

Which Constitution? Eleven Years of *Gunwall* in Washington State

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Each state has two constitutions. First, the state constitution frames the state government and declares the rights of citizens within its borders. Next, the Federal Constitution frames the national government and provides a Bill of Rights that both protects citizens in their relationship with that federal entity and (after the Fourteenth Amendment) protects citizens' relationships with their states in limited but important ways.

This Article studies the problem of choosing constitutions—particularly the choice between applying the national Bill of Rights or a state constitution's declaration of rights. Many others have presented arguments for and against the independent application of a state's rights guarantees¹ or have classified and analyzed the various theories of state constitutionalism in the shadow of the United States Supreme Court.² This examination focuses on practice rather than

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1. Substantial literature exists on the value and theoretical soundness of applying state declarations of rights independently of the Bill of Rights. A few of the better-known articles include William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor: Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975 (1979); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985); Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985); Robert J. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993). For an excellent overview of the basic differences between the federal Constitution and state constitutions, see G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169 (1992).

2. See, e.g., Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123 (1992); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of*

theory: specifically, how the Washington State Supreme Court has applied its formal doctrine on the role of the State's Declaration of Rights³ and how that court has characterized and applied six criteria it prescribed in *State v. Gunwall*⁴ to assist Washington lawyers and judges in briefing and interpreting Washington's Declaration of Rights when the national Bill of Rights also applies. After briefly reviewing the history of state constitutionalism, this Article analyzes 108 Washington Supreme Court opinions⁵ that referred to *Gunwall* during the 11 years after that case was decided. It suggests that a surprising divergence between theory and practice has occurred and recommends simple steps to make the Washington court's application more consistent with its doctrine.⁶

I. ONE NATION, FIFTY-ONE CONSTITUTIONS

State constitutions in most eastern seaboard states have existed longer than the Federal Constitution.⁷ In several instances, state governments were formalized more than a decade before the Articles of Confederation were replaced with the federal document that turned a loose amalgam of sovereign states into a nation. State declarations of rights are still older than the Bill of Rights, which was promised to ensure the national Constitution's passage,⁸ and received approval two years after the Constitution itself. Both the Federal Constitution's

Balancing the Relationship Between State and Federal Courts, 63 TEX. L. REV. 977, 983-86 (1985); Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 645-52 (1987).

3. See WASH. CONST. art. I.

4. 106 Wash. 2d 54, 720 P.2d 808 (1986). See Appendix *infra* for the text of the criteria.

5. The 90 Washington Courts of Appeals opinions that mentioned *Gunwall* during the same period are briefly reviewed in this article.

6. For a fascinating analysis of selected Washington Supreme Court criminal case opinions citing *Gunwall*, see Laura L. Silva, *State Constitutional Criminal Adjudication in Washington Since State v. Gunwall: "Articulate, Reasonable and Reasoned" Approach?* 60 ALBANY L. REV. 1871 (1997).

7. Some jurisdictions have been governed by basically the same constitution since the Revolution. Others underwent revision and replacement in the Nineteenth Century. See generally WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (1980); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989).

8. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 219-45 (1990); Robert A. Rutland, *Framing and Ratifying the First Ten Amendments*, in LEONARD LEVY & DENNIS MAHONEY, *THE FRAMING AND RATIFYING OF THE CONSTITUTION* 305-16 (1987); Michael Lienesch, *North Carolina: Preserving Rights*, in MICHAEL ALLEN GILLESPIE & MICHAEL LIENESCH, *RATIFYING THE CONSTITUTION* 343-67 (1989).

frame of government and its Bill of Rights were modeled on earlier state experiments.⁹ However, state and national rights declarations have a much older heritage, descending directly from earlier colonial charters and bills of rights, the English Bill of Rights of 1689,¹⁰ the Magna Carta and beyond.¹¹

When a person asserts that state or local government has abridged his or her rights, upon which constitution should he or she rely? Well into the Twentieth Century, citizens periodically relied upon state declarations of rights.¹² But the federal government's explosive midcentury growth and its successful role in ending the Depression, winning World War II, and ensuring the civil rights of minorities, gave the federal government and its Supreme Court tremendous visibility and moral power.¹³ In the political sphere, national transportation, social services, environmental, and civil rights programs had a huge impact on state agendas in the 1960s and 1970s. In the legal sphere, at least two postwar career generations of lawyers and judges were educated and practiced under a system that emphasized federal constitutional jurisprudence. While state constitutional thinking continued to develop vibrantly in areas relating to the structure and powers of state government,¹⁴ scholars, lawyers, and judges working on civil rights and liberties issues focused almost exclusively on the

9. See WILLIAM E. NELSON & ROBERT C. PALMER, *LIBERTY AND COMMUNITY: CONSTITUTION AND RIGHTS IN THE EARLY AMERICAN REPUBLIC* (1987); ADAMS, *supra* note 7, at 289-91; BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 26-27, 33-38, 58-91 (1977).

10. ADAMS, *supra* note 7, at 8-13; SCHWARTZ, *supra* note 9, at 1-23.

11. See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE* 1-34 (1968); SCHWARTZ, *supra* note 9, at 2-52; M.E. BRADFORD *ORIGINAL INTENTIONS: ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION* 19 (1993); DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* (1980). For an example of detailed historical sleuthing on one item in the Bill of Rights, the origin of the "right to bear arms" in the Twelfth Century, see Roy Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 *HASTINGS CONST. L.Q.* 961 (1975).

12. See, e.g., *Rosser v. Commonwealth*, 167 S.E. 257, 257 (Va. 1933); *State ex rel. Clithero v. Showalter*, 159 Wash. 519, 522-23, 293 P. 1000, 1001 (1930); *State v. Gibbons*, 118 Wash. 171, 184, 203 P. 390, 395 (1922); *State v. Jackson*, 83 Wash. 514, 517, 145 P. 470, 471 (1915); *Avery v. Vermont Elec. Co.*, 54 A. 179, 179-80 (Vt. 1903); *State v. Fabbri*, 98 Wash. 207, 210-11, 167 P. 133, 135 (1917). But see G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 *NOTRE DAME L. REV.* 1097, 1100-06 (1997), in which Professor Tarr describes empirical studies suggesting that while reliance on state rights guarantees in the Nineteenth and early Twentieth Century was steady, it was by no means frequent.

