Washington Law Review

Volume 73 | Number 3

7-1-1998

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Recommended Citation
Kristiana L. Farris, Notes and Comments, *Seeley v. State: The Need for Definitional Balancing in Washington Substantive Due Process Law*, 73 Wash. L. Rev. 669 (1998).
Available at: https://digitalcommons.law.uw.edu/wlr/vol73/iss3/7

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SEELEY V. STATE: THE NEED FOR DEFINITIONAL BALANCING IN WASHINGTON SUBSTANTIVE DUE PROCESS LAW

Kristiana L. Farris

Abstract: Seeley v. State, concerning the medical use of marijuana, underscored yet again the fundamental tensions and flaws in federal substantive due process analysis. The U.S. Supreme Court has increasingly restricted the definition of fundamental rights, leaving many important interests exposed to the highly deferential rational relationship standard for state regulation. Under the bifurcated federal substantive due process test, the initial classification of an individual interest as fundamental or non-fundamental is highly outcome determinative, leading to contorted definitions of individual rights before the test for the validity of a regulation is even applied. Washington has generally followed federal constitutional law when analyzing due process issues. This Note argues that *Seeley v. State* presented the Supreme Court of Washington with an opportunity to depart finally from the flawed federal analysis and adopt a substantive due process test that is better gauged to the importance of the individual interest at stake. In conclusion, the Note proposes a definitional balancing test that accords varying levels of protection to different rights depending upon the importance of the individual interest.

Smoking marijuana was the only effective way for Ralph Seeley to ease the debilitating side-effects of his chemotherapy treatment. Nevertheless, in *Seeley v. State*, the Supreme Court of Washington affirmed the State's refusal to allow doctors to prescribe leaf marijuana, even for patients undergoing chemotherapy for terminal cancer.[1] The *Seeley* majority held that Mr. Seeley's interest was not a fundamental right, and following the federal constitutional analysis, applied the rational relationship test to Mr. Seeley's equal protection and substantive due process claims.[2] The majority found that the placement of marijuana on Schedule I of controlled substances[3] was rationally related to the state

1. 132 Wash. 2d 776, 814, 940 P.2d 604, 623 (1997).

2. *Id.*, 940 P.2d at 622–23. This Note focuses on the substantive due process claim.

3. Under the Washington Uniform Controlled Substances Act, which parallels the federal Comprehensive Drug Abuse Prevention and Control Act, Schedule I drugs are characterized by a (a) high potential for abuse; (b) lack of currently accepted medical use in treatment in the United States; and (c) lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812(b)(1) (1997); Wash. Rev. Code § 69.50.203 (1997). Schedule II drugs meet similar criteria, except they are deemed to have a currently-accepted medical use or a currently-accepted medical use with severe restriction. 21 U.S.C. § 812(b)(2) (1997); Wash. Rev. Code § 69.50.205 (1997). Schedule III, IV, and V substances have qualities similar to those on Schedule II, but have decreasing potential for abuse. 21 U.S.C. §§ 812(b)(3)–(5) (1997); Wash. Rev. Code §§ 69.50.209–.211 (1997). Schedule I substances are illegal under all circumstances except research. *Seeley*, 132

interests of preventing drug abuse and protecting the public from unproved medications.[4] In his dissent, Justice Sanders conceded the equal protection issue, but argued that the substantive due process claim should be analyzed under the balancing test used in land use regulation challenges, rather than under the rigid federal rational relationship test.[5] Applying a balancing approach, Justice Sanders would have held that the placement of marijuana on Schedule I of controlled substances violated Mr. Seeley's substantive due process rights.[6]

This Note argues that although the *Seeley* majority correctly applied Washington precedent in holding that Washington's substantive due process analysis is equivalent to the federal due process test, the federal substantive due process test is flawed. *Seeley v. State* posed an opportunity for Washington courts to depart from the federal substantive due process analysis and adopt a different test that would be more responsive to the importance of the individual interests at stake.

Part I of this Note outlines the U.S. Supreme Court's test for evaluating substantive due process challenges to state actions. Part II summarizes Washington's substantive due process law. Part III describes the background, holding, and Justice Sanders's dissent in *Seeley v. State*. Part IV explains why *Seeley* comports with Washington precedent and criticizes both the federal and Washington approaches to substantive due process. This Note suggests that Washington should adopt a definitional balancing test that weighs individual and state interests before defining a rule. Finally, Part V concludes that the Washington court would have found in favor of Mr. Seeley under a definitional balancing analysis.

I. SUBSTANTIVE DUE PROCESS IN THE FEDERAL COURTS

Washington v. Glucksberg,[7] the latest U.S. Supreme Court case to address substantive due process, reasserted the Court's commitment to the bifurcated fundamental rights analysis as the sole substantive due process test. In *Planned Parenthood v. Casey*,[8] *Cruzan v. Director of*

Wash. 2d at 782–83, 940 P.2d at 607. One can legally possess substances on Schedules II through V with a valid prescription. *Id.*

4. *Id.* at 813, 940 P.2d at 622.

5. *Id.* at 814–15, 819, 940 P.2d at 623, 625 (Sanders, J., dissenting).

6. *Id.* at 833–34, 940 P.2d at 632 (Sanders, J., dissenting).

7. 117 S. Ct. 2258 (1997).

8. 505 U.S. 833, 861 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)) ("Due process has not been reduced to any

Missouri Department of Health,[9] *Youngberg v. Romeo*,[10] and *Roe v. Wade*,[11] the Court explicitly incorporated the balancing of individual and state interests into the due process analysis.[12] However, when the Court revisited the substantive due process issue in *Glucksberg*, it rejected any balancing approach and reaffirmed a more restrictive definition of fundamental rights.[13]

A. The Due Process Clause and Its Bifurcated Analysis

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[14] Originally, the federal courts interpreted the Due Process Clause primarily as a restriction on governmental *procedures* used to deprive persons of life, liberty, and property.[15] By the 1890s, however, courts began reading a substantive component into the clause, requiring that these deprivations be supported by some legitimate

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formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.").

9. 497 U.S. 261, 279 (1990) (quoting Youngberg v. Romero, 457 U.S. 307, 321 (1982)) ("But determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'").

10. 457 U.S. 307, 321 (1982) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)) (in determining whether substantive right protected by Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society").

11. 410 U.S. 113, 154 (1973) (weighing woman's privacy interest in abortion against state interest in protecting life to determine at what point state interest becomes sufficient to constitute compelling interest).

12. These cases balance individual and state interests in determining whether there has been a substantive due process violation. This is unusual because the two-tiered rational relationship test, as it is normally used, does not incorporate a balancing of interests. Rather, strict scrutiny requires a showing of a *compelling* state interest to which the regulation is narrowly tailored, while rational relationship merely requires that there be *any* state interest to which a regulation is rationally related. Balancing interests makes the rational relationship test more protective of individual rights because it demands more than just a showing of a state interest—it requires the state interest to outweigh the individual interest.

13. Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997).

14. U.S. Const. amend. V; *see also* U.S. Const. amend. XIV, § 1 ("Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

15. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276–77 (1855) (construing Due Process Clause strictly in terms of fairness of proceedings).

justification.[16] The notion that courts may hold certain state actions unconstitutional, regardless of the validity of the procedures by which they are executed, is now firmly rooted in constitutional law.[17]

The Supreme Court has developed a bifurcated framework for substantive due process analysis.[18] If a regulation infringes on a fundamental right, the action is unconstitutional unless it passes the strict scrutiny test.[19] Conversely, if the state action affects a non-fundamental individual interest, regulation impairing that interest need only be rationally related to a legitimate state interest to withstand review.[20]

1. The Rational Relationship Test

Interests not considered fundamental are subjected to the rational relationship test.[21] This extremely deferential level of review very rarely leads to invalidation of state actions.[22] Under this test, government infringement of the interest need only be rationally related to a legitimate state interest in order to withstand review.[23] In finding a rationally related government interest, courts may consider any conceivable state of facts, including those not actually considered by the legislature.[24] Even "rational speculation unsupported by evidence or empirical data" satisfies the rational basis criteria.[25]

16. Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. Rev. 625, 626 (1992).

