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Federalism, Uniformity, and the State Constitution—State v. Gunwall, 106 Wn. 2d 54, 721 P.2d 808 (1986)

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FEDERALISM, UNIFORMITY, AND THE STATE CONSTITUTION—*State v. Gunwall*, 106 Wn. 2d 54, 720 P.2d 808 (1986).

In *State v. Gunwall*[1] the Washington Supreme Court announced six criteria that Washington courts are to employ in determining whether a constitutional claim should be decided on state rather than federal grounds.[2] This method of state constitutional analysis implicitly rejects the idea that the state constitution applies to every case in which it is raised. Instead, the method assumes that the federal Constitution controls claims that individual rights have been violated, unless application of the state constitution can be justified through use of the court's criteria.[3] These criteria confine the development of independent state constitutional doctrines to provisions of the state constitution that are textually distinct from the federal Constitution, or to cases that present other defined reasons for departing from federal doctrine.[4]

The *Gunwall* court's method of state constitutional analysis undermines the role of Washington's constitution as a fundamental element of the state's law. This Note proposes a method for state constitutional analysis that is not focused on maintaining consistency with the content of federal doctrine. A principled, independent body of state constitutional law will not be readily achieved unless state courts focus directly on the text and structure of the state constitution in its entirety, without employing limitations that are keyed to federal constitutional doctrine.

I. THE DEVELOPMENT OF CONSTITUTIONAL FEDERALISM

A. The Historical Relationship Between State and Federal Constitutions

Many of our fundamental rights are rooted in a common law tradition that began developing long before 1776.[5] These common law rights were incorporated into the early state constitutions that were drawn before the federal constitutional convention was convened.[6] State constitutions thus

1. 106 Wn. 2d 54, 720 P.2d 808 (1986).
2. *Id.* at 58–59, 720 P.2d at 810–11.
3. *See infra* notes 121–23 and accompanying text.
4. *Gunwall*, at 61–62, 720 P.2d at 812–13.
5. Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125, 131 (1969).
6. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

preceded the federal Constitution,[7] and played an essential role in protecting individual liberties when the Union was formed.[8]

Creation of the federal government and its constitution left this role intact. State and federal constitutions coexisted, and with respect to civil liberties, each document acted as an independent check within its own sphere of influence.[9] State declarations of rights restrained the exercise of power by the states, and the federal Bill of Rights restrained the federal government.[10] These roles were determined by the nature of the federalist system, which apportioned power between the states and the nation, and among governmental departments, thereby affording a "double security" to the people.[11]

B. The Development of National Rights

Although under this original scheme state constitutions were to protect citizens from overreaching by state governments, the Civil War era demonstrated that state constitutional protections were not reliable for all citizens.[12] After the adoption of the Reconstruction amendments,[13] litigants

7. Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 977 (1979).

8. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 2–3 (1978).

9. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 493 (1977); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1327 (1982) [hereinafter *Developments*]; Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 277 (1973).

10. *Developments*, *supra* note 9, at 1336 n.28; Project Report, *supra* note 9. No bill of rights was included in the Constitution as originally accepted and ratified by the states, *Developments*, *supra* note 9, at 1327, in part because state constitutions, being already in existence, were considered sufficient to the task. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 588 (M. Farrand ed. 1911) (remarks of Roger Sherman). Although the original draft of the amendments to the Constitution proposed by James Madison in 1789 contained a provision expressly prohibiting the states from violating "the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases," this amendment was rejected. 1 ANNALS OF CONG. 436 (J. Gales ed. 1789); Project Report, *supra* note 9, at 276.

11. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and . . . usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 51, at 67 (J. Madison) (L. DeKoster ed. 1976). Of course, the states did not literally control the federal government. However, because power over local affairs was thought to have been retained by the states, and because the states could be expected to jealously guard that power, a check on federal power existed, at least theoretically. *See also* Project Report, *supra* note 9, at 286.

12. *See* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 174 (1984).

13. U.S. CONST. amends. XIII, XIV, XV.

looked increasingly to the fourteenth amendment of the federal Constitution and the United States Supreme Court for protection of civil liberties.[14] The gradual application of the federal Bill of Rights to the states through the fourteenth amendment[15] radically changed the historical relationship between state and federal constitutions.[16] Federal law protecting individual civil liberties expanded rapidly, accompanied by a decline in the number of state court decisions relying on state constitutions.[17]

C. *"Rebirth" of State Constitutional Law*

With a system of national rights firmly in place, state constitutions played only a minor role in protecting civil liberties.[18] However, when the broadly protective doctrines developed by the Warren Court began to be limited by the Burger Court, reliance on state constitutions was renewed.[19] Modern state constitutional analysis rests upon the idea that federal constitutional law establishes a "floor," or minimum level of protection, but does not prevent states from granting their citizens greater protection.[20] State constitutions may be independently interpreted so long as the national level of protection is not subverted.[21]

Courts and commentators assert that independent interpretation is valuable for at least three reasons.[22] First, it enhances the integrity of state law,

14. Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454, 455–56, 464–65 (1970); Brennan, *supra* note 9, at 493–94; Deukmejian & Thompson, *supra* note 7, at 977–78.

15. Brennan, *supra* note 9, at 493–94. The majority of the protections provided by the Bill of Rights were not applied to the states through the fourteenth amendment until the Warren Court years of 1962–1969. *Id.*

16. Project Report, *supra* note 9, at 282–84; *see also* Peterkort, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 159 (1981).

17. For instance, Washington abandoned the exclusionary rule adopted by the state courts in 1922 in State v. Gibbons, 118 Wash. 171, 203 P. 390, after the United States Supreme Court applied the federal exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961), *limited by* United States v. Leon, 468 U.S. 897 (1984). *See* Note, *The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy*, 61 WASH. L. REV. 459, 465 (1986).

18. Brennan, *supra* note 9, at 495; *Developments*, *supra* note 9, at 1328.

19. Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 425 (1974). Justice Brennan actively urged use of state constitutions as a way to achieve additional protection. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 874–75 (1976).

20. Wilkes, *supra* note 19, at 425–26; Force, *supra* note 5, at 129; *Developments*, *supra* note 9, at 1334–35.

21. *Developments*, *supra* note 9, at 1334.

22. State v. Coe, 101 Wn. 2d 364, 373–74, 679 P.2d 353, 359 (1984); Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 493–96 (1984); Comment, *Robinson at Large in the Fifty States: A Continuation of the State Bills of Rights Debate in the Search and Seizure Context*, 5 GOLDEN GATE

thus reinforcing state sovereignty and preserving the federalist system.[23] Second, it creates a safety net for individual civil liberties.[24] Finally, it permits experimentation in developing new theories for protecting those liberties.[25]

The principle that state constitutions can be interpreted independently has been readily accepted.[26] However, in an era when federal protection is considered the norm, state courts have not agreed on what theory justifies relying on state constitutions.[27] The concept of federal rights as a protective "floor" leaves many unanswered questions about the role that state constitutions are to play.[28] For example, state courts must decide whether to examine federal law or state law first.[29] They must ensure that the federal floor is preserved, even where federal law is unclear.[30] They must decide whether, and what, principles exist to limit the scope of state constitutions and the judicial decisions construing them.[31] Finally, they must accept that the increased diversity in protections for individual rights that is the direct consequence of constitutional federalism is desirable.[32] Courts have developed three general ways of dealing with these issues.[33] These approaches may be termed the deferential model,[34] the primacy model,[35] and the interstitial model.[36]

U.L. REV. 1, 108–09 (1974); Note, *The Utah Supreme Court and the Utah State Constitution*, 2 UTAH L. REV. 319, 327 (1986). *But see* Deukmejian & Thompson, *supra* note 7, at 975–77 (arguing that independent interpretation reallocates power from state legislatures to state courts, and may make the Supreme Court less willing to extend the protection of the federal Constitution; for one response to this argument, see *infra* note 180).