13. See Mosk, *supra* note 1, at 1083-88.

14. See James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 *RUTGERS L.J.* 819 (1991).

Federal Bill of Rights.¹⁵ That began to change, however, as the Burger and Rehnquist Courts cut back on the Warren era's advances in civil liberties and civil rights. Then, sparked by Justice William Brennan¹⁶ and building on earlier groundwork by others,¹⁷ the legal community in the 1980s embarked on a "new judicial federalism" that rediscovered and reemphasized the rich history of state declarations of rights.¹⁸ Ironically, the same "conservative" Court has recently underscored the importance of state powers and reinforced the limits on the federal government's constitutional powers.¹⁹ But as Rutgers Professor Robert F. Williams has pointed out, that 20-year-old movement is no longer "new."²⁰ In state after state,²¹ supreme

15. Perhaps the overwhelming focus on the Federal Constitution was reinforced by law teachers and judges themselves, whose outpouring of books, articles, and decisions concerning federal rights in the 1960s made them part of a truly noble cause while simultaneously promoting their individual careers. After all, many judges and professors have attended *national* law schools and then clerked for *federal* judges. When they begin their teaching careers, they quickly realize that advancement from a regional to a national law school (or from the state courts to the federal bench) is more effectively enhanced by useful scholarship, decisions, and recognition on national topics. Attention to topics of state law and constitutions can be useful, but does little to improve one's national standing. Former New Hampshire Supreme Court Justice Charles G. Douglas, III, eloquently made this point in *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1147 (1978).

16. See generally Brennan, *supra* note 1. See also William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548-53 (1986).

17. See Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii, xiv (1996), pointing out the early work of Robert Force in *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969). See also Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970).

18. See generally Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980). The heightened importance of state courts and state constitutional law led to many publications and law review symposia dedicated to those topics. See, e.g., EMERGING ISSUES IN STATE CONSTITUTIONAL LAW: INAUGURAL ISSUE (Nat'l Ass'n of Att'ys Gen. ed., 1988); SUSAN FINO, *THE ROLE OF STATE SUPREME COURTS IN THE NEW JUDICIAL FEDERALISM* (1987); Symposium: *The Washington Constitution*, 8 U. PUGET SOUND L. REV. 157 (1985); Ronald K.L. Collins et al., *State High Courts, State Constitutions and Individual Rights Litigation Since 1980: A Judicial Survey*, 16 PUBLIUS 141 (1986), reprinted in 13 HASTINGS CONST. L.Q. 599 (1986); *State Constitutional Commentary*, 59 ALBANY L. REV. 1539 (1996). Both Temple Law Review and Rutgers Law Journal have for several years provided annual symposia on state constitutional topics. See, e.g., *Emerging Issues in State Constitutional Law*, 68 TEMP. L. REV. 1035 (1995); NINTH ANNUAL ISSUE ON STATE CONSTITUTIONAL LAW, 28 RUTGERS L. J. 783 (1997).

19. See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *Boerne v. Flores*, 117 S. Ct. 2157 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

20. Williams, *supra* note 17; Ronald K.L. Collins, *Foreword: Reliance on State Constitutions—Beyond the "New Federalism"*, 8 U. PUGET SOUND L. REV. 157 2, at vi (1985).

courts today rely on their own constitutions to protect individual liberties in ways that go beyond the "federal floor" provided by the elements of the Bill of Rights incorporated by the Fourteenth Amendment.²²

II. WASHINGTON STATE: "TURNING TO OUR OWN CONSTITUTION FIRST"

Washington's Supreme Court was an early participant in the resurgence of state constitutional rights jurisprudence. In *State v. Ringer*, a 1983 case involving the warrantless search of a car based on an aroma of marijuana emanating from the vehicle,²³ Justice James Dolliver noted that the U.S. Supreme Court had held similar searches to be unprotected under the Fourth Amendment.²⁴ But rather than engaging in a further Fourth Amendment analysis, the court determined, 7-2, to focus on Article I, Section 7 of the Washington Constitution, its origins, and the law of search and seizure at the time Washington's constitution was adopted in 1889.²⁵ Based on a detailed analysis, the court decided "to return to the protections of our own constitution and to interpret them consistent with their common law beginnings,"²⁶ holding that the search was impermissible under Washington's Declaration of Rights.²⁷

But the *Ringer* decision carried with it a sharp dissent by former Justice Dimmick, echoing a common criticism by those who see judicial choice of state declarations of rights as little more than result-oriented decisions caused by dissatisfaction with a conservative trend on the United States Supreme Court.²⁸ She wrote: "Once again we confound the constabulary and, by picking and choosing between state

21. See Collins et al., *supra* note 18. For an interstate comparison with respect to a specific topic, see David B. Kopel et al., *The Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995).

22. See Collins et al., *supra* note 18, at 600-01. It is important to remember that the United States Supreme Court's "partial incorporation" of the Bill of Rights has provided for only a piecemeal extension of federal constitutional protections to actions of the states. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 567-69 (1978). Accordingly, citizens must rely on their state declarations of rights for the remaining protections.

23. 100 Wash. 2d 686, 674 P.2d 1240 (1983), *overruled in part by State v. Stroud*, 106 Wash. 2d 144, 150-53, 720 P.2d 436, 440-41 (1986).

24. *Ringer*, 100 Wash. 2d at 689, 674 P.2d at 1242.

25. See *id.* at 690, 674 P.2d at 1242-43.

26. See *id.* at 699, 674 P.2d at 1247.

27. See *id.* at 699-700, 674 P.2d at 1247-48.

28. See generally Deukmejian & Thompson, *supra* note 1.

and federal constitutions, change the rules after the game has been played in good faith."²⁹

Nevertheless, the Washington court soon relied again on the State's Declaration of Rights, holding in *State v. Coe* that Article I, Section 5 of the Washington Constitution barred a trial judge's gag order on the broadcast of certain lawfully obtained tape recordings.³⁰ In an opinion in which five of his colleagues concurred, former Justice Robert Utter gave the following rationale for the decision's reliance on "bona fide separate, adequate, and independent" state grounds; rather than on the United States Supreme Court's reasoning.³¹

Whether the prior restraint was constitutionally valid or invalid should be treated first under our state constitution, for a number of reasons. First, state courts have a duty to independently interpret and apply their state constitutions that stems from the very nature of our federal system and the vast differences between the federal and state constitutions and courts. Second, the histories of the United States and Washington Constitutions clearly demonstrate that the protection of the fundamental rights of Washington citizens was intended to be and remains a separate and important function of our state constitution and courts that is closely associated with our sovereignty. By turning to our own constitution first we grant the proper respect to our own legal foundations and fulfill our sovereign duties. Third, by turning first to our own constitution we can develop a body of independent jurisprudence that will assist this court and the bar of our state in understanding how that constitution will be applied. Fourth, we will be able to assist other states that have similar constitutional provisions develop a principled, responsible body of law that will not appear to have been constructed to meet the whim of the moment. Finally, to apply the Federal Constitution before the Washington Constitution would be as improper and premature as deciding a case on state constitutional grounds when statutory grounds would have sufficed. . . .³²

29. *Ringer*, 100 Wash. 2d at 703, 674 P.2d at 1250 (Dimmick, J., dissenting).