17. *Id.* This notion is referred to as "substantive due process," as opposed to "procedural due process."

18. One of the earliest uses of this substantive due process framework can be found in *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (finding that state ban on marine insurance policies issued by out-of-state companies violates substantive due process).

19. Roe v. Wade, 410 U.S. 113, 155 (1973).

20. Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997).

21. *Id.* at 2271–72.

22. *See* Galloway, *supra* note 16, at 645 ("[R]ationality review is usually a mere formality leading to the automatic conclusion that the government action is constitutional . . . .").

23. *Glucksberg*, 117 S. Ct. at 2271.

24. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 490–91 (1955).

25. FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

2. *The Strict Scrutiny Test*

When an interest is deemed a fundamental right, any state action directly impeding that right is subjected to the strict scrutiny test.[26] Under this test, the law must be narrowly tailored to serve a compelling state interest.[27] Statutes infringing on fundamental rights are given a strong presumption of unconstitutionality[28] and are often invalidated.[29]

B. *Determining Which Interests Are Fundamental*

In its most recent substantive due process case, *Washington v. Glucksberg*, the U.S. Supreme Court reaffirmed its narrow interpretation of fundamental rights.[30] Generally, fundamental rights are individual interests so important that any state action impeding those interests will receive the highest level of scrutiny. In defining which rights are fundamental, the Supreme Court has recently taken a narrow view. Noting that it has "always been reluctant to expand the concept of substantive due process,"[31] the Court restricted fundamental rights to those "which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[32] This represents a retreat from the previous three decades, during which the Court had articulated a broader view.[33]

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26. *Glucksberg*, 117 S. Ct. at 2268; Roe v. Wade, 410 U.S. 113, 155 (1973).

27. *Glucksberg*, 117 S. Ct. at 2268; *Roe*, 410 U.S. at 155.

28. *See* Galloway, *supra* note 16, at 638.

29. *See infra* notes 52–56 and accompanying text.

30. 117 S. Ct. 2258.

31. *Id.* at 2267 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

32. *Id.* at 2268 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

33. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154–55 (1973) (recognizing that right to physician-assisted abortion is within fundamental right of personal privacy); Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing marriage as fundamental right and invalidating statute prohibiting interracial marriage on equal protection grounds); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding that marital privacy is within zone of privacy that is fundamental right). Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), is a common source of reasoning for many of these expansions of rights. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 848–49 (1992); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 340–41 (1990); *Roe*, 410 U.S. at 169; *Griswold*, 381 U.S. at 484. In *Poe*, Justice Harlan explained that "it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather . . . a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions [of the Constitution]." 367 U.S. at 541–42 (Harlan, J., dissenting). But he carefully tied any implied rights to history and tradition. *Id.* at 542 (Harlan, J., dissenting) ("That tradition is a living thing. A decision of this Court

Recognized fundamental rights include marriage,[34] marital privacy,[35] use of contraception,[36] bodily integrity,[37] and abortion.[38] The Supreme Court has also declared that the individual interests in having children[39] and directing the education of one's children[40] are fundamental rights.

Most interests fail to rise to the level of fundamental rights. The Court has held that working,[41] running for political office,[42] obtaining welfare,[43] and receiving a public education[44] are not fundamental rights.[45] In controversial cases the Court has refused to grant fundamental right

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which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."); *see also* Anthony C. Cicia, *A Wolf In Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 Fordham L. Rev. 2241, 2247–48 (1996).

34. *See, e.g.*, *Loving*, 388 U.S. at 12.

35. *See, e.g.*, *Griswold*, 381 U.S. at 485–86.

36. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 452–53 (1972) (holding that Massachusetts law prohibiting non-married persons from obtaining contraceptives "conflicted with fundamental human rights").

37. *See, e.g.*, Rochin v. California, 342 U.S. 165, 169–70 (1952) (holding that forced stomach pumping of suspected narcotics dealer violated substantive due process).

38. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154–55 (1973) (legalizing abortion until fetal viability and whenever necessary to protect health of mother).

39. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541–42 (1942) (recognizing that fundamental rights were violated by forced sterilization of prisoner).

40. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (holding that Compulsory Education Act of 1922 unreasonably interferes with liberty of parents and guardians to direct upbringing and education of children); Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923) (invalidating state law prohibiting any language but English from being spoken in schools because there are "certain fundamental rights which must be respected").

41. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976) (recognizing no fundamental right to governmental employment).

42. *See* Clements v. Fashing, 457 U.S. 957, 963 (1982).

43. *See* Dandridge v. Williams, 397 U.S. 471, 486 (1970) (upholding Maryland regulation limiting family welfare benefits).

44. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37–38 (1973).

45. Debates continue among scholars regarding whether fundamental rights should be limited to those enumerated in the Constitution or could be expanded to embrace rights implied by more generalized conceptions of liberty. *See, e.g.*, David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 Harv. J. L. & Pub. Pol'y 795 (1996); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

status to privacy in homosexual relations[46] and the power to determine the time and manner of one's death.[47]

C. *The Classification of an Asserted Interest Often Determines the Outcome Under the Bifurcated Framework*

Under federal substantive due process analysis, the classification of an interest as fundamental or non-fundamental has proven to be critical to the outcome. When subjected to the rational basis test, state actions infringing upon non-fundamental individual interests are almost always affirmed. State actions upheld under rational basis review include statutes banning homosexual sodomy,[48] banning plastic nonreturnable milk containers,[49] and mandating that state police officers retire at the age of fifty.[50] State actions have been invalidated under rational basis review in very few cases.[51] Conversely, there are few cases in which the state regulation has been upheld under strict scrutiny analysis.[52] State actions that have been nullified include statutes forbidding interracial marriage,[53] use of contraception,[54] abortion,[55] and the teaching of modern

46. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (upholding state ban on homosexual sodomy).

47. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2274–75 (1997) (upholding state ban on physician-assisted suicide).

48. *See Bowers*, 478 U.S. at 196 (finding beliefs about morality of homosexuality served sufficient rational basis for law criminalizing sodomy even in privacy of home).

49. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981). Although *Clover Leaf* was an equal protection case, the Court applied a rational relationship test identical to that applied in substantive due process cases.

50. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). *Murgia* was also decided on equal protection grounds.

51. *See* Galloway, *supra* note 16, at 627. Few cases have invalidated legislation under rational basis review. *See, e.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 343–46 (1989) (holding that taxing property at 50% of its value violated equal protection); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 623–24 (1985) (holding that Vietnam veterans' tax exemption violated equal protection).

52. *See* Galloway, *supra* note 16, at 638 ("Government infringements of fundamental rights are normally subject to a strong presumption of unconstitutionality."). Very few cases uphold regulation subjected to strict scrutiny. *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 210–11 (1992) (upholding prohibition of campaigning within 100 feet of polling place entrance on election day against First Amendment free speech challenge); Webster v. Reproduction Health Servs., 492 U.S. 490, 521 (1989) (plurality opinion) (upholding state restriction on use of public employees and facilities for nontherapeutic abortions).

53. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (striking down statute on equal protection grounds).

languages other than English in public and private schools.[56] Thus, classification of interests as fundamental or non-fundamental is critical.

D. Deviations from the Bifurcated Test

The Supreme Court, recognizing that liberty cannot be shoehorned into discrete categories, suggested replacing or supplementing the two-tiered approach to due process with a balancing element in some cases.[57] Dissenting in *Poe v. Ullman,*[58] Justice Harlan proposed such balancing. His dissent was later cited with approval in *Griswold v. Connecticut*[59] and *Planned Parenthood v. Casey.*[60]

At times, courts have viewed the use of a balancing test as indicative of a future shift in due process analysis.[61] Any expectations that federal courts would commit to a more liberal balancing test were disappointed, however, when in *Washington v. Glucksberg*[62] the Supreme Court reversed *Compassion in Dying v. Washington,*[63] rejecting a "complex balancing of competing interests" as an element of due process

54. *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding marital privacy is within fundamental right of privacy).

55. *See* Roe v. Wade, 410 U.S. 113, 154–55 (1973).

56. *See* Meyer v. Nebraska, 262 U.S. 390, 401–02 (1923).