23. *See supra* note 22.

24. *Id.*

25. *Id.*

26. Over 300 opinions adopting independent state constitutional interpretation have been counted. Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317 (1986).

27. *See* Collins and Galie, *supra* note 26, at 322–39; Note, *Rediscovering State Constitutions for Individual Rights Protection*, 37 BAYLOR L. REV. 463, 464–72 (1985).

28. *See Developments, supra* note 9, at 1336–37.

29. Utter, *supra* note 22, at 492.

30. *Developments, supra* note 9, at 1358.

31. Utter, *supra* note 22, at 492.

32. *See id.*

33. A more elaborate breakdown of methods for state constitutional interpretation is discussed in Collins & Galie, *supra* note 26, at 323–39. The five models presented there are essentially subcategories of the deferential, primacy and interstitial models discussed *infra* in parts C.1–3.

34. The term "deferential model" will be used in this Note to refer to the approach adopted by those courts that have chosen to interpret their state constitutions coextensively with analogous federal provisions. *See infra* notes 37–40 and accompanying text. The term is not generally used by other commentators.

35. *Developments, supra* note 9, at 1356–57; Note, *supra* note 22, at 326–28.

36. Note, *supra* note 22, at 328–29.

1. Deferential Model

The deferential model assumes that constitutional rights are first and foremost federal rights defined by the United States Supreme Court.[37] Courts adopting this model avoid the issues that independent state constitutional analysis raises by simply interpreting state provisions evoked by litigants coextensively with federal provisions.[38] By finding the state provision to guarantee the same level of rights as the federal Constitution—no more and no less—they need only make the federal analysis. Courts have adopted this approach not only where the language of the state constitution is the same as the federal language, but even where the state language is different.[39] Because the result is the same as if the state constitution had never been discussed, the deferential model cannot truly be considered a model of independent interpretation.[40]

2. Primacy Model

In sharp contrast, the primacy model assumes that the application of the federal Bill of Rights to the states has established protections in addition to those provided by state constitutions, but has left the role of state constitutions otherwise unchanged.[41] Under this view, since state constitutions are both "first in time and first in logic,"[42] issues raised under state provisions should always be addressed before reaching federal constitutional grounds.[43] If the litigant succeeds on the state constitutional claim, there is no need to consider any federal claim raised, since the federal claim is not presented for decision unless the state claim fails.[44]

The primacy model ensures that the litigant is accorded the full protection of the state constitution, while retaining all of the benefits of federal constitutional protection. If state law meets or exceeds the level of federal protection, it controls the resolution of the claim. If, however, the state law

37. Linde, *supra* note 6, at 382–83.

38. *See, e.g.*, Northend Cinema v. Seattle, 90 Wn. 2d 709, 714–15, 585 P.2d 1153, 1156–57 (1978), *cert. denied*, Apple Theatre, Inc. v. City of Seattle, 441 U.S. 946 (1979).

39. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism,"* 8 U. PUGET SOUND L. REV. vi, ix (1984); Kelman, *Foreword: Rediscovering the State Constitutional Bill of Rights*, 27 WAYNE L. REV. 413, 417 (1981).

40. Kelman, *supra* note 39, at 414.

41. Linde, *supra* note 6, at 381–82.

42. *Id.* at 380.

43. *Id.* at 383; *see also* State v. Coe, 101 Wn. 2d 364, 373–74, 679 P.2d 353, 359 (1984). Consideration of state claims first under this model is based in part upon the historical precedence of state constitutions, Linde, *supra* note 12, at 174, and upon the principle that legal issues should be decided on the basis of the lowest available law. Utter, *supra* note 22, at 505.

44. Linde, *supra* note 6, at 383; *see also infra* note 46.

falls below the federal "floor," or is so broad that it invades some other countervailing federal right, it must give way to the federal Constitution.[45] Between the "floor" and the "ceiling" established by federal constitutional law, consideration of the state constitution is primary.[46] Commentators have found this model particularly well-suited to supporting state sovereignty, because it accords high status to the state constitution.[47]

3. *Interstitial Model*

Some judges and commentators who accept that state constitutions may be applied independently resist the idea that maintaining the original relationship between state and federal constitutions is possible or desirable.[48] The "interstitial" model developed by these theorists assumes that analysis of constitutional claims should always begin with the federal Constitution. The model then employs specific criteria to determine when a litigant's rights ought to be afforded alternative protection under the state constitution.[49] Under this model, the primary role of the state constitution is to supplement and "fill in the spaces" where there is no federal counterpart to a state constitutional provision or where federal law is undeveloped.[50] The state constitution may also apply to supplant federal analysis with state analysis where required by defined criteria.[51]

The interstitial model rejects both total deference to federal constitutional analysis in interpreting state constitutions,[52] and the idea that a complete body of independent state law should be developed.[53] While the primacy model views state constitutions as providing a full constellation of

45. *Developments, supra* note 9, at 1334–35; *see also* Peterkort, *supra* note 16, at 163.

46. *Developments, supra* note 9, at 1334–35. Under the primacy model, the litigant who raises both state and federal claims has three potential outcomes. First, he may succeed on the state claim, in which case the federal claim will not be reached. Second, he may fail on the state claim and succeed on the federal claim, indicating that protection under the state provision is too low. Finally, he may fail to succeed under both state and federal provisions.

47. Collins, *Reliance on State Constitutions: Some Random Thoughts*, 54 MISS. L.J. 371, 374–77 (1984); Utter, *supra* note 22, at 505.

48. State v. Hunt, 91 N.J. 338, 450 A.2d 952, 955 (1982); *see, e.g.*, Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 756–58 (1977); Deukmejian & Thompson, *supra* note 7, at 990–91; Howard, *supra* note 19, at 934–37; *Developments, supra* note 9, at 1336–37.

49. *See, e.g.*, State v. Hunt, 91 N.J. 338, 450 A.2d 952, 955 (1982); Bice, *supra* note 48, at 756–58; Deukmejian & Thompson, *supra* note 7, at 990–91; Howard, *supra* note 19, at 934–37; *Developments, supra* note 9, at 1336–37.

50. Collins, *supra* note 47, at 405; *see generally Developments, supra* note 9, at 1357–66 (discussing interstitial model and its application).

51. *See, e.g., infra* notes 82–103 and accompanying text.

52. *See supra* notes 37–40 and accompanying text.

53. *See supra* notes 41–47 and accompanying text.

rights in addition to those provided by the federal Constitution,[54] the interstitial model views state constitutional provisions as providing alternatives that are available only where deviation from the federal rule can be expressly justified.[55] The state and federal constitutions may be thought of as parallel lines under primacy analysis, but as a system of overlays with cutouts under interstitial analysis.

D. Adequate State Grounds

An important issue for courts that engage in independent state constitutional interpretation is the potential for federal review of their decisions. Analysis of state constitutional issues under the interstitial model always discusses federal constitutional doctrine. Analysis under the primacy model may discuss it by analogy in disposing of the state law claim. The state law decisions in these cases must be able to resist review by federal courts if they are to be final.[56]

The United States Supreme Court recently expanded its jurisdiction to review state cases that discuss both state and federal constitutional doctrine in *Michigan v. Long*.[57] Under the *Long* analysis, decisions applying a state constitutional provision must rest upon "bona fide separate, adequate and independent state grounds"[58] if they are to survive petitions for federal review. Although this requirement does not expressly prevent recourse to federal precedent in analyzing the state constitution, the independence of the state ground must be "apparent from the four corners" of the opinion.[59] If the decision rests primarily on federal law or is interwoven with federal law, the Supreme Court may accept review.[60] Any federal cases cited in a state constitutional analysis must be accompanied by a "plain statement" that they are only being used persuasively, and do not compel the result reached under the state constitution.[61] Avoiding federal review enhances

54. Linde, *supra* note 6, at 381–82.

55. Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737, 743–44 (1976).