30. 101 Wash. 2d 364, 373-78, 679 P.2d 353, 359-61 (1984).

31. See *id.* at 378, 675 P.2d at 361. Justice Utter expressly referred to the then-recent *Michigan v. Long*, 463 U.S. 1032, 1041 (1983), in which the United States Supreme Court held that it would decline to review a state court's holding under its own constitution only "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds." The United States Supreme Court's recognition of the independent authority of state courts to interpret and apply their own constitutions was earlier confirmed in *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

32. *Coe*, 101 Wash. 2d at 373-74, 679 P.2d at 359.

Coe was a strong affirmation of the primacy of the Washington Constitution. But Justice Utter soon argued in two law review articles³³ that state courts should not ignore federal constitutional questions, but should evaluate similar state and federal provisions on a dual track, in part to ensure that state constitutional jurisprudence develops in a principled, methodical and nonresult-oriented way. Justice Utter's support for the use of consistent criteria to evaluate state declarations of rights in the context of federal rulings³⁴ may well have been an attempt to answer the criticism by Justice Dimmick and others that independent state jurisprudence was prone to unprincipled decision-making. Indeed, the need to respond to this critique was expressly mentioned when, in the influential *Gunwall* case in 1986,³⁵ the Washington court unanimously adopted a step-by-step criteria approach in an opinion authored by former Justice James Andersen.³⁶ Justice Andersen asserted that "[m]any of the courts now resorting to state constitutions rather than to analogous provisions of the United States Constitution simply announce that their decision is based on the state constitution but do not further explain it."³⁷ To "establish [a] . . . principled basis for repudiating federal precedent" and to "furnish [a] . . . rational basis for counsel to predict the future course of state decisional law," the *Gunwall* court adopted the following six "nonexclusive neutral criteria . . . 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":³⁸

1. The textual language of the state constitution;
2. Significant differences in the texts of parallel provisions of the federal and state constitutions;
3. State constitutional and common law history;
4. Preexisting state law;

33. See Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Utter & Pitler, *supra* note 2.

34. Utter & Pitler, *supra* note 2, at 654-64.

35. 106 Wash. 2d at 59-61, 720 P.2d at 811-12.

36. *Id.* at 61-62, 720 P.2d at 812-13. The *Gunwall* criteria were consciously modeled on an approach suggested by New Jersey Justice Alan B. Handler a year earlier. See *id.* at 61 n.9, 720 P.2d at 812 n.9 (citing *State v. Hunt*, 450 A.2d 952, 964-67 (N.J. 1982) (Handler, J., concurring)).

37. *Gunwall*, 106 Wash. 2d at 60, 720 P.2d at 811-12 (emphasis added).

38. *Id.* at 61-62, 720 P.2d at 812-13. The *Gunwall* criteria are listed here in summary form. The full text of the criteria as set forth in *Gunwall* is contained at Appendix A to this Article.

5. Differences in structure between the federal and state constitutions; and
6. Matters of particular state interest or local concern.

In the *Gunwall* opinion, Justice Andersen went on to state that the six criteria were aimed at the following:

(1) suggesting to counsel where briefing might appropriately be directed in cases wherein they are urging independent state constitutional grounds; and (2) helping to insure that if this court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well founded legal reasons and *not by merely substituting our notion of justice for that of duly elected legislative bodies or the United States Supreme Court*.³⁹

Although *Gunwall* outlined the criteria that Washington's court wanted counsel to use in presenting arguments based on the State's Declaration of Rights, the *Gunwall* opinion did not answer some critical questions that were imbedded in Justice Andersen's explanation of why the court laid down the six criteria. Did the court really believe that the state's own constitution came first, as it had stated in *Ringer* and *Coe*, and were the *Gunwall* criteria meant principally to encourage proper briefing so that a Washington rights jurisprudence could be fully developed? Did the court intend that independent interpretation of Washington's constitution would enable the court on occasion to reach different conclusions than the United States Supreme Court, even when the language of the two rights documents were similar? Or did the court mean, as implied by Justice Andersen's language about "repudiating federal precedent,"⁴⁰ that the United States Supreme Court had binding jurisdiction over the Washington Constitution when similar provisions were involved? Was the State's Declaration of Rights to be used only in special circumstances when counsel could demonstrate that it was appropriate?

The answers to these questions were by no means obvious, both because members of Washington's court likely had differing views and because those views reflected a national debate over how state judges should apply their constitutions. The contrasting approaches have been well-documented by legal scholars.⁴¹ The "primacy" approach

39. *Id.* at 62-63, 720 P.2d at 813 (emphasis added).

40. *Id.* at 60, 720 P.2d at 812.

41. See Pollock, *supra* note 2; Utter & Pitler, *supra* note 2; see also Linda White Atkins, *Federalism, Uniformity, and the State Constitution*, 62 WASH. L. REV. 569, 573-75 (1987); Thomas Morawetz, *Deviation and Autonomy: The Jurisprudence of Interpretation in State*

emphasizes a State's declaration of rights; and in its pure form, a court will not move to a federal constitutional analysis unless a party is found to be without protection under the state constitution.⁴² At the other end of the spectrum is the "lock-step," "absolute harmony," or "deferential" approach, which assumes that in all circumstances a state constitution will be interpreted coextensively with the United States Supreme Court's interpretation of similar provisions in the Bill of Rights.⁴³ In between these two extremes are various shades of gray: the "presumptive" approach assumes that state courts will follow the national Court unless a strong argument to the contrary is made, while the "interstitial" or "supplemental" approach will apply the state constitution, but only when there are gaps in the Supreme Court's decisions or jurisprudence. The "dual sovereignty" method advocated by Justice Utter simultaneously looks at both constitutions, with the notion that doing so affords state courts an opportunity to both learn from (and teach) the federal judiciary, and to develop independent state interpretations while using the best in the national court's thinking. This approach also provides the Supreme Court the opportunity to see reasoning by state courts on federal constitutional issues not yet decided at a national level.⁴⁴

Gunwall and the criteria method have been continuously criticized in law reviews as unavoidably leading to a presumptive approach that does not give sufficient respect and deference to a state's own constitution.⁴⁵ This is more than an academic debate. At its root, a court's decision on which approach to use makes a big difference in how seriously it takes its State's constitution and how effective litigants' recourse to state declarations of rights will be. But the advantages and disadvantages of each approach have already been well-documented and argued.⁴⁶ Rather than entering into this debate, I will examine how Washington's court itself has characterized what it meant to do in *Gunwall* and how that case has been used in practice during the eleven years since it was published.