57. *See* Planned Parenthood v. Casey, 505 U.S. 833, 849–50, 876 (1992) (citing with approval Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) advocating balance between individual liberty and state interest, then outlining rule that state may not place undue burden on woman's ability to obtain abortion); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 279 (1990) (citing Youngberg v. Romeo, 457 U.S. 307, 321 (1982), for substantive due process test "whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests"); Roe v. Wade, 410 U.S. 113, 154 (1973) (balancing individual liberty interest against state interest before determining when state's interest becomes sufficiently compelling to overcome strict scrutiny).

58. 367 U.S. at 542–43 (Harlan, J., dissenting).

59. 381 U.S. at 484 (citing *Poe*, 367 U.S. at 516–22 (Harlan, J., dissenting), for the proposition that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

60. 505 U.S. at 850 (citing *Poe*, 367 U.S. at 542 (Harlan, J., dissenting), for the proposition that due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society").

61. *See, e.g.*, Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996) (viewing *Casey* and *Cruzan* as signaling turn toward more liberal balancing test for substantive due process).

62. 117 S. Ct. 2258 (1997).

63. 79 F.3d 790.

analysis.[64] The Court reaffirmed the use of the bifurcated fundamental rights based test and committed itself to a more restrictive approach to categorizing asserted interests as fundamental.[65]

II. SUBSTANTIVE DUE PROCESS IN WASHINGTON

Washington generally has followed the federal bifurcated substantive due process analysis.[66] However, the courts have departed occasionally from the federal law.

In challenges to land use regulation, Washington courts have deviated from the federal substantive due process law by applying a test for substantive due process challenges that has been abandoned by the federal courts.[67] The *Lawton v. Steele*[68] test, as adopted by Washington

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64. Washington v. Glucksberg, 117 S. Ct. 2258, 2268 n.17 (1997) ("[A]lthough Justice Harlan's opinion has often been cited in due-process cases, we have never abandoned our fundamental-rights-based analytical method.... True, the Court relied on Justice Harlan's dissent in *Casey*... but... we did not in so doing jettison our established approach.").

65. *Id.*

66. *See, e.g.*, State v. Manusier, 129 Wash. 2d 652, 679–82, 921 P.2d 473, 486–88 (1996) (rejecting substantive and procedural due process challenges to "three strikes law"). For cases citing federal precedent, see, for example, Westerman v. Cary, 125 Wash. 2d 277, 293, 892 P.2d 1067, 1076 (1994); State v. Wheeler, 95 Wash. 2d 799, 803–04, 631 P.2d 376, 379 (1981). For cases employing strict scrutiny or rational basis tests, see, for example, *In re* Dependency of C.B., 79 Wash. App. 686, 689–90, 904 P.2d 1171, 1174 (1995); State v. Luther, 65 Wash. App. 424, 427–28, 830 P.2d 674, 675–76 (1992); and City of Seattle v. Larkin, 10 Wash. App. 205, 208, 516 P.2d 1083, 1085 (1973).

67. *See, e.g.*, Rivett v. City of Tacoma, 123 Wash. 2d 573, 581, 585, 870 P.2d 299, 303, 305 (1994) (holding that city ordinance imposing liability upon abutting property owners for condition of sidewalks and indemnifying city for judgments arising out of negligent maintenance of sidewalks violated due process clause of State Constitution); Guimont v. Clarke, 121 Wash. 2d 586, 608–09, 614, 854 P.2d 1, 13–14, 16–17 (1993) (invalidating statute requiring landowners to provide monetary assistance for tenant relocation costs); Presbytery of Seattle v. King County, 114 Wash. 2d 320, 330–31, 338–40, 787 P.2d 907, 912–13, 917–18 (1990) (refusing to invalidate land use regulation prohibiting development of portion of undivided parcel of real property); Orion Corp. v. State, 109 Wash. 2d 621, 646–48, 673, 747 P.2d 1062, 1076–78, 1089 (1987) (upholding Shoreline Management Act and Skagit County Shoreline Management Master Program against wetlands owner challenge). The *Lawton* test, upon which these cases are based, has been effectively abandoned by the federal courts. *See infra* note 68.

68. 152 U.S. 133 (1894). This case pre-dates the U.S. Supreme Court's 1897 adoption of the bifurcated substantive due process test. *See supra* note 18 and accompanying text. The U.S. Supreme Court has only entertained one substantive due process challenge to land use regulations since *Lawton*: *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). In the federal courts, the *Lawton* test has not survived the rejection of the *Lochner* Era line of cases. Instead, the federal courts have analyzed challenges to land use regulations almost exclusively under a takings analysis. Paul J. Boudreaux, *The Quintessential Best Case for "Takings" Compensation—A Pragmatic Approach to*

courts, uses a three-pronged analysis. In determining whether a regulation violates due process, the court asks "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner."[69] The "unduly oppressive" inquiry lodges wide discretion in the court to contravene legislative prerogative and requires a balancing of the public interest against that of the land owner.[70] This test has resulted in the invalidation of several land use regulations.[71] Similarly, in free exercise of religion challenges to land use regulations, Washington courts have departed willingly from the federal analysis and foregone deferring to the legislature in favor of extending greater protection to individual interests.[72]

In addition to cases involving property, at least one Washington court of appeals has expressed general dissatisfaction with the bifurcated federal substantive due process analysis. In *City of Seattle v. McConahy*,[73] a Washington appellate court found the Ninth Circuit's

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Identifying the Elements of Land Use Regulations that Present the Best Case for Government Compensation, 34 San Diego L. Rev. 193, 224 (1997).

69. *Guimont*, 121 Wash. 2d at 609, 854 P.2d at 114. In a recent case, Justice Sanders, writing for the majority, applied an "arbitrary or irrational" test, finding that a land use action violated substantive due process. Mission Springs v. City of Spokane, 134 Wash. 2d 947, 970, 954 P.2d 250, 261 (1998). As Justice Talmadge noted in his dissent, this was an unexplained departure by the majority from the established three-part *Lawton* test for substantive due process challenges to land use regulations. *Id.* at 988–89, 954 P.2d at 270–71 (Talmadge, J., dissenting).

70. *Presbytery*, 114 Wash. 2d at 331, 787 P.2d at 913.

71. *See, e.g.*, *Guimont*, 121 Wash. 2d at 612–13, 854 P.2d at 16–17 (invalidating state law requiring mobile home park owners to contribute toward tenants' relocation costs as requiring owners to bear unfair portion of costs that society as whole should shoulder); Robinson v. City of Seattle, 119 Wash. 2d 34, 55, 830 P.2d 318, 331 (1992) (striking down city ordinance requiring land owners to provide relocation assistance to tenants displaced when low income housing demolished as unduly burdensome).

72. The U.S. Supreme Court has held that laws of general applicability burdening a religious practice do not violate the free exercise clause. Employment Div. v. Smith, 494 U.S. 872, 878–79 (1990). Washington courts, however, have on numerous occasions invalidated land use regulations on free exercise of religion grounds. *See, e.g.*, Munns v. Martin, 131 Wash. 2d 192, 209–10, 930 P.2d 318, 326 (1997) (striking down city demolition ordinance delaying construction of pastoral center); First United Methodist Church v. Hearing Exam'r, 129 Wash. 2d 238, 252, 916 P.2d 374, 381 (1996) (invalidating Landmarks Preservation Ordinance preventing church from selling property and using funds to further religious mission); First Covenant Church v. City of Seattle, 120 Wash. 2d 203, 223, 840 P.2d 174, 185 (1992) (striking designation of church as historic preservation landmark).