56. Michigan v. Long, 463 U.S. 1032, 1041 (1983); Collins, *supra* note 47, at 395.

57. 463 U.S. 1032 (1983).

58. *Id.* at 1041.

59. *Id.* at 1040.

60. *Id.* at 1040–41.

61. *Id.* at 1041. If the independent state grounds fail to hold up under this standard the Supreme Court is free to circumvent the state constitutional analysis, and substitute federal doctrine. This is so even where the state has a preexisting body of law construing its constitution to grant broader rights, if the state court fails to cite that body of law and to separate clearly any discussion of federal precedent from its holding under the state constitution. *Id.* at 1043–44, 1044 n.9; *see generally* Seid, *Schizoid Federalism, Supreme Court Power and Inadequate Adequate State Ground Theory:* Michigan v. Long,

the credibility and precedential value of a court's independent state constitutional analysis.[62] Therefore, how well its method of analysis meets the constraints imposed by *Long* is an important consideration.[63]

E. Independent State Constitutional Grounds and the Washington Court

Washington cases decided on independent state constitutional grounds date from the mid-1970's.[64] These cases employ a variety of approaches to state constitutional analysis, but do not adopt a consistent methodology. A 1978 decision stated that the "general rule" was to give state constitutional provisions the same interpretation as analogous provisions of the federal Constitution.[65] Several cases have relied on differences in the texts of state and federal provisions to justify relying on the state constitution.[66] At least one case relied on a state provision with no federal counterpart.[67] The 1984 case of *State v. Coe* employed the primacy method of analysis,[68] but its

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18 CREIGHTON L. REV. 1, 20–23 (1984) (discussing Michigan law of search and seizure and impact of Supreme Court's analysis).

62. *Cf.* Collins, *supra* note 47, at 395 (discussing impact on certainty of state law of analytical method that avoids federal review).

63. The *Long* standard is less deferential to the decisions of state courts than prior formulations of the doctrine. *See* Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92, 92 (March 1984) (citing Herb v. Pitcairn, 324 U.S. 117 (1945)). *Long* has been viewed as an adverse reaction by the Court to the development of state court doctrines that conflict with corresponding federal doctrine. Collins, *supra* note 47, at 398 & n.85; Seid, *supra* note 61, at 8–9.

64. *See, e.g.*, Carter v. University of Washington, 85 Wn. 2d 391, 536 P.2d 618 (1975) (finding constitutional right of appeal for indigent party in civil case), *overruled*, Housing Auth. v. Saylors, 87 Wn. 2d 732, 557 P.2d 321 (1976); cases cited in Utter, *supra* note 22, at 493 n.4. *But see* Petstel, Inc. v. County of King, 77 Wn. 2d 144, 153–54, 459 P.2d 937, 942 (1969) (court acknowledged that independent interpretation was theoretically possible, but rejected a claim that Washington Constitution art. I, § 3 be interpreted differently from the due process clause of the fourteenth amendment.)

Only those cases decided on state constitutional grounds after the application of the Bill of Rights to the states are discussed here. Washington cases decided on state constitutional grounds prior to the incorporation of the Bill of Rights into the fourteenth amendment are not properly within the scope of the term "independent interpretation," because the only possible grounds for decision were those of the state constitution. *See supra* notes 9–17 and accompanying text.

65. Northend Cinema v. Seattle, 90 Wn. 2d 709, 714, 585 P.2d 1153, 1156–57 (1978), *cert. denied*, Apple Theatre, Inc. v. City of Seattle, 441 U.S. 946 (1979). The court acknowledged, however, that it was not compelled to adopt the federal construction. *Id.*

66. *See, e.g.*, State v. Ringer, 100 Wn. 2d 686, 674 P.2d 1240 (1983) (WASH. CONST. art. I, § 7), *overruled*, State v. Stroud, 106 Wn. 2d 144, 720 P.2d 436 (1986); State v. White, 97 Wn. 2d 92, 640 P.2d 1061 (1982) (WASH. CONST. art. I, § 7); Alderwood Assocs. v. Washington Envtl. Council, 96 Wn. 2d 230, 635 P.2d 108 (1981) (WASH. CONST. art. I, § 5); State v. Simpson, 95 Wn. 2d 170, 622 P.2d 1199 (1980) (WASH. CONST. art. I, § 7).

67. Darrin v. Gould, 85 Wn. 2d 859, 540 P.2d 882 (1975) (WASH. CONST. art. XXI, § 1).

68. 101 Wn. 2d 364, 373, 679 P.2d 353, 359 (1984) (overturning trial court order banning radio and television broadcast of tape recordings played in open court).

rationale[69] for this methodology was not influential.[70]

A number of Washington cases interpreting the state constitution independently have involved Washington Constitution article I, section 7, the state counterpart to the fourth amendment.[71] In general, Washington courts have developed stricter rules governing police conduct under this section than the United States Supreme Court has adopted in interpreting the fourth amendment.[72] The article I, section 7 cases have been controversial because of the difficulties they are said to present for police, who must decide in advance whether their actions will have to pass muster under federal standards or under some more stringent state standard.[73] This problem has made some state judges skeptical of independent state constitutional interpretation.[74] It is in this climate that the Washington Supreme Court in *State v. Gunwall* turned its attention to the methodology used to arrive at independent interpretation.

II. *STATE v. GUNWALL*

A. Facts and Procedure

The petitioner in *State v. Gunwall* was charged with violations of the Uniform Controlled Substances Act on the basis of evidence seized in a search of her home.[75] Although the search was conducted pursuant to a warrant, the affidavit used to obtain the warrant relied on information

69. The *Coe* court rested its decision to address state claims first on several grounds, including the nature of the federal system, the historical development of the state and federal constitutions, state sovereignty, and the principle that a court should not apply the highest law to invalidate governmental action when a lesser rule will suffice. State v. Coe, 101 Wn. 2d at 373–74, 679 P.2d at 359.

70. A chronological review of subsequent cases reveals that the state courts have not followed the *Coe* court's method of analyzing the state constitution first. State v. Bartholomew, 101 Wn. 2d 631, 639, 683 P.2d 1079, 1085 (1984) (where the court analyzed the federal Constitution before considering the state constitution); State v. Crandall, 39 Wn. App. 849, 853, 697 P.2d 250 (1985) (same); State v. Brooks, 43 Wn. App. 560, 565, 718 P.2d 837, 839 (1986) (same); State v. Gunwall, 106 Wn. 2d 54, 64–65, 720 P.2d 808, 814 (1986) (same).

71. *See e.g., supra* note 66; *compare* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") *with* WASH. CONST. art. I., § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

72. *See, e.g.,* Utter, *supra* note 22, at 493 n.4.

73. State v. Ringer, 100 Wn. 2d 686, 705–06, 674 P.2d 1240, 1251 (1983) (Dimmick, J., dissenting), *overruled,* State v. Stroud, 106 Wn. 2d 144, 720 P.2d 436 (1986).

74. *Id.;* State v. Simpson, 95 Wn. 2d 170, 200–02, 622 P.2d 1199, 1214–18 (1980) (Horowitz, J., dissenting).