Constitutional Law, 26 CONN. L. REV. 635 (1994).

42. Utter & Pitler, *supra* note 2, at 647; *State v. Moylett*, 836 P.2d 1329, 1332 (Or. 1992); *State v. Traylor*, 596 So. 2d 957, 961 (Fla. 1992).

43. Utter & Pitler, *supra* note 2, at 645.

44. Utter, *supra* note 33, at 1047-50.

45. See generally Atkins, *supra* note 42; see also James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099 (1991); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997).

46. See, e.g., the articles listed *supra*, in notes 1, 2, 17, 33 and 41.

III. GUNWALL IN THEORY AND PRACTICE

A. *Eleven Years of Gunwall*

First, it is helpful to examine the raw data. Between June 12, 1986, when the *Gunwall* decision was issued, and June 12, 1997, the case was cited in 108 separate Washington Supreme Court opinions and 96 opinions issued by the State's three Courts of Appeals. During that period, other Washington appellate decisions dealt with interpretations of both the federal and the state constitutions. But the 204 opinions reviewed for this survey provide a good sample, particularly because the reference to *Gunwall* in each decision means that the court was considering whether and how to apply the Washington Constitution when an analogous federal provision also applied.

Of the 108 supreme court rulings, the vast majority involved criminal proceedings. That is not surprising, given that declarations of rights protect persons from government action and criminal filings, which are a common and powerful form of governmental activity against an individual's behavior. Only thirty of the supreme court opinions involved civil matters; some of those related to speech and the press,⁴⁷ defamation,⁴⁸ religious freedom,⁴⁹ licenses,⁵⁰ entitlements,⁵¹ industrial insurance,⁵² and custody,⁵³ but a number were indirectly connected to law enforcement and regulatory matters, such as cases concerning the forfeiture of drug property,⁵⁴ regulations on lewd conduct,⁵⁵ and housing code enforcement.⁵⁶ Of the 108 opin-

47. See *Nelson v. McClatchy Newspapers, Inc.*, 131 Wash. 2d 573, 931 P.2d 1123, cert. denied, 1185 S. Ct. 175 (1997); *Collier v. Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (1993); *Halquist v. Department of Corrections*, 113 Wash. 2d 818, 783 P.2d 1065 (1989); *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989).

48. See *Richmond v. Thompson*, 130 Wash. 2d 368, 922 P.2d 1343 (1996); *LaMon v. Butler*, 112 Wash. 2d 193, 770 P.2d 1027 (1989).

49. See *Malyon v. Pierce County*, 131 Wash. 2d 779, 935 P.2d 1272 (1997); *First Covenant Church v. Seattle*, 120 Wash. 2d 203, 840 P.2d 174 (1992); *Witters v. Commission for the Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989).

50. See *Foley v. Department of Fisheries*, 119 Wash. 2d 783, 837 P.2d 14 (1992).

51. See *Conrad v. University of Wash.*, 119 Wash. 2d 519, 834 P.2d 17 (1992); *Bedford v. Sugarman*, 112 Wash. 2d 500, 772 P.2d 486 (1989).

52. See *Harris v. Department of Labor & Indus.*, 120 Wash. 2d 461, 843 P.2d 1056 (1993); *Holbrook v. Weyerhaeuser Co.*, 118 Wash. 2d 306, 822 P.2d 271 (1992); *Clark v. Pacificorp*, 118 Wash. 2d 167, 822 P.2d 162 (1991).

53. See *State v. Carver*, 113 Wash. 2d 591, 781 P.2d 1308 (1989).

54. See *Tellevik v. Real Property*, 120 Wash. 2d 68, 838 P.2d 111 (1992); *Rozner v. Bellevue*, 116 Wash. 2d 342, 804 P.2d 24 (1991).

55. See *Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 871 P.2d 1050 (1994); *Forbes v. Seattle*, 113 Wash. 2d 929, 785 P.2d 431 (1990); *O'Day v. King County*, 109 Wash. 2d 796, 749

ions, more than half (62 cases, or 57%) declined to consider state constitutional arguments because of inadequate briefing.⁵⁷ Ten cited *Gunwall* solely for its substantive holdings on electronic eavesdropping, and two are unclear about why *Gunwall* was cited.⁵⁸ This leaves only thirty-four cases (32%) in which the court fully undertook the question of how to interpret a state constitutional provision that has a federal counterpart.

During the period studied, ninety-six Washington Supreme Court cases cited *Gunwall* for its procedural precepts on how to use the Washington Constitution. All of these cases involved claims based on thirteen of the thirty-five sections of the Declaration of Rights, occasionally claiming violations of multiple sections. The most frequently cited provisions were those concerning privacy/search and seizure,⁵⁹ due process,⁶⁰ freedom of speech,⁶¹ privileges and immunities,⁶² self-incrimination/double jeopardy,⁶³ rights of the accused/speedy trial,⁶⁴ and jury trial.⁶⁵ These provisions were raised by parties as shown in Table 1, below.

P.2d 142 (1988).

56. See *Seattle v. McCready*, 123 Wash. 2d 260, 868 P.2d 134 (1994); *Margola Assoc. v. Seattle*, 121 Wash. 2d 625, 854 P.2d 23 (1993); *Guimont v. Clarke*, 121 Wash. 2d 586, 854 P.2d 1 (1993).

57. See *infra* note 101 and accompanying text. The 62 cases in this enumeration do not include *Seattle v. Montana*, 129 Wash. 2d 583, 919 P.2d 1218 (1996), because, while the court asserted a lack of adequate state constitutional briefing, the opinions nevertheless proceeded to analyze the Washington constitutional issues. *Id.* at 590-91, 919 P.2d at 1221-22. See *infra* notes 126-35 and accompanying text. The rejection rate for inadequate briefing was somewhat higher in the noncriminal cases: 21 of 30, or 70%.