73. 86 Wash. App. 557, 937 P.2d 1133 (1997) (upholding Seattle ordinance prohibiting individuals from sitting on sidewalks in certain business districts).

balancing test in *Compassion in Dying v. Washington*[74] consistent with previous Washington substantive due process law, and observed that "it contributes a useful approach to due process analysis because it creates a more workable balance among the competing interests presented in cases like this one than does the traditional balancing test."[75] Three weeks later, however, the U.S. Supreme Court overruled *Compassion in Dying*.[76] The next due process case to arise in Washington was *Seeley v. State*.[77]

III. *SEELEY V. STATE*

A. Facts and Procedural History

Ralph Seeley, diagnosed with a rare and terminal form of bone cancer in 1986, endured many surgeries including the removal of his right lung and part of his left lung.[78] After trying numerous prescription drugs to curb the painful side effects of radiation therapy and chemotherapy, Mr. Seeley found that only one treatment effectively relieved him of his pain, nausea, and vomiting: smoking leaf marijuana.[79] Mr. Seeley's doctor testified that leaf marijuana provided the most effective therapy for Mr. Seeley's symptoms, and that he would have prescribed it for Mr. Seeley if he legally could have done so.[80]

In 1994, Mr. Seeley filed a pro se lawsuit against the State of Washington, requesting a declaratory judgment that the placement of marijuana on Schedule I of controlled substances was unconstitutional under article I, sections 12 and 32 of the Washington State Constitution.[81] Mr. Seeley also sought an order directing the board of pharmacy to reclassify marijuana so physicians could prescribe it for patients with a legitimate medical need.[82] The Pierce County Superior Court granted Mr. Seeley's motion for summary judgment, declaring that

74. 79 F.3d 790, 816 (9th Cir. 1996).

75. *McConahy*, 86 Wash. App. at 565, 937 P.2d at 1138, The court failed to define the "traditional balancing test" for substantive due process in Washington, but implied that a balancing of interests has always been appropriate in substantive due process analysis.

76. Washington v. Glucksberg, 117 S. Ct. 2258, 2275 (1997).

77. 132 Wash. 2d 776, 940 P.2d 604 (1997).

78. *Id.* at 781, 940 P.2d at 606.

79. *Id.* at 782, 940 P.2d at 607.

80. *Id.* at 801, 940 P.2d at 617.

81. *Id.* at 785, 940 P.2d at 608.

82. *Id.*

the placement of marijuana on Schedule I violated his rights and liberties as protected by the Washington State Constitution.[83] The State of Washington directly appealed from this judgment, and the Supreme Court of Washington granted review.[84]

B. Holding and Analysis

The Supreme Court of Washington, in an eight-to-one opinion, reversed the superior court and upheld the placement of marijuana on Schedule I.[85] The *Seeley* majority analyzed the case primarily under the Washington Equal protection clause.[86] The court noted, however, that "under both an equal protection and a due process challenge the analysis and the result are the same."[87]

1. The Right to Use Marijuana Is Not Fundamental

Citing cases addressing recreational, rather than medicinal use of marijuana, the *Seeley* majority concluded that "the right to smoke marijuana" is not fundamental.[88] The majority also determined that although refusal of treatment is a protected right, "[t]he selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health."[89] After deciding that

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83. *Id.*; *see* Wash. Const. art. I, §§ 12, 32.

84. *Seeley*, 132 Wash. 2d at 785, 940 P.2d at 608–09.

85. *Id.* at 814, 940 P.2d at 623.

86. *Id.* at 808 n.20, 940 P.2d at 619–20 n.20; *see* Wash. Const. art. I, § 32.

87. *Id.* (citing NORML v. Bell, 488 F. Supp. 123, 134 (D.D.C. 1980)).

88. *Id.* at 792, 940 P.2d at 612 (citing State v. Smith, 93 Wash. 2d 329, 610 P.2d 869 (1980) (involving possession of more than 40 grams of marijuana)). Every case the majority cites in support of the proposition that "the right to smoke marijuana" is not fundamental involved *recreational* use of marijuana or possession of marijuana with intent to sell. None of the cases cited address directly *medicinal* use. The court cites *Bell*, 488 F. Supp. at 143 (refusing to adopt proposal invalidating Controlled Substances Act and advocating that marijuana be available for any purpose); State v. Anonymous, 355 A.2d 729, 731, 742 (Conn. 1976) (holding that, although possession of marijuana is not fundamental, classification of marijuana with dangerous psychoactive drugs amphetamines and barbiturates for penalty purposes is irrational and thus violative of equal protection); Kreisher v. State, 319 A.2d 31, 33 (Del. Super. Ct. 1974) (upholding conviction for possession and sale of marijuana and hashish); Commonwealth v. Leis, 243 N.E.2d 898, 906 (Mass. 1969) (upholding conviction for possession of marijuana and for conspiracy to violate Narcotic Drugs Act); and People v. Alexander, 223 N.W.2d 750, 752–53 (Mich. Ct. App. 1974) (upholding conviction for unlawful delivery of marijuana).

89. *Seeley*, 132 Wash. 2d at 792, 940 P.2d at 612 (quoting Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1979)) (upholding federal prevention of laetrile use by cancer patients).

Mr. Seeley's interest in accessing medicinal marijuana did not constitute a fundamental right, the majority applied the rational basis test.[90]

2. *Rational Basis Test in Equal Protection*

While substantive due process jurisprudence deals with state infringement on individual rights, the principle of equal protection concerns government classification of citizens for differential treatment. Both bodies of law employ a form of rational basis review. Under the equal protection rational basis test, "the legislation will be upheld unless the classification rests on grounds wholly irrelevant to the achievement of a legitimate state objective."[91] The *Seeley* majority held that:

> The party challenging the legislation 'must show, beyond a reasonable doubt, that no state of facts exists or can be conceived sufficient to justify the challenged classification, or that the facts have so far changed as to render the classification arbitrary and obsolete.'[92]

As in rational basis due process analysis, the state action survives if it can be justified by the thinnest thread of a legitimate state interest.

The State asserted a dual interest in controlling potential drug abuse and assuring efficacy and safety in medicines,[93] which the majority assumed to be legitimate.[94] Noting that other narcotics, such as cocaine, morphine, and methamphetamines, are omitted from Schedule I and can be prescribed by physicians,[95] the court found dispositive the fact that marijuana had not been similarly approved for medical use, but that a synthesized form of THC[96] in pill form was available.[97] While declining to decide whether marijuana possesses medicinal value, the court concluded that Mr. Seeley "ha[d] not shown that the legislative treatment

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90. *Id.* at 795, 940 P.2d at 613.

91. *Id.*

92. *Id.* at 795–96, 940 P.2d at 613–14 (quoting *Smith*, 93 Wash. 2d at 337, 610 P.2d at 875).

93. *Id.* at 800, 940 P.2d at 616.

94. *Id.* at 805, 940 P.2d at 618.

95. *Id.* at 806, 940 P.2d at 619.

96. Delta-9-tetrahydrocannabinal (THC) is one of the principle active ingredients in marijuana. *Id.* at 782, 940 P.2d at 607.

97. *Id.* at 807, 940 P.2d at 619. The court did not explain how a chemotherapy patient who needs THC to control nausea and vomiting is expected to ingest a pill and keep it down long enough to stop the vomiting.

of marijuana [was] 'so unrelated' to the achievement of the legitimate purposes of the legislature" as to render the placement of marijuana on Schedule I unconstitutional.[98]

C. *Justice Sanders's Dissent*

In an impassioned dissent Justice Sanders asserted that equal protection was the wrong analytical framework to employ in *Seeley*. He argued that "the problem is how the government treats Mr. Seeley, not that Mr. Seeley is treated differently from others. Equalizing injustice does not cure it."[99] Justice Sanders rested his argument upon the Due Process Clause of the Fourteenth Amendment and its equivalent in the Washington State Constitution.[100] In making a due process argument, he rejected the majority's use of the rational relationship test in favor of the balancing test established in *Lawton v. Steele*.[101] Justice Sanders asserted that the *Lawton* analysis, as adopted by Washington in *Orion Corp. v. State*,[102] provided the appropriate federal test.[103]

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98. *Id.* at 805, 940 P.2d at 618. The federal judiciary has not directly decided a substantive due process challenge to a prohibition on medicinal marijuana. Federal courts have considered rescheduling marijuana to Schedule II, but these cases have been decided on statutory, rather than constitutional grounds. *See* Alliance for Cannabis Therapeutics v. DEA, 15 F.3d 1131 (D.C. Cir. 1994); NORML v. DEA, 559 F.2d 735 (D.C. Cir. 1977). Cases raising constitutional issues, such as privacy and free exercise of religion, have involved claims that marijuana should be made available for all uses, including recreation. *See* Olsen v. DEA, 878 F.2d 1458 (D.C. Cir. 1989); NORML v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); NORML v. Bell, 488 F. Supp. 123 (D.D.C. 1980).

