nor hampering individual religious beliefs and activities. If a court determines that state action violates the separation-of-church-and-state protections of Article I, Section 11, it should then check that result against the free exercise requirements of the same provision and vice versa. If a court detects a conflict between free exercise and separation of church and state, it should resolve the case by asking which result best serves the religious freedom of individuals.

In *Witters v. State of Washington Commission for the Blind*,[239] the court passed up an excellent opportunity to synthesize free exercise and establishment through a focus on the religious freedom of the individual.[240] Although the court directly addressed the question of whether the denial of aid infringed on Witters' free exercise of his religion,[241] it found that the denial of assistance did not burden Witters' ability to freely exercise his religion because becoming a minister was a career choice rather than a religious choice.[242] However, Witters' choice was arguably religiously motivated and within the protection of free exercise.[243] Witters chose to carry out his religious beliefs by becoming a minister or church leader, and his free exercise of religion was jeopardized when the state denied him that opportunity.[244] If the denial of Witters' financial assistance burdened his free exercise of religion, under the current Article I, Section 11, test, the state would be required to show a compelling state interest for the denial of aid.[245] The only conceivable interest the state could have in denying the assistance is the increased

238. *See supra* notes 208–13 and accompanying text.

239. 112 Wash. 2d 363, 771 P.2d 1119 (1989).

240. Although the examples discussed here are establishment cases, the focus on the religious freedom of the individual applies to all Article I, Section 11, cases.

241. *See Witters*, 112 Wash. 2d at 367, 370, 771 P.2d at 1121–22 (1989).

242. *See id.* at 372, 771 P.2d at 1123 (citing Witters v. State of Wash. Comm'n for the Blind, 102 Wash. 2d 624, 631, 689 P.2d 53, 56 (1984)).

243. *See id.* at 392–93, 771 P.2d at 1133 (Dolliver, J., dissenting).

244. *See id.*

245. *See* Munns v. Martin, 131 Wash. 2d 192, 200, 930 P.2d 318, 321 (1997).

separation of church and state.[246] However, the U.S. Supreme Court has held that a state interest in providing greater separation of church and state is not sufficient to override free exercise rights.[247] Under the proposed textual approach to free exercise, a stricter separation of church and state is not an interest in the "peace and safety of the state" and could not be used to justify burdening free exercise rights.[248] A focus on individual religious freedom suggests that the court should not have denied Witters' financial aid. While the denial of aid infringed on Witters' individual religious freedom by preventing him from becoming a pastor and carrying out his religious beliefs, the granting of aid would not have infringed on individual religious freedom, because taxpayers would not have been forced to support a religion they do not believe in.

Maylon v. Pierce County,[249] which upheld the sheriff's chaplaincy program, also provided fertile ground for a synthesis between free exercise and separation of church and state. The court briefly examined the free exercise implications if the chaplains were not permitted to express their religious beliefs to those who sought such information, but did not rest its decision on those grounds.[250] Although it would be inappropriate for the chaplains, many of whom were community church leaders, to evangelize actively in their volunteer capacity, the state infringes on free exercise when it prevents two consenting individuals from practicing their religion solely because the state brought them together. The court could have rested its decision on the fact that the free exercise rights of the volunteer chaplains would be burdened by requiring the chaplains to refrain from religious discussion. A balancing approach, based on the goal of individual religious freedom, would find the chaplaincy program constitutional. By allowing the chaplaincy program, the court preserved the individual religious freedom of the chaplains without infringing on the individual religious freedom of the taxpayers.

246. *See Witters*, 112 Wash. 2d at 394, 771 P.2d at 1134 (Dolliver, J., dissenting). The court recognized this as a compelling state interest for equal protection purposes. *See id.* at 372–73, 771 P.2d at 1123–24.

247. *See id.* at 394–95, 771 P.2d at 1134–35 (Dolliver, J., dissenting) (citing Widmar v. Vincent, 454 U.S. 263, 275–76 (1981)).

248. *See id.* at 395, 771 P.2d at 1135 (Dolliver, J., dissenting).

249. 131 Wash. 2d 779, 935 P.2d 1272 (1997).

250. *See id.* at 802–03, 935 P.2d at 1283–84.

IV. CONCLUSION

In January 2000, college student Joshua Davey filed suit in federal district court alleging, among other things, that the Washington governor and other state officials violated his free exercise rights under the Washington Constitution when they excluded students majoring in theology from eligibility for the Washington Promise Scholarship.[251] Davey had already secured a Promise Scholarship and was majoring in theology at Northwest College in Kirkland when he learned that because of the state's new policy he was no longer eligible to receive the scholarship.[252] Though the case is in federal court, it provides an excellent opportunity for reconsideration of the *Witters* decision. The case is factually similar to *Witters*, and presents both free exercise and establishment issues that could be resolved through a focus on individual religious freedom.

As the Supreme Court of Washington has repeatedly recognized, the state constitution protects religious liberty differently than the federal constitution. Accordingly, religious-freedom jurisprudence in Washington should account for that difference. The *Gunwall* factors provide guidance in developing a jurisprudence that reflects the intricacies of Article I, Section 11. The differences between the state and federal religion provisions, the history of Article I, Section 11, and the structure of the Washington Constitution all point to a textually based religious-liberty jurisprudence in Washington. The textual analysis provided by the *Health Care Facilities* test for establishment cases should be emulated in the free exercise context. Courts should modify the existing free exercise test by replacing federal strict scrutiny terminology with the language of the state constitution. In addition, courts should strive to resolve the tension between free exercise and separation of church and state that is present in the text by focusing on the goal of individual religious freedom.

251. *See* Davey v. Locke, No. C00-0061R, at 10–11 (W.D. Wash. filed Jan. 13, 2000).

252. *See id.* at 4–5.