58. *State v. Hoffman*, 116 Wash. 2d 51, 126, 804 P.2d 577, 616 (1991) (involving WASH. CONST. art. I, § 22) (Dore, J., dissenting); *State v. Whelchel*, 115 Wash. 2d 708, 726, 801 P.2d 948, 957 (1990) (involving WASH. CONST. art. I, § 22).

59. See WASH. CONST. art. I, § 7.

60. See *id.* § 3.

61. See *id.* § 5.

62. See *id.* § 12.

63. See *id.* § 9.

64. See *id.* § 22.

65. See *id.* § 21.

Table 1
 Washington Constitutional Provisions Most
 Frequently Raised in 96 State Supreme
 Court Cases Citing *Gunwall* Factors
 June 12, 1986-June 12, 1997

Provision Relied Upon by Party	Frequency
Art. I, § 7 (Privacy/Search & Seizure)	22
Art. I § 3 (Due Process)	19
Art. I § 5 (Freedom of Speech)	14
Art. I § 12 (Privileges & Immunities)	11
Art. I § 9 (Self-Incrim./Double Jeopardy)	10
Art. I § 22 (Rights of Accused, Speedy Trial)	9
Art. I § 21 (Jury Trial)	8
Art. I § 11 (Freedom of Religion)	4
Other	15

(Note: Some cases involved more than one provision.)

Although *Gunwall* and subsequent decisions made it clear that the privacy/search and seizure protections of article I, section 7, are distinctly different from and stronger than the Fourth Amendment,⁶⁶ failure to adequately brief the state grounds led the Washington Supreme Court to ignore those claims in ten of the twenty-two cases in which they were made. The court generally has viewed the state and federal due process provisions as similar in scope and content,⁶⁷ but because of briefing failures, the court has directly addressed and analyzed the state provision in only four of the nineteen cases in which it was asserted.

66. See, e.g., *State v. Boland*, 115 Wash. 2d 571, 580, 800 P.2d 1112, 1116 (1990); *Seattle v. Messiani*, 110 Wash. 2d 454, 456-58, 755 P.2d 775, 776-78 (1988); *State v. Stroud*, 106 Wash. 2d 144, 148, 720 P.2d 436, 439 (1986).

67. See, e.g., *State v. Wittenbarger*, 124 Wash. 2d 467, 481, 880 P.2d 517, 524 (1994); *State v. Ortiz*, 119 Wash. 2d 294, 302-04, 831 P.2d 1060, 1065-66 (1992).

Of the thirty-four cases in which the court addressed state constitutional claims that had been asserted, thirteen can be said to have held that the relevant state provisions were to be interpreted coextensively with analogous sections of the Bill of Rights.⁶⁸

In another thirteen cases, the court independently or differently interpreted the state provisions but reached the same results that it found were dictated by United States Supreme Court's holdings on analogous sections of the Federal Constitution.⁶⁹ In a pair of recent three-strikes-you're-out cases, the court applied several state provisions identically with the federal sections,⁷⁰ and one section independently,⁷¹ but the results were still the same under both constitutions.

68. This author views the following cases as having interpreted the state constitutional language in a manner essentially identical to the United States Supreme Court's interpretation of analogous provisions of the Federal Constitution: *Richmond v. Thompson*, 130 Wash. 2d 368, 922 P.2d 1343 (1996) (WASH. CONST. art. I, §§ 4, 5); *State v. Gocken*, 127 Wash. 2d 95, 896 P.2d 1267 (1995) (WASH. CONST. art. I, § 9); *State v. Russell*, 125 Wash. 2d 24, 882 P.2d 747 (1994) (WASH. CONST. art. I, § 9); *State v. Wittenbarger*, 124 Wash. 2d 467, 880 P.2d 517 (1994) (WASH. CONST. art. I, § 3); *State v. Ortiz*, 119 Wash. 2d 294, 831 P.2d 1060 (1992) (WASH. CONST. art. I, § 3); *State v. Hopper*, 118 Wash. 2d 151, 822 P.2d 775 (1992) (WASH. CONST. art. I, § 22); *State v. Smith*, 117 Wash. 2d 263, 814 P.2d 652 (1991) (WASH. CONST. art. I, § 7); *State v. Earls*, 116 Wash. 2d 364, 805 P.2d 211 (1991) (WASH. CONST. art. I, § 9); *In re Teddington*, 116 Wash. 2d 761, 808 P.2d 156 (1991) (WASH. CONST. art. I, § 7); *State v. Straka*, 116 Wash. 2d 859, 810 P.2d 888 (1991) (WASH. CONST. art. I, § 3); *Ford Motor Co. v. Barrett*, 115 Wash. 2d 556, 800 P.2d 367 (1990) (WASH. CONST. art. I, § 12); *State v. Reece*, 110 Wash. 2d 766, 757 P.2d 947 (1988) (WASH. CONST. art. I, § 5); *State v. Box*, 109 Wash. 2d 320, 745 P.2d 23 (1987) (WASH. CONST. art. I, § 3).

69. *Ino Ino, Inc. v. Bellevue*, 132 Wash. 2d 103, 937 P.2d 154 (1997), *cert. denied*, 118 S. Ct. 856 (1998) (WASH. CONST. art. I, § 5); *Malyon v. Pierce County*, 131 Wash. 2d 779, 935 P.2d 1272 (1997) (WASH. CONST. art. I, § 11); *Seattle v. Montana*, 129 Wash. 2d 583, 919 P.2d 1218 (1996) (WASH. CONST. art. I, § 24); *State v. Hendrickson*, 129 Wash. 2d 61, 917 P.2d 563 (1996) (WASH. CONST. art. I, § 7); *State v. Johnson*, 128 Wash. 2d 431, 909 P.2d 293 (1996) (WASH. CONST. art. I, § 7); *State v. Carter*, 127 Wash. 2d 836, 904 P.2d 290 (1995) (WASH. CONST. art. I, § 7); *State v. Hobbie*, 126 Wash. 2d 283, 892 P.2d 85 (1995) (WASH. CONST. art. I, § 21); *State v. Goucher*, 124 Wash. 2d 778, 881 P.2d 210 (1994) (WASH. CONST. art. I, § 7); *State v. Corliss*, 123 Wash. 2d 656, 870 P.2d 317 (1994) (WASH. CONST. art. I, § 7); *State v. Hastings*, 119 Wash. 2d 229, 830 P.2d 658 (1992) (WASH. CONST. art. I, § 7); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wash. 2d 413, 780 P.2d 1282 (1989) (WASH. CONST. art. I, § 5); *State v. Irizarry*, 111 Wash. 2d 591, 763 P.2d 432 (1988) (WASH. CONST. art. I, § 22); *State v. Schaaf*, 109 Wash. 2d 1, 743 P.2d 240 (1987) (WASH. CONST. art. I, §§ 21, 22).