99. *Seeley*, 132 Wash. 2d at 815, 940 P.2d at 623 (Sanders, J., dissenting).

100. *Id.* The ACLU raised the due process argument in its amicus brief. Citing *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996), the ACLU argued that the classification of marijuana on Schedule I was a violation of substantive due process right to privacy because the individual interest outweighed the state interest in regulating the substance. Amicus Brief of the American Civil Liberties Union of Washington Foundation at 12, Seeley v. State, 132 Wash. 2d 776, 940 P.2d 604 (1997) (No. 63534-0). The State of Washington responded that there was no privacy interest in access to marijuana and that the classification of marijuana on Schedule I furthered legitimate State interests. *See* State of Washington's Answer to American Civil Liberties Union Amicus Brief at 8, 12, Seeley v. State, 132 Wash. 2d 776, 940 P.2d 604 (1997) (No. 63534-0). In stating that the court need not address issues raised solely by an amicus brief unless necessary to reach a proper decision, the court implied that if it had found the due process issue necessary to the decision, it would have addressed the issue. *See Seeley*, 132 Wash. 2d at 808 n.20, 940 P.2d at 619 n.20.

101. 152 U.S. 133, 137 (1894); *Seeley*, 132 Wash. 2d at 818, 940 P.2d at 625 (Sanders, J., dissenting); *see supra* notes 67–69 and accompanying text.

102. 109 Wash. 2d 621, 646–47, 747 P.2d 1062, 1076 (1987); *see also* Rivett v. City of Tacoma, 123 Wash. 2d 573, 870 P.2d 299 (1994); Presbytery of Seattle v. King County, 114 Wash. 2d 320, 787 P.2d 907 (1990).

103. *Seeley*, 132 Wash. 2d at 819, 940 P.2d at 625 (Sanders, J., dissenting).

Under the first prong of the *Lawton/Orion* test—whether the legislation advances a legitimate public purpose[104]—Justice Sanders found the state interest in absolutely criminalizing marijuana relatively minimal.[105] According to the dissent, any state interest in "discouraging drug abuse and otherwise protecting the citizenry from itself by curtailing what it alleges to be the unknown consequences associated with the inhalation of marijuana" is not particularly strong in the context of terminally ill patients.[106]

Following the second *Lawton/Orion* prong—whether the means are reasonably necessary to accomplish the state purpose[107]—the dissent characterized the State's total and absolute prohibition of marijuana as excessive and overly broad.[108] In light of the fact that other narcotics are available through medical prescription, Justice Sanders found the placement of marijuana on Schedule I anomalous.[109] He concluded that the availability of leaf marijuana by prescription would represent a better tailored method by which "the government could accomplish some of its alleged objectives while making the substance available to those with a particular medical need."[110]

Under the third *Lawton/Orion* prong—whether the regulation is unduly burdensome[111]—Justice Sanders found Mr. Seeley's interest in obtaining palliative relief, like a woman's interest in *Roe v. Wade*[112] and *Planned Parenthood v. Casey*,[113] to be deeply personal and individual, implicating notions of personal autonomy and bodily integrity.[114] Balancing these vital interests in one's own body against a rather

104. *Orion*, 109 Wash. 2d at 646–47, 870 P.2d at 1076.

105. *Seeley*, 132 Wash. 2d at 820–21, 940 P.2d at 626 (Sanders, J., dissenting) ("[I]f the state's interest to regulate abortion in the context of *Casey* and *Roe* is insufficient, the State's asserted interest to criminalize Mr. Seeley's ingestion of marijuana to ease the effects of nausea is even less so.").

106. *Id.* at 817, 940 P.2d at 624 (Sanders, J., dissenting).

107. *Orion*, 109 Wash. 2d at 646–47, 870 P.2d at 1076.

108. *Seeley*, 132 Wash. 2d at 825, 940 P.2d at 628–29 (Sanders, J., dissenting).

109. *Id.* at 825–26, 940 P.2d at 628–29 (Sanders, J., dissenting).

110. *Id.* at 827, 940 P.2d at 629 (Sanders, J., dissenting). Justice Sanders noted that his decision here does not preclude the possibility that availability only through prescription may not be sufficient to overcome the objections raised about the existence of a legitimate state interest raised under the first prong of the *Lawton/Orion* test. *Id.*

111. *Orion*, 109 Wash. 2d at 646–47, 870 P.2d at 1076.

112. 410 U.S. 113 (1973).

113. 505 U.S. 833 (1992).

114. *Seeley*, 132 Wash. 2d at 821–22, 940 P.2d at 626–27 (Sanders, J., dissenting).

nebulous state interest, Justice Sanders found Mr. Seeley's interest much weightier.[115] He concluded that forcing Mr. Seeley to endure the nausea and pain of chemotherapy without the palliative relief of leaf marijuana was unduly oppressive.[116]

Justice Sanders criticized the majority's use of the rational relationship test's "extremely deferential standard."[117] As he noted, "strict scrutiny is virtually impossible to pass while rational basis is virtually impossible to fail."[118] The bifurcated classification analysis used by the majority was problematic because it failed to recognize that liberty interests lie on a continuum.[119] The dissent argued that the burden should shift to the government to justify government intervention, rather than to individuals to demonstrate why they should be free from excessive regulation.[120]

IV. THE *SEELEY* MAJORITY SHOULD HAVE ADOPTED A DEFINITIONAL BALANCING TEST

The *Seeley* majority correctly followed Washington substantive due process precedent; nonetheless, Washington courts remain free at any point to detach their due process analysis under the Washington Constitution from the federal test. The bifurcated federal test to which Washington has traditionally tied its substantive due process law has several fundamental flaws. *Seeley v. State* posed an opportunity for the Supreme Court of Washington to depart from the federal bifurcated analysis and adopt a test that affords protection from regulation more proportional to the importance of the individual interest.

A. The Majority Correctly Followed Washington Precedent

The dissent incorrectly asserted that the *Lawton* test is the appropriate federal due process analysis. *Lawton v. Steele* was decided before the U.S. Supreme Court adopted the bifurcated strict scrutiny/rational relationship test. The Court has effectively abandoned *Lawton* and any

115. *Id.* at 819–20, 940 P.2d at 624–25 (Sanders, J., dissenting).

116. *Id.* at 827, 940 P.2d at 629 (Sanders, J., dissenting).

117. *Id.* at 828, 940 P.2d at 630 (Sanders, J., dissenting).

118. *Id.* at 829, 940 P.2d at 630 (Sanders, J., dissenting).

119. *Id.* (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

120. *Id.* at 830, 940 P.2d at 630 (Sanders, J., dissenting).

application of substantive due process to land use regulations.[121] If Washington courts follow federal precedent, then under *Washington v. Glucksberg*, the bifurcated test remains the proper analysis.[122] If one accepts that Washington's approach does and should mimic the federal substantive due process analysis, then the majority correctly found against Mr. Seeley.

B. Washington is Free to Depart From the Federal Analysis

Under federal law, a state has the "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."[123] The Washington due process clause and its federal equivalent have virtually identical wording. Article 1, section 3 of the Washington State Constitution reads, "[n]o person shall be deprived of life, liberty, or property, without due process of law."[124] Although no significant textual difference exists between the federal and state due process clauses, this alone does not bar a different interpretation of the protections afforded under these provisions.[125]

Washington courts use an analytic framework to evaluate whether it is permissible to deviate from the federal constitutional analysis and afford greater protection under the Washington constitution.[126] Referred to as the *Gunwall* test, this analysis consists of six non-exclusive factors that may be considered: (1) textual language; (2) differences in the texts; (3) constitutional history; (4) pre-existing state law; (5) structural

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121. *See supra* note 68.

122. *Supra* note 7 and accompanying text.

123. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 75 (1980).