75. State v. Gunwall, 106 Wn. 2d 54, 55–56, 720 P.2d 808, 809–10 (1986).

derived from telephone toll records and from placement of a pen register[76] on petitioner's telephone.[77] Petitioner moved to suppress the evidence obtained in the search on the basis that the information derived from the pen register and the telephone toll records was illegally obtained.[78] The trial court denied the motion, and petitioner Gunwall appealed directly to the Washington Supreme Court.[79]

B. The Court's Method for Analyzing State Constitutional Issues

The *Gunwall* court held that to the extent the warrant was based on the information gained through the pen register and telephone toll records, it was invalid under Washington Constitution article I, section 7.[80] As the court noted, this conclusion would not have been reached under federal law, because the fourth amendment does not require a warrant for the placement of a pen register on a private telephone line, nor does it protect telephone toll records.[81] In deciding that article I, section 7 compels a different result, the court discussed federal law first, and then employed six "nonexclusive neutral criteria" to conclude that resort to separate and independent state grounds was appropriate in this particular case.[82] The text of each criterion, the court's method of applying it, and the conclusions reached thereby, are discussed below.[83]

1. "Textual language of the state constitution."[84] The court's first criterion considers whether the text of the state constitution may provide grounds for reaching a different decision than would be reached under the

76. A device placed on a telephone line or connection that identifies all local and long distance numbers dialed, whether the call is completed or not. *Id.* at 63–64, 720 P.2d at 813. The telephone conversation itself is not monitored. *Id.* at 64 n.15, 720 P.2d at 813 n.15.

77. *Id.* at 56, 720 P.2d at 809.

78. *Id.*

79. *Id.*

80. Denial of Gunwall's motion to suppress was upheld, however, because the court found other evidence in the affidavit sufficient to show probable cause for obtaining the warrant. *Id.* at 70, 720 P.2d at 817. Thus, the court need not have decided petitioner's state constitutional claim at all.

81. *Id.* at 64, 720 P.2d at 814.

82. *Id.* at 61, 720 P.2d at 812; *see also* Deukmejian & Thompson, *supra* note 7, at 991–96 (similar criteria discussed); Howard, *supra* note 19, at 935–39 (same); Utter, *supra* note 22, at 509–24 (some of the same principles proposed as guides to interpretation of the language of the state constitution).

A two-step process is implicit in the analysis the court undertakes. First, whether the federal or the state provision should be applied, and second, how broadly or narrowly that provision should be interpreted. The court's statement of method does not prescribe a two-step analysis. However, in deciding the case it first uses the criteria to decide to apply state law instead of federal law, and then relies on precedent from other states to determine the scope of the state constitutional right. *Gunwall*, 106 Wn. 2d at 67–68, 720 P.2d at 815–16.

83. The representation of the court's analysis here is necessarily brief, since the court's own discussion is scant. *See Gunwall*, 106 Wn. 2d 61–62, 65–67, 720 P.2d at 812–15.

84. *Id.* at 61, 720 P.2d at 812.

federal Constitution, either because it is "more explicit" than any provision in the federal Constitution, or without any federal counterpart at all.[85] The court concluded that under the language of article I, section 7,[86] the relevant inquiry was whether the state had unreasonably intruded into the defendant's private affairs.[87]

2. *"Significant differences in the texts of parallel state and federal constitutional provisions."*[88] The second criterion states that significant differences in the texts of parallel provisions may justify relying on the state constitution. This criterion also suggests that even if significant differences are not present, other relevant provisions of the state constitution may require the state constitution to be interpreted differently.[89] In applying this criterion, the court noted that the language of the fourth amendment is substantially different from that of article I, section 7, because the state provision expressly protects a citizen's private affairs.[90] The court concluded that the material difference in language permits a more expansive interpretation of the state provision.[91]

3. *"State constitutional and common law history."*[92] This criterion addresses whether the state constitution was intended to confer greater protection, by reference to historical evidence relevant to the scope of state provisions.[93] Although the court found it unnecessary to consider state common law history on searches and seizures, it did find the rejection of a proposed provision identical to the fourth amendment at the 1889 state constitutional convention to be significant.[94]

4. *"Preexisting state law."*[95] The fourth criterion calls for examination of previously established bodies of state law, including statutes, to determine if they are responsive to the issues raised by analogous state constitutional claims.[96] The court discussed Washington's statutory protections for electronic communications, especially section 9.73.010 of the Washington

85. *Id.*
86. *See supra* note 71.
87. *Gunwall,* 106 Wn. 2d at 65, 720 P.2d at 814.
88. *Id.* at 61, 720 P.2d at 812.
89. *Id.*
90. *See supra* note 71.
91. *Gunwall,* 106 Wn. 2d at 65–66, 720 P.2d at 814.
92. *Id.* at 61, 720 P.2d at 812.
93. *Id.* at 61–62, 720 P.2d at 812. Since the federal Bill of Rights was inapplicable to the states when Washington's constitution was drafted in 1889, it is questionable that any of its provisions were expressly intended to confer "greater protection" than the federal Constitution in the way that the *Gunwall* court uses that phrase. *See infra* text accompanying notes 121–23.
94. *Gunwall,* 106 Wn. 2d at 66, 720 P.2d at 814–15.
95. *Id.* at 62, 720 P.2d at 812.
96. *Id.* These bodies of law, according to the court, help to define the scope of constitutional rights. *Id.*

Revised Code, which makes it a misdemeanor to wrongfully obtain knowledge of a telegraphic message. It concluded that the existence of such protections supports resorting to independent state constitutional grounds for determining the propriety of intrusions involving telephone communications.[97]

5. "Differences in structure between the federal and state constitutions."[98] The fifth criterion considers how differences in the structure of state and federal constitutions may affect interpretation of the state provisions. Criterion five notes that while the federal Constitution is a grant of enumerated powers, the state constitution acts as a limitation on the otherwise plenary powers of the state government.[99] The court concluded that this fact supported construing article I, section 7 as offering protection for individual privacy rights.[100]

6. "Matters of particular state interest or local concern."[101] The last criterion asks whether the subject matter of the state constitutional provision is local in character, or whether it requires national uniformity. The court stated that the former is a more appropriate setting for applying the state constitution.[102] The court concluded that this criterion overlapped criterion four, in the sense that a balance must be struck between the need for national uniformity in search rules relating to telephone communications, and contrary state policy considerations. In the case of telephone records and pen registers, the court found that state policy considerations outweighed the interest that existed in uniform national rules.[103]

The court's stated reasons for adopting these criteria were to ensure that decisions reached on independent state constitutional grounds avoided excessive judicial policymaking and unnecessary deviation from United States Supreme Court precedent.[104] The court was also concerned that

97. *Id.* at 66, 720 P.2d at 815.

98. *Id.* at 62, 720 P.2d at 812.

99. *Id.* It follows, according to the court, that "the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them." *Id.* It is difficult to understand what the court meant by this. Although the federal government has those powers that are expressly granted to it by the Constitution, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404–05 (1819), and state powers are retained, both the Bill of Rights and the Washington Declaration of Rights limit governmental power. The court implies that the justification for independently applying the state constitution arises from the difference between granted and retained powers. This difference is more formal than substantive, however, since both state and federal powers are ultimately granted from the same souce—the people. A better justification for independent interpretation is that it restores, as nearly as possible, the original relationship of functional equality between state and federal constitutions. *See supra* notes 5–11 and accompanying text.

100. *Gunwall*, 106 Wn. 2d at 67, 720 P.2d at 815.

101. *Id.* at 62, 720 P.2d at 813.

102. *Id.*

103. *Id.* at 67, 720 P.2d at 815.