70. *State v. Manussier*, 129 Wash. 2d 652, 665, 672, 679-80, 921 P.2d 473, 479, 482, 486-87 (1996), *cert. denied*, 117 S. Ct. 1563 (1997) (WASH. CONST. art. I, §§ 3, 12, 21, 23); *State v. Rivers*, 129 Wash. 2d 697, 921 P.2d 495 (1996) (WASH. CONST. art. I, § 21).

71. *Manussier*, 129 Wash. 2d at 674, 921 P.2d at 483-84 (WASH. CONST. art. I, § 14); *Rivers*, 129 Wash. 2d at 712, 921 P.2d at 502 (WASH. CONST. art. I, § 14).

This leaves only eight cases (almost all characterized by sharply split opinions) that were analyzed independently and in which results differed from the outcomes under the Federal Constitution.⁷²

There is a pattern to the Washington court's application of the Washington Constitution when analogous federal language also pertained.

Table 2
Washington Constitutional Provisions Raised in
Thirty-Nine Claims After Full *Gunwall* Briefing
June 12, 1986-June 12, 1997

Provision Relied Upon	State and Federal Provisions Interpreted Identically	Independent Interpretation, Same Result	Independent Interpretation, Different Result
Art. I., § 7 (Privacy/Search)	2	6	5
Art. I., § 3 (Due Process)	5	--	--
Art. I., § 5 (Free Speech)	2	2	--
Art. I., § 12 (Privileges & Immunities)	1	--	--
Art. I., § 9 (Self-Incrim./ Double Jeopardy)	3	--	--
Art. I., § 22 (Rights of Accused, Speedy Trial)	1	2	--
Art. I., § 21 (Jury Trial)	2	3	1 ^a
Art. I., § 11 (Freedom of Religion)	--	1	2 ^a
Other	2	3	--

a. See discussion in Note 72.

(Note: Some cases involved more than one provision.)

72. *Seattle v. McCready*, 123 Wash. 2d 260, 868 P.2d 134 (1994) (WASH. CONST. art. I, § 7); *First Covenant Church v. Seattle*, 120 Wash. 2d 203, 229, 840 P.2d 174, 188-89 (1992) (WASH. CONST. art. I, § 11, distinguishing the issues from those that had been previously decided by the United States Supreme Court and did not definitively (and differently) rule on a case equivalent to *First Covenant* until *Boerne v. Flores*, 117 S. Ct. 2157 (1997)); *State v. Boland*, 115 Wash. 2d 571, 800 P.2d 1112 (1990) (WASH. CONST. art. I, § 7); *Bedford v. Sugarman*, 112 Wash. 2d 500, 772 P.2d 486 (1989) (WASH. CONST. art. I, § 7); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711, 725 (1989) (WASH. CONST. art. I, § 21, stating that the United States Supreme Court had not ruled on the issue in question—see *infra* notes 116-122 and accompanying text); *Witters v. State Comm'n for Blind*, 112 Wash. 2d 363, 771 P.2d 1119 (1989) (WASH. CONST. art. I, § 11); *Seattle v. Mesiani*, 110 Wash. 2d 454, 755 P.2d 775 (1988) (WASH. CONST. art. I, § 7); *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986) (WASH. CONST. art. I, § 7).

In the opinions in which the court applied the state and federal provisions identically, the due process claim was involved most often—in five cases.⁷³ Although Justice Utter persistently noted that the court never addressed the striking difference between the history and the wording of Washington's Privileges and Immunities Clauses and the equal protection language of the Fourteenth Amendment to which it was compared,⁷⁴ his colleagues chose to read them identically in three of the cases.⁷⁵ Two opinions involved speech,⁷⁶ and three concerned the rights of the accused.⁷⁷ Among the opinions that applied the state and federal provisions independently yet reached similar results, article I, section 7 figures most prominently (six cases),⁷⁸ reflecting the fact that Washington's search-and-seizure language has received the most jurisprudential attention from lawyers and judges. Similarly, of the eight cases in which the court independently applied Washington's constitution and arrived at a different result than the federal approach, five involved article I, section 7.⁷⁹ Two of the eight cases concerned religious freedom claims and one involved trial by jury.⁸⁰ Thus, when one views all ninety-six Washington Supreme Court opinions citing *Gunwall* for its procedural methodology during the eleven years after it was issued, only two of twenty-one sections of Washington's Declaration of Rights with analogous federal constitutional counterparts⁸¹ were interpreted independently. These interpretations led to differing results from those that would have prevailed had only the United States Constitution been applied.

Furthermore, during the same eleven-year period there appear to have been no cases in which, (1) both the Declaration of Rights and the Bill of Rights applied, (2) the court found them to be substantially the same, and (3) the court chose to interpret the Washington provision differently than the United States Supreme Court.

73. See *supra* note 68-69.

74. See, e.g., *State v. Smith*, 117 Wash. 2d at 282-91, 814 P.2d at 661-66; *Ford Motor Co.*, 115 Wash. 2d at 570-71, 800 P.2d at 375.

75. See *supra* note 68, and *infra* notes 107-08 and accompanying text.

76. *Id.*

77. *Id.*

78. See cases cited in *supra* note 69.

79. *Id.*

80. *Id.*

81. See WASH. CONST. art. I, §§ 3-5, 7-14, 16, 18, 21-25, 28, 30, 31.

The experience in ninety-six opinions of the State Courts of Appeals⁸² was somewhat different. In only one-third (thirty-five cases) were constitutional arguments rejected for inadequate briefing. Six cited *Gunwall* solely for its substantive holdings on electronic eavesdropping.⁸³ Of the remaining fifty-five (which apparently were adequately briefed), thirty-five opinions found no material difference between the Declaration of Rights provision cited and the Bill of Rights, or found some difference but held that the result was the same.