124. Wash. Const. art I, § 3. For the equivalent federal provision, see *supra* note 14 and accompanying text.

125. City of Seattle v. Duncan, 44 Wash. App. 735, 743, 723 P.2d 1156, 1160 (1986). In addition, the proposition that similarity in words equates to similarity in meaning, thus mandating deference to the federal interpretation, rests upon two weak assumptions: the U.S. Supreme Court has arrived at a definitive meaning of the constitutional provisions, and the U.S. Supreme Court never errs in arriving at this meaning. *See* G. Alan Tarr, *Understanding State Constitutions*, 65 Temp. L. Rev. 1169 (1992) (criticizing "artificial cannon of construction that identical language in two instruments should be read identically" and concluding that state courts interpreting identical constitutional provisions must first determine whether Supreme Court has arrived at true meaning of constitutional provision, only following Court's interpretation when they conclude it is correct); *id.* at 1191–92 (quoting David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 Tex. L. Rev. 1051, 1063 (1985)).

126. State v. Gunwall, 106 Wash. 2d 54, 62–63, 720 P.2d 808, 813 (1986).

differences; and (6) matters of particular state or local concern.[127] Using this test, the *Seeley* majority could have departed from the federal substantive due process analysis.

Although the first factor—textual language—is identical in the two constitutions,[128] the other *Gunwall* factors support more extensive due process protections under the state constitution. Under the second *Gunwall* factor, even when the due process clauses of the state and federal constitutions are identically worded, other relevant provisions of the state constitution may indicate that the state constitution should be interpreted differently.[129] Several sections in the Washington Constitution directly cite individual rights and privacy as interests that must be protected by the state constitution.[130] This suggests broader protection for the interests asserted in substantive due process cases. The first section of the Washington Constitution states that "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."[131] No equivalent federal provision exists, although the Ninth Amendment does contain some similar language.[132] In addition, article I, section 7 of the Washington Constitution explicitly protects individual privacy interests, providing that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[133] The language in this provision has led Washington courts to hold that Washington more stringently protects individuals from search and seizure than does the parallel Fourth Amendment of the U.S. Constitution.[134] This explicit focus on protecting individual rights in the

127. *Id.* at 58, 720 P.2d at 811.

128. *See supra* notes 14 and 124 and accompanying text.

129. *Gunwall*, 106 Wash. 2d at 61, 720 P.2d at 812.

130. *See* Wash. Const. art I, §§ 1, 7.

131. Wash. Const. art I, § 1. In fact, the title of the first article in the Washington State Constitution is "Declaration of Rights." Wash. Const. art I.

132. *See* U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). It should be noted, however, that although this provision in the Washington Constitution has a place of particular prominence in the document, the Washington Supreme Court has been reluctant on at least one occasion to grant any independent substantive relief under this provision alone. *See, e.g.*, State v. Crediford, 130 Wash. 2d 747, 751–52, 927 P.2d 1129, 1131 (1996) (refusing to invalidate drunk driving statute on premise that it exceeds police power and thus violates article I, section 1 of Washington State Constitution).

133. Wash. Const. art I, § 7.

134. *See, e.g.*, State v. Hendrickson, 129 Wash. 2d 61, 76, 917 P.2d 563, 570–71 (1996) (finding warrantless search of defendant's truck after initial inventory search unconstitutional); City of Seattle

Washington Constitution warrants a broader reading of the state's due process clause because the touchstone of due process is protecting individuals against arbitrary government actions.[135]

The third and fourth factors—state constitutional and common law history and pre-existing state law[136]—are not particularly enlightening in the due process area. In drafting article I, section 3 of the Washington Constitution, the convention simply mimicked the language in the U.S. and Oregon Constitutions without serious debate or discussion.[137] Notably, the Fourteenth Amendment to the U.S. Constitution represents a federal restriction on the plenary powers of the states.[138] States reinforce this protection of individual rights when they enact parallel provisions in their own constitutions. Early Washington cases are ambiguous, describing individual liberties broadly and restricting permissible state intervention, but occasionally also mimicking much of the U.S. Supreme Court's early deference to the legislature.[139]

Under the fifth factor—structural differences between the U.S. Constitution and state constitution[140]—one considers that the U.S. Constitution grants enumerated powers, whereas the state constitution limits the otherwise plenary power of the state.[141] This factor will always favor an independent state interpretation.[142]

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v. McCready, 123 Wash. 2d 260, 281–82, 868 P.2d 134, 145 (1994) (finding warrants authorizing inspection of buildings for code violations pursuant to city's proactive enforcement program invalid as unconstitutional searches); *see also* 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.").

135. *See* Dent v. West Virginia, 129 U.S. 114, 123 (1889).

136. *Id.*

137. *See Journal of Washington State Constitutional Convention 1889*, 495–96 (B. Rosenow ed. 1962); *see also* Arthur S. Beardsley, *Notes on the Sources of the Constitution of State of Washington, 1889–1939*, University of Washington School of Law (1939).

138. Shelley v. Kraemer, 334 U.S. 1, 19–20 (1948).

139. *Compare* Karasek v. Peier, 22 Wash. 419, 425–26, 61 P. 33, 36 (1900) (holding that police power to regulate land is limited to nuisance prevention), *and* State v. Carey, 4 Wash. 424, 428, 30 P. 729, 730 (1892) (noting general rule that "all the personal liberty possibly consistent with the general welfare is conceded to the individual"), *with* Territory v. Ah Lim, 1 Wash. 156, 158–59, 24 P. 588, 588 (1890) (adopting Justice Marshall's proposition in Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), that courts should be highly cautious in invalidating legislation).

140. *Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 812.

141. Seeley v. State, 132 Wash. 2d 776, 789–90, 940 P.2d 610, 611 (1997).

142. *Id.*

The sixth criteria—matters of particular state interest or local concern[143]—supports an argument for adopting a new substantive due process test. The regulation of health and safety matters is primarily and historically a matter of local concern.[144] Individual interests related to those issues should be protected by a state due process analysis that responds to these local concerns. In addition, states can and should provide more protection of individual rights than the baseline protection the federal Constitution affords.[145]

Assessing the *Gunwall* test as a whole, sufficient justification exists for Washington courts to depart from the federal substantive due process analysis and adopt an independent test under the Washington Constitution. The overall textual and structural differences between the U.S. and Washington State Constitutions strongly favor an independent interpretation of the Washington due process clause.

C. *Washington Should Create an Independent Analysis Because the Federal Substantive Due Process Test Has Fundamental Flaws*

The federal substantive due process test is fundamentally flawed in several ways. First, because the strict scrutiny and rational relationship tests are at opposite ends of the spectrum of review, the preliminary characterization of an interest as fundamental or not fundamental is crucial. Second, because this categorization is so critical, the description of the asserted interest gets manipulated to justify fitting the interest into the desired category. Third, in light of the Supreme Court's restrictive view of fundamental rights, many important interests receive the rational relationship test's minimal protection.

1. *Strict Scrutiny Is Too Stringent, but Rational Relation Is Too Deferential*

A disconcerting problem with the two-tiered federal test for substantive due process violations is that it is not really a "test" at all. Whether an individual interest is categorized as fundamental or non-

143. *Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 812.

144. *See* Hillsborough County, Fla. v. Automated Med. Lab., Inc., 471 U.S. 707, 718 (1985) (holding that federal regulations governing collection of blood plasma from paid donors did not preempt local ordinances).

145. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 504 (1977).

fundamental decides the result.[146] The rational relationship test consists of "minimal scrutiny in theory and virtually none in fact."[147] Because of its highly deferential quality, rational review has been dubbed the "hands off" test.[148] Meanwhile, strict scrutiny is difficult to overcome.[149] Such a categorical approach eliminates all but the most cursory judicial consideration of the important state and individual interests at stake. In most cases, the "fundamental/non-fundamental" categorization determines the result before these interests are even examined.

2. *The Two-Tiered Test Creates an Artificial and Contorted Definition of Rights*

Because the success or failure of a substantive due process claim hinges almost entirely upon the initial categorization of an asserted right as fundamental or not, the definition of those rights is contorted to justify placing the asserted interest into one category or the other. *Seeley v. State*[150] exemplifies this phenomenon. Essentially, Mr. Seeley requested that marijuana be placed on Schedule II of controlled substances so that patients, particularly those with terminal cancer, may be prescribed leaf marijuana by their doctors in order to alleviate some of the debilitating side effects of chemotherapy. The majority, however, defined Mr. Seeley's interest as "the right to smoke marijuana,"[151] thus encompassing recreational as well as medicinal use.[152] The court may have employed this loose analysis to minimize Mr. Seeley's asserted interest and justify application of the rational relation standard.