104. These decisions, the court said, should "be made for well founded legal reasons and not by

these decisions be the product of reason, not "pure intuition,"[105] and that they provide a reliable basis for predicting the results of future decisions.[106] In fashioning this analytical method, the court made no reference to the primacy model of analysis it had adopted in *State v. Coe*[107] just two years prior, nor to any of the other approaches previously employed by Washington courts.[108]

III. ANALYSIS

The court in *State v. Gunwall* recognized that state constitutional doctrine cannot be applied to new cases and new issues unless it is understandable and logically reasoned.[109] However, the analytical method adopted by the court achieves this result in a way that limits the ability of Washington judges to develop strong independent state constitutional doctrine. The *Gunwall* method sacrifices legitimate interests of constitutional federalism[110] to the goal of minimizing departure from federal precedent. Although preserving national uniformity is a possible relevant interest,[111] it is inadequate by itself to create a firm base for state constitutional analysis. Focus on uniformity inhibits the development of a comprehensive body of state constitutional doctrine that could serve to enhance respect for state law and the state's sovereignty.[112] Further, it undermines the role of state, as opposed to national, law as a means of responding readily to social change.[113]

While the court did not consider the value of other methods of state constitutional analysis that have been employed by Washington courts in the past, the primacy model used in *State v. Coe*[114] has several advantages over the method adopted in *Gunwall*.[115] Washington law can be benefited by a consistent decision on the part of courts to address state constitutional issues first. The *Gunwall* criteria may be retained under the primacy model as interpretive principles.[116] In this way, the primacy model can become a

merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court." *Id.* at 63, 720 P.2d at 813.

105. *Id.*
106. *Id.* at 60, 720 P.2d at 812.
107. 101 Wn. 2d 364, 679 P.2d 353 (1984).
108. *See supra* notes 64–70 and accompanying text.
109. *Gunwall*, 106 Wn. 2d at 60, 720 P.2d at 812.
110. *See supra* note 22 and accompanying text.
111. *See* Deukmejian & Thompson, *supra* note 7, at 994–96.
112. *See supra* note 22.
113. *See* Utter, *supra* note 22, at 495.
114. 101 Wn. 2d 364, 679 P.2d 353 (1984); *see supra* note 69 and accompanying text.
115. *See infra* notes 165–80 and accompanying text.
116. *See infra* notes 181–87 and accompanying text.

more powerful tool for developing the state constitution than the *Gunwall* method employed alone.

A. Gunwall *Presumes That Federal Constitutional Doctrine Is Controlling*

1. An Interstitial Model for Washington

The method of state constitutional analysis adopted by the court in *Gunwall* is a form of the interstitial model.[117] The court examined federal law first, and applied its six criteria to determine whether the state constitution provides alternative protection.[118] Its opinion expresses concern with maintaining the integrity of United States Supreme Court precedent and with avoiding judicial activism, both typical concerns of the interstitial method.[119] *Gunwall's* analysis assumes that use of the state constitution must be justified in each particular case, and that deviation from federal doctrine should be limited—assumptions that are also characteristic of the interstitial method.[120]

2. Federal Superiority

The *Gunwall* court began with an implicit premise that only one constitution, federal or state, applies to a given claim in a given case.[121] The court's criteria are generally addressed to determining when the state constitution provides "cogent grounds" for reaching a decision different from that mandated by the federal Constitution.[122] Under the court's method, the state constitution is to be applied only when a particular interpretation different from the federal interpretation is justified through

117. *See supra* notes 48–55 and accompanying text.

118. State v. Gunwall, 106 Wn. 2d 54, 64–67, 720 P.2d 808, 814–15 (1986).

119. *See supra* notes 48–55 and accompanying text.

120. *Gunwall*, 106 Wn. 2d at 58, 60–61, 63, 720 P.2d at 810, 812–14; *see supra* notes 48–55 and accompanying text.

121. Although this premise is not made explicit in the court's opinion, it is implicit in the way the court frames the issues. The court prefaces its general discussion of the criteria by explaining that they are "relevant to determining whether, in a given situation, the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution." *Gunwall*, 106 Wn. 2d at 61, 720 P.2d at 812. Its statement of the issues presented on appeal, however, makes clear that the criteria are to be used to make a choice between state and federal protection: "When is it appropriate for this court 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." *Id.* at 58, 720 P.2d at 810.

122. *Id.* at 61, 720 P.2d at 812.

use of the criteria. In effect, the structure of the court's method creates a presumption that federal law controls, which must be rebutted through use of the criteria.[123]

The circumstances under which this presumption can be overcome are ultimately quite circumscribed. The first two criteria focus on limiting independent interpretation to state constitutional provisions that are textually different from the federal Constitution.[124] The third and fourth criteria are aimed at identifying different types of historical intention to depart from federal law.[125] Only the last two criteria do not refer expressly to differences in language or intent.[126] Criterion five is addressed to structural differences between the state and federal constitutions, but its explanation of those differences is not sufficiently developed to overcome the federal law presumption alone.[127] Criterion six focuses on matters of local interest, and suggests that state policies can justify independent interpretation.[128] Matters of state interest or local concern are certainly relevant, but are meaningful primarily within the context of substantive analysis. Criterion six, therefore, is also unable to provide an independent framework for decision.

The court's method rests mainly on the idea that state constitutional doctrine that differs from federal doctrine is illegitimate unless expressly justified by clear differences in text or historical intent. If no such differences can be identified, the federal Constitution as interpreted by the United States Supreme Court is presumed to control. But as commentators have pointed out, there is no persuasive reason why independent state constitutional analysis should be so narrowly restricted.[129] State courts are equally free to adopt independent interpretations where state and federal provisions are the same as where they are different.[130] The only reasons to limit independent interpretation to state provisions markedly different from

123. *See* Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. REV. 353, 356 (1984).

124. These criteria are the textual language of the state constitution, and significant differences in the texts of parallel state and federal constitutional provisions. *See supra* notes 84–91 and accompanying text.

125. These criteria are state constitutional and common law history, and preexisting state law. *See supra* notes 92–97 and accompanying text. Criterion three focuses on the intent of the drafters of the state constitution, and criterion four focuses on prior expressions of intent by either the legislature or the courts. *Gunwall*, 106 Wn. 2d 54, 61–62, 720 P.2d 808, 812 (1986).

126. *See supra* notes 98–103 and accompanying text.

127. *See supra* note 99 and accompanying text. Because analysis based on state constitutional structure is by its nature tied to the text of the document, criterion five is closely related to the first four textually based criteria.

128. *See supra* notes 101–03 and accompanying text.

129. Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 282–84 (1973); Utter, *supra* note 22, at 506.

130. *See supra* note 129.

federal provisions are to help preserve national uniformity of constitutional doctrine, and to accord respect to the reasoning of majority opinions of the United States Supreme Court.[131] But respect for the Court does not require that its reasoning be accorded the status of a presumption. Further, national uniformity of rights is irreducibly provided by the federal Constitution in its capacity as a "floor" of protection.[132] Preserving uniformity beyond this level, however, is at odds with the basic concept of independent state constitutional interpretation.[133]

B. Gunwall's *Methodology Diminishes State Law Independence and Finality, and Reduces Judicial Economy*

1. Independence

Independent interpretation of the state constitution can confer benefits that go beyond reaching different results in a particular case. Among the broader reasons that exist for independent interpretation is the goal of increasing respect for state law, and hence for state sovereignty.[134] This goal will be best served if state constitutional doctrine is developed by creating a separate, rational, independent body of law.

At a minimum, the goal of independence requires a court to keep its state analysis separate from any federal analysis.[135] This is particularly important in interstitial analysis, which always discusses federal law. However, the federal law presumption adopted in *Gunwall* makes separation of analyses difficult because its very existence causes federal law to dominate

131. Particular doctrines or modes of analysis employed by the Supreme Court are certainly open to dispute, as the Court's numerous five–four and plurality opinions demonstrate. *See, e.g.*, Bowers v. Hardwick, 106 S. Ct 2841 (1986); Brewer v. Williams, 430 U.S. 387 (1977).

132. *See supra* notes 20–21 and accompanying text; *see also infra* note 180 (federal floor will be maintained despite active independent interpretation of state constitutions). For an analysis of the state constitution that accords considerable respect to the decisions of the United States Supreme Court without using such a presumption, see State v. Stroud, 106 Wn. 2d 144, 153–76, 720 P.2d 436, 441–53 (1986) (Durham, J., concurring). Justice Durham reaches a result similar to the federal one through this analysis. *Id.* at 171, 720 P.2d at 451 ("We reach a comparable result through different reasoning.").