The implications of this data are discussed below, particularly the surprising number of rejections based on faulty briefing and the small number of State Declaration of Rights sections that are interpreted differently from analogous federal constitutional language and then lead to different results. To better understand the information about the application of the *Gunwall* criteria, it would be useful to review how the state court itself has characterized what it meant to do in *Gunwall*.

B. Primacy in Theory

First in *Ringer* and *Coe*, and then in many of the cases citing *Gunwall* during the last decade, the Washington court forcefully underscored the principle that when properly briefed, issues would be analyzed on the basis of the State Declaration of Rights before turning to analogous sections of the Bill of Rights.⁸⁴ This position has been taken by almost all of the justices writing opinions on the matter. An early post-*Gunwall* example is the 1988 case of *Seattle v. Messiani*,⁸⁵ a successful challenge to Seattle's sobriety checkpoint program based on article I, section 7 of the Washington Constitution.⁸⁶ The court's opinion, written by Justice Utter, referenced *Coe* and stated:

When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and

82. Under Washington Rule of Appellate Procedure 12.3, not all Washington Court of Appeals opinions are published. They are nevertheless available through electronic services.

83. *State v. Fellows*, No. 34141-3-I, 1997 Wash. App. LEXIS 153 (Feb. 3, 1997) (unreported); *State v. Farmer*, 80 Wash. App. 795, 800, 911 P.2d 1030, 1033 (1996); *State v. Sanchez*, 74 Wash. App. 763, 766, 875 P.2d 712, 714 (1994); *State v. Lucas*, 56 Wash. App. 236, 243, 783 P.2d 121, 125-26 (1989); *State v. Stanphill*, 53 Wash. App. 623, 626, 769 P.2d 861, 863 (1989); *State v. Gonzalez*, 51 Wash. App. 242, 249, 752 P.2d 939, 944 (1988).

84. See *supra* notes 23-32 and accompanying text.

85. 110 Wash. 2d 454, 755 P.2d 775 (1988).

86. Article I, section 7 states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

because consideration of the United States Constitution first would be premature.⁸⁷

A month later in *State v. Reece*,⁸⁸ Justice William Goodloe strongly echoed Justice Utter's language in *Coe* and *Messiani*, upholding an antipornography law in a challenge under the state constitution's free-speech provision:⁸⁹

The proper inquiry under *Gunwall* is not to ask whether state constitutional analysis is necessary, but to ask whether on a given subject matter the Washington constitutional provision should afford greater protection than the minimum protection afforded by the federal constitution. *There is no presumption of adherence to federal constitutional analysis.*⁹⁰

In subsequent opinions written by various justices, the court often repeated that when a party properly alleges violations of both the federal and Washington constitutions, the court would first examine the state constitutional claim.⁹¹ Justice Andersen's *Gunwall* reference to using the six criteria as a "basis for repudiating federal precedent"⁹² was hardly mentioned. On the contrary, the court's opinions, particularly those written by Justice Dolliver, stressed that while federal decisions might be given significant weight in interpreting analogous state provisions, United States Supreme Court rulings were to be treated as guides, rather than as binding precedent.⁹³ The court also developed a general consensus to the effect that Washington's Declaration of Rights, as a limit on the plenary powers of state government, often could be expected to provide stronger protections than might be afforded by the federal Bill of Rights, which regulates the limited powers granted to the federal government.⁹⁴ But as

87. *Messiani*, 110 Wash. 2d at 456, 755 P.2d at 776.

88. 110 Wash. 2d 766, 757 P.2d 947 (1988).

89. Article I, section 5 states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

90. *Reece*, 110 Wash. 2d at 777-78, 757 P.2d at 953-54 (emphasis added).

91. See, e.g., *State v. Hendrickson*, 129 Wash. 2d 61, 69, 917 P.2d 563, 567 (1996) (Talmadge, J.); *State v. Johnson*, 128 Wash. 2d 431, 457, 909 P.2d 293, 307 (1996) (Smith, J.); *State v. Young*, 123 Wash. 2d 173, 178, 867 P.2d 593, 595-96 (1994) (Johnson, J.); *O'Day v. King County*, 109 Wash. 2d 796, 801-02, 749 P.2d 142, 145-46 (1988) (Utter, J.); *State v. Stroud*, 106 Wash. 2d 144, 154, 720 P.2d 436, 442 (1986) (Durham, J., concurring).

92. *State v. Gunwall*, 106 Wash. 2d 54, 60, 720 P.2d 808, 812 (1986).

93. See *State v. Fortune*, 128 Wash. 2d 464, 474-75, 909 P.2d 930, 934-35 (1996); *Rozner v. Bellevue*, 116 Wash. 2d 342, 351, 804 P.2d 24, 29-30 (1991).

94. See, e.g., *State v. Young*, 123 Wash. 2d 173, 178-79, 867 P.2d 593, 595-96 (1994) (Johnson, J.); *State v. Dodd*, 120 Wash. 2d 1, 20-22, 838 P.2d 86, 96-97 (1992) (Dore, J.); *First Covenant Church v. Seattle*, 120 Wash. 2d 203, 224, 840 P.2d 174, 186 (1992) (Dore, J.). But see Justice Sanders' observation in *Malyn v. Pierce County*, 131 Wash. 2d 779, 792 n.10, 935

discussed below,⁹⁵ gaining access to those stronger protections required adequate briefing of the state claims using the *Gunwall* criteria.

C. *Gunwall* Briefs: Developing a Body of Independent Jurisprudence

In the first period of almost two years following *Gunwall*, the case was cited in only four Washington Supreme Court opinions,⁹⁶ perhaps indicating that counsel were not taking advantage of the Declaration of Rights in their presentations to the court. In May 1988, Justice Utter took the opportunity in *State v. Wethered* to remind both bench and bar that the *Gunwall* criteria were meant to be used so that courts would have a full understanding of the relevant language, history, and policy of the State Declaration of Rights.⁹⁷ He noted that the defendant's counsel had urged the court to apply article I, section 9 of the Washington constitution in a hashish delivery case, but wrote:

[Wethered] fails to use the *Gunwall* interpretive principles to assist this court to determine whether the self-incrimination provisions of that article confer the right to *Miranda* or *Miranda*-like warnings. By failing to discuss at a minimum the six criteria mentioned in *Gunwall*, he requests us to develop without benefit of argument or citation of authority the "adequate and independent state grounds" to support his assertions. We decline to do so consistent with our policy not to consider matters neither timely nor sufficiently argued by the parties.