The dissent described Mr. Seeley's interest on a more abstract ideological level. In Justice Sanders's view, Mr. Seeley asserted "personal concerns of bodily autonomy coupled with a personal desire to

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146. *See supra* Part I.C.

147. Galloway, *supra* note 16, at 645 (citing Gerald Gunther, Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972)).

148. *See id.* (citing Gerald Gunther, *Constitutional Law*, 583, 462 (1991)); *see also* Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 Temp. L. Rev. 1247, 1259 (1960).

149. *See supra* Part I.A.2.

150. 132 Wash. 2d 776, 940 P.2d 604 (1997).

151. *Id.* at 792, 940 P.2d at 612.

152. *See supra* note 88.

mitigate if not alleviate needless physical suffering,"[153] and an "interest to inhale or ingest any substance to relieve his agony."[154] The disparity between how the majority and dissent defined Mr. Seeley's interest demonstrates the inherent tension that arises when the categorization of an interest is so pivotal to the outcome of a substantive due process challenge.[155]

The definitional problem arising in substantive due process jurisprudence is a product of forcing liberty interests into two arbitrary categories. Such important interests as determining the time and manner of one's death or gaining palliative relief from one's suffering do not fit neatly into the two simple categories of fundamental and non-fundamental rights. Instead, such interests lie along a continuum, and a due process analysis designed to protect this variety of interests must be responsive to this range of personal rights.

3. *The Current Test Fails to Ensure Fairness and Protection of the Individual From Overbroad State Regulation*

Because under the deferential rational relationship test courts rarely protect individual rights from state infringement, substantive due process is virtually meaningless for any right not deemed "fundamental." With the recent backlash against expansive views of fundamental rights,[156] many important, but not "fundamental," liberty interests lack Fourteenth Amendment protection. These interests fall through the chasm between "the virtual rubber-stamp of truly minimal review" and "the virtual death-blow of truly strict scrutiny."[157]

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153. *Seeley*, 132 Wash. 2d at 822–23, 940 P.2d at 627 (Sanders, J., dissenting).

154. *Id.* at 831, 940 P.2d at 631 (Sanders, J., dissenting).

155. Bowers v. Hardwick, 478 U.S. 186 (1986), provides another example. The U.S. Supreme Court described the proposed interest at issue in *Bowers* as the "right to engage in homosexual sodomy." *Id.* at 191. A strong dissent, however, characterized the asserted interests as "the most comprehensive of rights and the right most valued by civilized man, namely the right to be left alone." *Id.* at 199 (Blackmun, J., dissenting).

156. *See supra* notes 30–33 and accompanying text.

157. Laurence H. Tribe, *American Constitutional Law* 1089 (1st ed. 1978) ("[T]he all-or-nothing choice between minimum rationality and strict scrutiny ill-suits the broad range of situations arising under the equal protection clause, many of which are best dealt with neither through the virtual rubber-stamp of truly minimal review nor through the virtual death-blow of truly strict scrutiny, but through methods more sensitive to the risks of injustice than the former and yet less blind to the needs of government flexibility than the latter.").

The current bifurcated due process analysis effectively denies protection to such important interests as maintaining privacy in sexual relations,[158] determining the time and manner of one's death,[159] and acquiring palliative relief for the debilitating side effects of chemotherapy.[160] When courts have subjected these important interests to the rational relationship test, any armor against state interference has disappeared.[161]

The right to receive the most effective treatment for the side-effects of chemotherapy cannot be discounted as an insignificant interest. Mr. Seeley's interest touches upon issues of privacy similar to those described in *Casey* as "a person's most basic decisions about . . . bodily integrity."[162] Even federal courts have acknowledged the importance of this type of interest. Critical to the Court in *Roe* and *Casey* was the fact that the abortion decision had profound and deeply personal consequences for the woman's life.[163] Mr. Seeley's personal suffering consumed his daily life and perhaps had more profound and immediate effects than even a woman's decision to abort a pregnancy. Furthermore, Justice O'Connor concurred with the majority in *Glucksberg* in part because she believed that terminally ill patients had a right to receive palliative relief from their suffering "even when doing so would hasten their deaths."[164]

Courts often cite deference to the legislature as a reason for not protecting these interests.[165] There is no logical reason for this deference in Washington with regard to such personal matters as obtaining

158. *See Bowers*, 478 U.S. 186.

159. *See* Washington v. Glucksberg, 117 S. Ct. 2258 (1997).

160. *See* Seeley v. State, 132 Wash. 2d 776, 940 P.2d 604 (1997).

161. *Glucksberg*, 117 S. Ct. 2258.

162. Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992).

163. *Id.* at 851; Roe v. Wade, 410 U.S. 113, 153 (1973).

164. 117 S. Ct. at 2303 (O'Connor, J., concurring) ("In sum, there is no need to address the question whether suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives. There is no dispute that dying patients in Washington and New York can obtain palliative care, even when doing so would hasten their deaths.").

165. *See, e.g.*, Sintra, Inc. v. City of Seattle, 131 Wash. 2d 640, 689 n.35, 935 P.2d 555, 580 n.35 (1997) (Talmadge, J., concurring in part, dissenting in part) (citing Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 534, 520 P.2d 162, 169 (1974)) ("This unfortunate history of the due process clause in the United States Supreme Court presents to this court a sobering lesson in the necessity for judicial deference to the legislature in the exercise of its police power to accomplish economic regulation.").

palliative relief when Washington courts are so much more willing to question legislative prerogatives in areas such as land use regulation.[166] The disparity of judicial treatment between property interests and personal privacy interests is unjustifiable.

D. Washington Should Adopt a Definitional Balancing Test

Washington should adopt a test that provides protection more sensitive to the importance of the individual interest asserted. This goal could be met by using a definitional balancing test in which courts analyze substantive due process issues by first identifying the state and individual interests implicated by the case, and then construing a rule of general applicability that either explicitly or implicitly assigns weight or value to the competing interests.[167] This methodology was used in *Roe v. Wade*.[168] In that case, the U.S. Supreme Court weighed the competing state and individual interests implicated in the regulation of abortion.[169] After balancing these interests, the court developed a general rule to be applied to all future cases raising similar issues of state impediment of access to abortion.[170]

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166. *See supra* notes 67–71 and accompanying text. It is true that property is an enumerated right in the text of the Constitution. Stepping away from a formalist perspective, however, it seems that a person's interest in his or her own body should be even more vital, and receive even greater protection, than his or her interest in land.

167. Balancing has been suggested in a line of cases stemming from Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). Justice Marshall also suggested a sliding scale approach in an equal protection context. Rather than forcing rights into discrete categories, Justice Marshall would concentrate on the relative importance of the interest to the individual versus the asserted state interest. *See* Crump, *supra* note 45, at 911 (citing Thomas C. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 1–2 (1984)). In fact, Crump suggests that in many cases, the U.S. Supreme Court really has been balancing individual and state interests all along. *Id.* at 911–12.

168. 410 U.S. 113, 153 (1973).

169. *Id.* at 153–54.

170. The rule generated in *Roe* states:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

For guidance in balancing the relevant interests, the court should look to the factors employed by the Ninth Circuit in *Compassion in Dying*[171] and later adopted by a Washington court of appeals in *City of Seattle v. McConahy*.[172] These include (1) the importance of the various state interests, both in general and in the factual context of the case; (2) the manner in which those interests are furthered by the state law or regulation; (3) the importance of the liberty interest both in itself and in the context in which it is being exercised; (4) the extent to which that interest is burdened by the challenged state action; and (5) the consequences of upholding or overturning the statute or regulation.[173]

Acceptance of a balancing test does not necessarily mean a return to the *Lochner* era of excessive judicial invalidation of legislative acts.[174] *McConahy* was the first Washington case to employ the balancing test from *Compassion in Dying*. *McConahy*, a challenge to the Seattle ordinance forbidding sitting on a sidewalk, involved assertions of significant rights to autonomy and freedom of movement.[175] The court, however, upheld the ordinance as constitutional even under a balancing test.[176] A balancing test when properly employed is self-limiting; state regulations would only be invalidated when the government interest is outweighed by the individual liberty interest. Given the substantial state interests in public health, safety, and welfare, this balancing would often favor the state and certainly would not result in a sudden flood of invalidation.[177]

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164–65.