133. *Cf.* Collins, *Reliance on State Constitutions—Away From A Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1, 5–6 (1981) (incongruous to speak of independent state constitutional protections where development of state constitutional doctrine is dependent upon federal doctrine); *see also infra* note 180. The irony of the court's focus on preserving uniformity is that the *Gunwall* method itself permits considerable independent action in one of the main areas where uniformity could be beneficial—the area of search and seizure law. *See* State v. Ringer, 100 Wn. 2d 686, 703–06, 674 P.2d 1240, 1250–51 (1983) (Dimmick, J., dissenting) (critique of allowing variation in search and seizure standards), *overruled*, State v. Stroud, 106 Wn. 2d 144, 720 P.2d 436 (1986).

134. Collins, *supra* note 133, at 5–6; Collins, *supra* note 47, at 388 & n.54.

135. Collins, *supra* note 63, at 93.

not only the opinion, but the thinking of the judge writing it.[136] Judges who begin their analyses with a discussion of presumptively controlling federal doctrine later tend naturally to look to federal cases whenever they are in doubt, rather than relying upon independent state-based lines of analysis.

This characteristic is apparent in the opinions of courts that have applied *Gunwall's* method.[137] These opinions rely on prior state precedent in their state constitutional analyses, but do not distinguish between state cases that engage in fourth amendment analysis and those that develop an analysis keyed to independently construed state constitutional structure and history.[138] The result is that even when the state and federal analyses occupy separate sections of the opinion, the state analysis still appears to be interwoven with the federal analysis.[139]

A separate problem arises because when courts analyze federal constitutional issues first, as *Gunwall* requires them to do, and then decide the case on state grounds, their opinions as to the federal law are necessarily dicta.[140] If the adequacy of the state law ground goes unchallenged, or is upheld under the *Michigan v. Long* standard,[141] the statements as to federal

136. *See, e.g.*, State v. Bakke, 44 Wn. App. 830, 723 P.2d 534 (1986). Although the *Bakke* court devoted a section of its opinion to consideration of the *Gunwall* factors, *Id.* at 840–42, 723 P.2d at 539–40, its state analysis was in fact not kept separate from its fourth amendment analysis. *Id.* at 832–33, 723 P.2d at 535–36.

137. Fury v. Seattle, 46 Wn. App. 110, 122–24, 730 P.2d 62, 68–69 (1986); State v. Bakke, 44 Wn. App. 830, 840–42, 723 P.2d 534, 539–40 (1986); State v. Boyce, 44 Wn. App. 724, 728–30, 723 P.2d 28, 30–31 (1986).

138. *See, e.g.*, State v. Bakke, 44 Wn. App. 830, 723 P.2d 534 (1986). The *Bakke* court began its opinion with a discussion of principles that it generally applied to both the fourth amendment and article I, section 7. It then discussed the cases cited by the defendant, without expressly keying the discussion to either the fourth amendment or article I, section 7. In its later application of the *Gunwall* factors, the *Bakke* court relied in its state analysis on State v. Campbell, 15 Wn. App. 98, 99, 547 P.2d 295, 297 (1976), a case that considered the constitutionality of a warrantless entry under the fourth amendment and article I, section 7. *Campbell* in turn conducted a primarily federal constitutional analysis. *Id.* at 100–03, 547 P.2d at 297–99. Finally, after concluding that the police entry did not exceed the scope of a reasonable search under state precedent, the *Bakke* court determined that the seizure involved was lawful by recourse once again to federal precedent. 44 Wn. App. at 841–42, 723 P.2d at 540.

139. United States Supreme Court opinions may be examined for the persuasiveness of their reasoning on a particular issue without having this effect. There is a substantial difference between citing a Supreme Court case for its holding, and examining its approach to analysis. If the analysis is compelling, it must still be demonstrated to apply within the context of the state constitution, taking into account the different structure and purposes of that document. *See* Brennan, *supra* note 9, at 501–02; *see also* State v. Kennedy, 107 Wn. 2d 1, 4–13, 726 P.2d 445, 447–52 (1986) (federal precedent discussed, but integrated into independent state historical and common law foundations); State v. Stroud, 106 Wn. 2d 144, 153–76, 720 P.2d 436, 441–51 (1986) (Durham, J., concurring) (same); State v. Ringer, 100 Wn. 2d 686, 698–703, 674 P.2d 1240, 1242–50 (1983) (same), *overruled,* State v. Stroud, 106 Wn. 2d 144, 720 P.2d 436..

140. *See* Collins, *supra* note 47, at 393 n.68.

141. *See supra* notes 56–63 and accompanying text.

doctrine will never be reviewed by the federal courts.[142] This may happen just as easily where the federal doctrine is uncertain as where it is settled. If a subsequent state court relies upon the prior court's federal analysis in construing the state constitution, layers of state constitutional doctrine may come to rest on unreviewed state court constructions of federal law.[143] Such case law will lack independent analytical consistency, and its credibility will suffer accordingly.[144]

2. *Finality*

Commingling of state and federal precedent not only dilutes the integrity of state constitutional doctrine, but may also permit its reversal by the United States Supreme Court. *Michigan v. Long*[145] states that a court relying on federal cases in its state analysis can avoid Supreme Court review by complying with the "plain statement" rule.[146] But there is an apparent conflict between this formalistic rule and the Court's assertion that it will accept review where state and federal law are interwoven.[147] One commentator has suggested that since the plain statement rule is formal, and the "interwoven" test substantive, the Court may not always defer to a plain statement if the underlying reliance on federal doctrine is substantial.[148] A close reading of the *Long* decision supports the suggestion that under some circumstances the Court may not accept a plain statement at face value.[149]

142. If a decision of a state's highest court is effectively insulated from Supreme Court review by an adequate and independent state ground, any consideration of federal constitutional issues can only have an advisory effect. *See* Collins, *supra* note 47, at 393 n.68.

143. This problem could be avoided if the court confined its use of Supreme Court cases to examination of modes of analysis which were then integrated into its discussion of the state constitution. *See supra* note 139.

144. The issue here is not that all state pronouncements on federal law should be reviewed, but that state judges construing state law should take responsibility for their work. State law is more credible when it rests on a foundation in full control of the state judiciary.

145. 463 U.S. 1032 (1983).

146. *See supra* notes 59–61 and accompanying text.

147. The Court stated that the plain statement rule means that it will assume there are no adequate and independent state grounds "when it is not clear from the opinion itself that the [state] court relied upon an adequate and independent state ground *and* when it fairly appears that the state court rested its decision primarily on federal law." Michigan v. Long, 463 U.S. 1032, 1042 (1983) (emphasis added). If federal decisions are in fact interwoven with the state law, and the Supreme Court defers to a plain statement, the Court is indicating that it is interested only in the intent of the state court, not the substance of its analysis. The overall thrust of the interwoven test is substantive, however, and rests on the Court's perception of whether the state court felt compelled by federal law to decide as it did. *Id.* at 1042 nn.7–8.

148. Collins, *supra* note 63, at 92–93; *see also* Collins, *supra* note 47, at 405–06, 405 n.112 and cases cited therein; *Developments, supra* note 9, at 1340–42.

149. *See* Collins, *supra* note 47, at 398–99, 399 n.87, 403. The *Long* Court stated that its plain statement rule "obviates in *most* instances the need to examine state law in order to decide the nature of the state court decision . . . ." Michigan v. Long, 463 U.S. 1032, 1041 (1983) (emphasis added). In a

The *Gunwall* court's method of analysis promotes reliance on federal constitutional doctrine, and has been employed without regard for the plain statement rule.[150] *Michigan v. Long* may not completely foreclose federal review even if courts comply with the plain statement rule.[151] Careful drafting of the opinion, therefore, is still a wise course. Given the degree of deference *Gunwall* accords to federal law, the capacity of lower courts to consistently meet this drafting burden is questionable.[152] Use of the *Gunwall* method may therefore set the stage for federal review of cases decided on "independent" state grounds.[153]

3. *Judicial Economy*

At the broadest level, *Gunwall's* method of analysis does not take into account the principle that courts should decide cases on the basis of the lowest possible law.[154] Courts in general agree that a case should not be decided on constitutional grounds if a statutory ground or other basis is available.[155] It follows that it may not be the wisest course to employ the federal Constitution if an identical principle in the state constitution will serve.[156] First, it is sensible for state judges to address issues of federal law as infrequently as possible, because they are not the final authorities on that law.[157] Second, economical use of United States Supreme Court resources

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footnote to this statement the Court declares that "[t]here may be certain circumstances in which clarification is necessary or desirable, and we will not be foreclosed from taking the appropriate action." *Id.* at 1041 n.6.

150. *See supra* notes 137–38 and accompanying text. *Gunwall* did not emphasize that compliance with *Long* is important, although it did cite the case in a footnote. State v. Gunwall, 106 Wn. 2d 54, 67 n.24, 720 P.2d 808, 815 n.24 (1986). The lower court opinions applying *Gunwall's* criteria discussed above, *supra* notes 137–38, lack such a plain statement.

151. *See supra* notes 147–49 and accompanying text.

152. *See supra* notes 136–39 and accompanying text.

153. Justice Durham's concurring opinion in State v. Stroud, 106 Wn. 2d 144, 153–76, 720 P.2d 436, 441–51 (1986), demonstrated an awareness of the issues raised by *Michigan v. Long*, and successfully addressed them by employing a form of primacy analysis. Justice Durham addressed the state constitution first, and turned to the federal Constitution only to establish the height of the federal floor. Her discussion of federal case law was extensive, but it did not compel the state result she reached, and was not interwoven with state law so that the state grounds were unclear. *See id.*

154. *See* Collins, *supra* note 47, at 391; Linde, *supra* note 6, at 383; Utter, *supra* note 22, at 505. Application of this principle is arguably most appropriate when the choice is between a statute and a constitution, because the need for judicial review of statutes is reduced by their susceptibility to popular override. State constitutions, however, resemble statutes because they are relatively easy to amend, and because their content is generally comprehensive to the point of resembling a code. *See Developments*, *supra* note 9, at 1353. Application of the lowest law principle to the choice between state and federal constitutions thus makes good policy sense.

155. Linde, *supra* note 6, at 383.

156. Utter, *supra* note 22, at 505.

157. State judges speak most authoritatively on issues of state law because those issues are consigned to their final jurisdiction. Their judgments have the most force when they construe that law. *See* Utter, *supra* note 22, at 505.

suggests that as many cases as possible ought to be finally decided at the state court level.[158] *Gunwall's* federal law presumption, however, limits the use of state constitutional grounds to particular cases. State constitutional provisions that are similar to federal provisions are unlikely to provide grounds sufficient to overcome the federal presumption.[159] These provisions therefore will be rendered inactive, eliminating the state law ground for decision in cases involving issues falling within their language. This makes it inevitable that cases will be decided on federal constitutional grounds when state ones would have sufficed. The result will be an increase in the number of cases that are potential candidates for appeal to the United States Supreme Court.

In the long run, it is difficult to understand how state constitutional interpretation can ever be truly independent as long as there is a presumption, even if rebuttable, that federal law controls.[160] The deference to federal law that results from the use of the *Gunwall* method interferes with the development of an analytically independent body of state constitutional law. Since the goal is *independent* interpretation, the method of analyzing state constitutional issues chosen should support this goal, not subvert it as does the *Gunwall* method.

C. *The Primacy Model Provides a Sounder Theory for Washington Independent Interpretation*

1. *Providing Enhanced Security Is the Proper Role for Washington's Constitution*

A basic level of protection for civil liberties has already been guaranteed to all citizens by the application of most of the Bill of Rights to the states through the fourteenth amendment.[161] Given this fact, the most logical role left for the state constitution to play is to provide an enhanced security for the rights of Washington citizens by adding another level of protection.[162]

158. For a discussion of the Court's burgeoning work load, see G. GUNTHER, CONSTITUTIONAL LAW 65–68 (11th ed. 1985).

159. *Compare* WASH. CONST. art. I, § 9 *with* U.S. CONST. amend. V, cl. 2; *compare also* WASH. CONST. art. I, § 3 *with* U.S. CONST. amend. V (due process clause) *and* U.S. CONST. amend. XIV (due process clause).

160. One exception is law developed under a state constitutional provision, such as Washington Constitution article XXXI (the state equal rights amendment), that has no conceivable federal counterpart. In analyzing such provisions, the court will have no choice but to rely upon its own intellectual resources.

161. *See* G. GUNTHER, *supra* note 158, at 422-40; Brennan, *supra* note 9, at 493–94.

162. Alderwood Assocs. v. Washington Envtl. Council, 96 Wn. 2d 230, 238, 635 P.2d 108, 113 (1981).

Therefore, the most important function of state constitutional analysis is to preserve the power of the state constitution to protect individual rights. *State v. Gunwall,* however, employed a reactive rather than an independent approach to state constitutional analysis. In so doing, *Gunwall* truncates the potential of the state constitution to serve as the source of doctrines that offer more complete or more rational means for protecting civil liberties than do federal constitutional analyses.

2. *The Value of Putting First Things First*

Independent state constitutional interpretation in the modern era has the potential to provide the kind of "double security" against violations of civil liberties that the federalist system has long provided against general governmental overreaching.[163] This goal can be served by returning state constitutions as nearly as possible to their original relationship of functional equality with the federal Constitution.[164] The state constitution can successfully enhance security for individual rights by adding another complete level of protection. The primacy model of analysis, previously adopted in Washington in *State v. Coe,*[165] offers a realistic means of achieving this goal.

a. *Use of the Primacy Model Benefits Application of Both the Federal and the State Constitution*

The primacy model does not assume that only one constitutional provision, federal or state, can apply to a given case;[166] nor does it adopt a presumption that this provision should be a federal one.[167] Its foundational assumption is rather that both constitutions always apply, and that litigants do not choose one or the other, but are protected in tandem by both.[168] Under this model of analysis every provision of the state constitution may be used, not just those that vary significantly from the federal Constitution on their face.[169] A consistent application of the state constitution through

163. *Id.* at 237–38, 635 P.2d at 113; Brennan, *supra* note 9, at 502–03.

164. *See supra* notes 10–11 and accompanying text. Recall that the federal Constitution provides a floor of protection through the Supremacy Clause. Above that floor, state courts are free to adopt state doctrines providing more protection. *Developments, supra* note 9, at 1333–35. State constitutions thus respond to the supremacy principle, while having a full range of action above the federal floor. They are equal in protective action, but they do not present any challenge to federal supremacy.

165. 101 Wn. 2d 364, 679 P.2d 353 (1984); *see supra* notes 5–11 and accompanying text.

166. *See supra* note 121 and accompanying text.

167. *See supra* note 123 and accompanying text.

168. *See supra* notes 41–45 and accompanying text.

169. *See supra* notes 41–47 and accompanying text.

the primacy model would thereby develop the whole state constitution, not just isolated provisions.

Concurrently, the primacy model effectively preserves federal claims. If the state constitution does not provide relief in a particular case, the litigant may press for relief under the federal Constitution.[170] Resolving state claims first, however, would ensure that the federal Constitution would not be invoked unless necessary.[171] Cases would be decided on the basis of the lowest possible law,[172] and only those claims that genuinely require federal protection would reach the United States Supreme Court.