171. 79 F.3d 790 (9th Cir. 1996).

172. 86 Wash. App. 557, 565, 937 P.2d 1133, 1138 (1997).

173. *Compassion in Dying*, 79 F.3d at 816.

174. *See supra* Part I.C.

175. 86 Wash. at 564, 566, 937 P.2d at 1138, 1139.

176. *Id.* at 567, 937 P.2d at 1139.

177. Of course, this new test does not threaten to require previously protected rights, such as a woman's right to access abortion, to re-establish themselves under the new test. Rights protected under the federal constitution would continue to be a floor below which state protection could not fall. *See* Mills v. Rogers, 457 U.S. 291, 299–300 (1982).

A definitional balancing test would also avoid some of the uncertainty inherent in ad hoc balancing. The U.S. Supreme Court has sought to avoid "complex balancing of competing interests in every case."[178] Under a definitional balancing test, the balancing of interests would occur only when novel substantive due process issues arise. Once the interests have been balanced and a general rule of constitutional law is constructed, that rule will apply to all subsequent cases involving the same right without a need for further balancing.

It is possible that the same manipulation of definitions would occur in a balancing test as in the existing bifurcated substantive due process analysis but with lesser effects. In a balancing test, the court could describe an asserted interest in a way that makes the interest seem more or less vital in an effort to tip the scales. However, the effect of this manipulation should not be nearly as severe as it is with the two-tiered test. Under the bifurcated analysis, the effort to shoehorn the liberty interest into either the fundamental or non-fundamental category becomes vital to the outcome and can result in a severe contortion of the interest. With a balancing test, the fact that the level of protection afforded to an interest lies on a continuum renders the consequences of the definition less significant.

V. A BALANCING TEST WOULD HAVE CHANGED THE OUTCOME OF *SEELEY V. STATE*

Fairly applying the proposed definitional balancing test would have changed the outcome of *Seeley v. State* because the *McConahy* factors embodied in the proposed test weigh in favor of restructuring state regulation of medicinal marijuana in a manner less burdensome to the legitimate interests of the terminally ill in obtaining palliative relief. The first factor—the importance of the state interest—is of some weight; however, the significance of this state interest may not be as strong in the case of a terminally ill individual. The second factor—the manner in which the state interest is furthered by state law—seems to weigh against the state. A total ban on all medicinal use of marijuana is not well tailored to the named state interests. A much less restrictive and better suited solution would be to limit the legalization of marijuana to prescriptive use, and to require extensive testing of the side-effects of marijuana before releasing the drug to patients who are not terminally ill

178. Washington v. Glucksberg, 117 S. Ct. 2258, 2268 (1997).

with cancer. Ultimately, if no problems are discovered in testing, marijuana might be prescribed for illnesses such as glaucoma and non-terminal cancer.

The third factor—the importance of the liberty interest—looks to Mr. Seeley's significant interest in obtaining palliative relief. Mr. Seeley demonstrated that he suffered from great pain, nausea and vomiting, and that no other form of medication had provided him adequate relief.[179] These are matters of bodily integrity and deeply personal issues concerning private suffering, interests that should be among those most strongly protected from unreasonable intrusion by the state.

The fourth factor is the extent to which the individual interest is burdened by the challenged state action. In Mr. Seeley's case, the absolute prohibition on the one substance that provided him palliative relief was unquestionably a great burden upon this interest.

The fifth factor is the effect of upholding or overturning the statute or regulation. Overturning the placement of marijuana on Schedule I would not require leaving the substance entirely free from regulation. A more narrowly tailored regulation could be enacted that would serve the state interest in controlling drugs, while imposing a lesser burden upon the terminally ill. The state lists PCP, angel dust, cocaine, opium, and morphine for prescriptive use;[180] it hardly seems unreasonable to extend this status to medicinal marijuana.

Balancing all the factors, a court could find that Mr. Seeley's individual interest outweighs the state interest in broadly prohibiting marijuana use. The court would then be left to fashion a rule of general applicability that would apply should this issue arise again. For example, terminally ill cancer patients could have a right to obtain medicinal marijuana under a doctor's prescription if they could establish (1) they are undergoing treatment for terminal cancer, and (2) their doctors certify that no other medication provides adequate palliative relief for the side-effects of their treatment.

Regardless of the outcome reached by a court, a test better gauged to the weight of the individual interest at stake and more sensitive to the risks of injustice would have been applied. An important individual interest would have been given a greater opportunity to overcome undue state infringement.

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179. Seeley v. State, 132 Wash. 2d 776, 781, 940 P.2d 604, 606 (1997).

180. Wash. Rev. Code § 69.50.206 (1997).

VI. CONCLUSION

Seeley v. State presented an excellent opportunity for Washington to finally detach its substantive due process analysis from the federal approach. The federal two-tiered approach to substantive due process challenges justifiably has come under heavy attack from both jurists and scholars.[181] Washington courts also have expressed their discomfort with the federal approach. In *City of Seattle v. McConahy*, the Washington Court of Appeals seemed ready to adopt a test that balances competing state and individual interests.[182] Washington was leaning toward a more liberal and less artificial analysis until the U.S. Supreme Court issued its opinion in *Washington v. Glucksberg*.[183] The Supreme Court of Washington mechanically followed the *Glucksberg* analysis in *Seeley*.[184]

It was precisely at this juncture that the Supreme Court of Washington should have chosen to depart from the federal approach to substantive due process. Instead, the Supreme Court of Washington should have continued on the path begun by the court of appeals in *McConahy*. Adopting a balancing test is vital to the view that substantive due process is designed to protect individual liberty.[185] The suggested balancing test avoids the deferential rubber-stamp of rational relationship by giving a level of protection proportional to the importance of the interest on a sliding scale that is more fair than the bifurcated federal analysis. In light

181. *See supra* Part IV.C.1.

182. 86 Wash. App. 557, 564–65, 937 P.2d 1133, 1138 (1997).

183. 117 S. Ct. 2258 (1997).

184. 132 Wash. 2d 776, 940 P.2d 604.

185. "If we view the Supreme Court's substantive due process doctrine as a vehicle for protecting personal autonomy, the principled application of this doctrine requires a consideration of the interests of the individual and the competing governmental interests in regulation." Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 235 (1987).

of the current political climate, the Supreme Court of Washington is likely to be faced with the issue of substantive due process and medicinal use of marijuana again in the near future.[186] At that time, the Court should apply a test more sensitive to the importance of the individual interest at risk.

186. Washington Initiative 685, a medical marijuana initiative, was voted down in November 1997, but State Senator Jeanne Kohl is currently sponsoring a similar bill: the Washington State Medical Marijuana Act, Senate Bill 6271. The "Ralph Seeley Medical Marijuana Initiative" and another draft of the November 1997 initiative are being circulated. Hunter T. George, *Medicinal Marijuana Initiatives Will Go to Voters Again*, News Trib. (Wash.), Feb. 7, 1998, at B3. California and Arizona legalized marijuana for medicinal purposes in 1994. Ethan A. Nadelmann, *Battle of the Drug Warriors*, Globe and Mail (Toronto), June 13, 1998, at D9. Virginia has permitted the use of marijuana to treat glaucoma since 1979. *State, Local Votes to Decide Controversial Issues Today*, Wall St. J., Nov. 4, 1997, at A24. Initiatives for the November 1998 ballot have been circulated in Florida, Maine, and Alaska. *See The FDA and 'Medicinal Marijuana'*, Tampa Trib., June 1, 1998 at 6; Paul Van Stanbrouck, *Marijuana Still Divides California*, Christian Science Monitor, May 4, 1998, at 1; Joshua L. Weinstein, *Petitions for Marijuana Vote Rejected*, Portland Press Herald, Apr. 1, 1998, at 1B.