A further argument in favor of the primacy model is the clear separation of federal and state constitutional claims that it provides. Because primacy analysis begins with state claims rather than ending with them, it avoids the tendency of interstitial analysis to embellish or complete state law arguments by reference to federal doctrines.[173] In addition, primacy analysis enables state courts to accept not only arguments based on the text or structure of the state constitution, but a variety of other arguments as well.[174] For instance, state courts could adopt the viewpoints of Supreme Court dissenters on an issue if they believed those views were better reasoned, without regard to whether there was express state language[175] or historical intent[176] authorizing the choice. Judges could, and probably would, explain how state law departed from federal law, but their analyses would be unfettered by the presumed superiority of federal reasoning.

170. *See supra* notes 41–47. Some commentators have objected that the primacy model requires litigants to exhaust any possible state claims in state court before having access to the federal courts. Project Report, *supra* note 9, at 288. But the primacy model does not require that state constitutional claims be raised; it says only that if they are raised, they should be addressed first.

171. *See supra* notes 42–46 and accompanying text.

172. *See supra* notes 154–58 and accompanying text.

173. *See supra* notes 137–39 and accompanying text. Properly applied, the primacy model of analysis would only discuss federal constitutional claims if the state claims failed. *See supra* notes 41–46 and accompanying text. This insures against interweaving state and federal grounds for decision, because if the state claim fails, the only possible grounds remaining would be federal ones. *See* Collins, *supra* note 47, at 390 n.58, 396–408. Discussion of federal precedent in resolving a state constitutional claim would almost by necessity be limited to the persuasiveness of the Supreme Court's reasoning, since it would be difficult for federal law to compel the answer to a question that was from the beginning solely one of state law. Under primacy analysis, state constitutional claims would not be in any way dependent upon the outcome of possible federal claims, and the possibility of confusion would be reduced. *See supra* note 46.

174. *See supra* notes 129–31 and accompanying text.

175. *See supra* notes 84–91 and accompanying text.

176. *See supra* notes 92–97 and accompanying text.

b. *The Primacy Model Allows Courts to Create a Principled Body of State Constitutional Law*

Another characteristic of primacy analysis is that it does not require fixed reliance on particular criteria to limit the scope of constitutional rules or to avoid excessive policymaking at the judicial level. The scope of state constitutional rules may be limited by developing doctrines based directly on the text and structure of the state constitution, rather than in reaction to federal language or structure. Primacy analysis yields decisions that are based on clearly articulated state grounds, and that openly rest on state policies. Activism can be controlled because the judges making these policies, unlike the federal judiciary, are elected and are thus directly responsible to the people at large.[177] As a final check, if the people are truly dissatisfied with the policies expressed in state constitutional law, they may supplant them by amending the state constitution.[178]

Finally, the primacy model permits a wider range of doctrinal variation above the federal floor than does *Gunwall's* model of analysis. This allows better representation of regional political and moral views.[179] If it becomes necessary for those views to be tested at the United States Supreme Court level, the issues will be clearer by reason of their development within the context of the state constitution.[180]

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177. *See* Utter, *supra* note 22, 495–96.

178. *See* WASH. CONST. art. XXIII.

179. *See* Alderwood Assocs. v. Washington Envtl. Council, 96 Wn. 2d 230, 238, 635 P.2d 108, 113 (1981); Howard, *supra* note 19, at 940; Utter, *supra* note 22, at 495; *Developments, supra* note 9, at 1350–51.

180. One concern that independent state constitutional interpretation raises is that active use of state protections will reduce the United States Supreme Court's motivation for maintaining a strong body of federal law. Deukmejian & Thompson, *supra* note 7, at 975. This result is unlikely, however, precisely because of the regional differences found in our country. There will always be states where rights will be interpreted conservatively. Litigants from these states may be counted upon to press the Supreme Court for protections their states will not give. In addition, bills of rights under state constitutions are on the whole as broad or broader in scope than the federal Bill of Rights. *See* Force, *supra* note 5, at 159–82; Graves, *State Constitutional Law: A Twenty Five Year Summary,* 8 WM. & MARY L. REV. 1, 17–21 (1966). If state constitutions are consistently and independently applied, the protection they provide will thus usually equal or exceed federal protection. The response of one Georgia judge to a recent survey on the subject of independent interpretation is revealing in this regard:

> The Supreme Court of Georgia does not favor the use of State Constitutional law in view of the fact that in the criminal law field especially, the State Constitution gives the individual more protection than does the Federal. The field of free speech is the only field in which our Court follows the State Constitution, and it is more protective than the Federal. Strangely enough, lawyers in the state have not realized that you can depend upon the State Constitution rather than the Federal. If they did, we would have some interesting opinions coming from our Supreme Court in its effort to ignore the more protective State Constitution.

Quoted in Collins, Galie & Kincaid, *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey,* 13 HASTINGS CONST. L.Q. 599, 609–10 (1986).

3. *The True Value of the Criteria Announced in* State v. Gunwall

The primacy model is the most appropriate means of answering the question of when to apply the state constitution, but the criteria developed by the *Gunwall* court retain value as interpretive principles. Considerations of textual language[181] and state constitutional and common law history[182] are fundamental to developing state doctrine independently rather than in reaction to federal law. Washington had a well developed body of law under some provisions of its state constitution[183] well before the incorporation of the Bill of Rights into the fourteenth amendment.[184] This history is highly relevant to developing an independent foundation for state doctrine.[185] The structure of the state constitution as an historically separate check on state power[186] provides the logic for developing state guarantees as a dual level of protection for state citizens. Finally, reflection of local policy concerns[187] forms an important rationale for independent state constitutional rules. The analytical principle of *Coe* and the analytical principle of *Gunwall* can in combination work to create a vital state constitution. All that remains is to apply these principles together to develop Washington constitutional doctrine fully and consistently.

V. CONCLUSION

The interstitial method of state constitutional analysis adopted in *State v. Gunwall* is ultimately less satisfactory than a methodology which combines the *Gunwall* criteria with the theoretical purity of the primacy model. Primacy theory is preferable to interstitial analysis for determining when to apply the state constitution for several reasons. First, it provides a rational, principled method of analyzing state constitutional issues. Second, it builds a body of independent state law which is more likely to maintain its independence and to avoid successful petitions for United States Supreme Court review of state constitutional decisions. Third, it better supports state sovereignty and offers greater flexibility in meeting changing social mores on a local level. Finally, primacy theory preserves the independence of the

181. Criterion one, *see supra* notes 84–87 and accompanying text.

182. Criterion three, *see supra* notes 92–94 and accompanying text.

183. Criterion four, *see supra* notes 95–97 and accompanying text.

184. *See, e.g.*, State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922) (adopting exclusionary rule as remedy for illegal searches and seizures under Washington Constitution article I, section 7).

185. *See e.g.*, State v. Ringer, 100 Wn. 2d 686, 699, 674 P.2d 1240, 1247 (1983), *overruled*, State v. Stroud, 106 Wn. 2d 144, 674 P.2d 436 (1986).

186. Criterion five, *see supra* notes 99–101 and accompanying text.

187. Criterion six, *see supra* notes 102–04 and accompanying text.

body of state constitutional law, and provides restraints on judicial activism. The decision of the court in *State v. Gunwall* to supplant this system was thus ill-considered.

The analytical criteria applied to state constitutional analysis in *State v. Gunwall* are not without value. If employed in conjunction with a consistent application of the Washington Constitution to every case in which it is raised, these criteria are appropriate guides to interpretation of the state constitution. Integration of the *Gunwall* criteria with the primacy model will create a consistent and principled method of state constitutional analysis, ensuring that the power of Washington's constitution to protect its citizens will be preserved.

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