. . . .
 . . . We therefore will only consider Wethered's claims under federal constitutional law.⁹⁸

P.2d 1272, 1278 n.10 (1997), that while state and federal constitutional provisions often differ, one cannot always assume that the state language will be stronger.

95. See *infra* notes 97-101 and accompanying text.

96. *O'Day v. King County*, 109 Wash. 2d 796, 801-02, 749 P.2d 142, 145-46 (1988); *State v. Box*, 109 Wash. 2d 320, 335, 745 P.2d 23, 32 (1987) (Dore, J., dissenting); *State v. Schaaf*, 109 Wash. 2d 1, 13, 743 P.2d 240, 246 (1987); *State v. Stroud*, 106 Wash. 2d 144, 158, 720 P.2d 436, 444 (1986). During the same period, the State Courts of Appeals cited *Gunwall* in 10 separate cases.

97. 110 Wash. 2d 466, 472, 755 P.2d 797, 800 (1988).

98. *Id.* at 472-73, 755 P.2d at 800-01 (citations omitted). In Utter, *supra* note 1, the former Washington Justice further argued the importance of adequately briefing state constitutional issues in order to develop state and federal constitutional law. In that article and in Utter, *supra* note 33, he pointed out that in a cooperative federalist system the state and national courts must listen to and rely on each other, and that the thoughtful development of state constitutional law, and state court comment on federal law, are both of national importance.

Wethered and its numerous progeny underscored the court's concern about pulling jurisprudence out of thin air and its desire to see state constitutional history and theory rediscovered and fully explained in order to avoid "an unbalanced and incomplete development of the issues"⁹⁹ and to enable lawyers to effectively predict the future course of state constitutional rulings.¹⁰⁰

In the nine years following *Wethered*, the court proceeded to massively reject state constitutional arguments that were not accompanied by full *Gunwall* briefings—such arguments were ignored in nearly two-thirds of the cases in which the court mentioned *Gunwall* for purposes other than for the substantive holding in that ruling. In following the *Wethered* rejection approach, the court occasionally repeated its insistence that counsel help rediscover state constitutional language and chided lawyers for failing to do their duty in this regard.¹⁰¹

The court's majority itself was sometimes chided by dissenting and concurring colleagues for jumping to conclusions about the meaning of specific Washington constitutional provisions when advocates had not presented full *Gunwall* briefs. Justice Utter often launched this criticism. In *State v. Irizarry*, in which the court held that felony murder was not a lesser included offense within the crime of aggravated first-degree murder, Justice Utter concurred with the outcome but criticized his colleagues for having concluded that the Washington Constitution's provisions on the rights of the accused¹⁰² had been violated.¹⁰³ He wrote:

Because this court has not yet interpreted the Washington Constitution's restrictions on this issue, until this court has the benefit of briefing that considers at least the nonexclusive factors of *State v. Gunwall*, this is still an open question.

Despite the similar language of the [S]ixth [A]mendment to the United States Constitution and article 1, section 22 of the

99. *State v. Clark*, 124 Wash. 2d 90, 95 n.2, 875 P.2d 613, 615 n.2 (1994). The court's insistence that lawyers thoroughly brief and educate the court about the origins and meaning of Washington's Constitution is something akin to a council of elders in a remote land asking the merchants who infrequently venture there over treacherous mountain passes to school the council in an ancient language that has long since been lost in their community but which the traders are thought to still speak. The councilors are eager to engage in commerce, but realize that until they can negotiate with the merchants fluently, they may find themselves making some bad bargains.

100. *O'Day*, 109 Wash. 2d at 801-02, 749 P.2d at 145-46.

101. See, e.g., *State v. Clark*, 124 Wash. 2d 90, 95 n.2, 875 P.2d 613, 615 n.2 (1994); *Forbes v. Seattle*, 113 Wash. 2d 929, 934, 785 P.2d 431, 433 (1990).

102. See WASH. CONST. art. I, § 22.

103. 111 Wash. 2d 591, 596-97, 763 P.2d 432, 435-36 (1988) (Utter, J., concurring).

Washington Constitution, both entitling defendants to trial "by an impartial jury", this court does not presumptively apply the federal analysis if that analysis is not supported by the language, history and context of our constitution.

This court may well reject the federal analysis on this issue if we are presented with adequate briefing on the Washington Constitution. Nothing in the majority should be read to discourage [the defendant] in his new trial or future defendants from fully asserting their rights protected by the Washington Constitution.¹⁰⁴

Justice Utter repeated this criticism on several other occasions,¹⁰⁵ in one instance noting that his colleagues' "furtive construction of the Washington Constitution does not comply with the mandate of *State v. Gunwall*."¹⁰⁶ Justice Utter seemed particularly concerned about his colleagues' conclusion, without full *Gunwall* briefing by attorneys, that the "privileges and immunities" language of article I, section 12 should be treated as "substantially identical" to the very differently worded Equal Protection clause of the Fourteenth Amendment. In one instance he urged his fellow justices not to reach such a conclusion because the trial court had not had the opportunity to consider a *Gunwall* brief on the question,¹⁰⁷ and in another case took it upon himself to write a "*Gunwall* brief" concurrence that marched through each of the criteria to demonstrate the differences between the two provisions.¹⁰⁸ Nothing in *Gunwall* or *Wethered* suggests that the Washington court's members are themselves required to structure their opinions according to the six *Gunwall* criteria—ostensibly those are simply briefing guides for attorneys. But when lawyers present their arguments according to the *Gunwall* framework, not surprisingly the force of the framework itself causes the justices to use it when shaping their arguments and making their points. This has occurred sometimes in majority opinions¹⁰⁹ and sometimes in dissents or concurrences¹¹⁰ and has recently surfaced in both majority and dissenting voices,

104. *Id.* at 596-97, 763 P.2d at 436 (Utter, J., concurring).

105. See *State v. Hastings*, 119 Wash. 2d 229, 246, 830 P.2d 658, 667 (1992); *State v. Smith*, 117 Wash. 2d 263, 284, 814 P.2d 652, 662 (1991); *Witters v. Commission for Blind*, 112 Wash. 2d 363, 374, 771 P.2d 1119, 1124 (1989) (Utter, J., dissenting).

106. *Hastings*, 119 Wash. 2d at 246, 830 P.2d at 667.

107. See *Ford Motor Co. v. Barrett*, 115 Wash. 2d 556, 570-71, 800 P.2d 367, 375 (1990).

108. See *State v. Smith*, 117 Wash. 2d 263, 284-87, 814 P.2d 652, 662-63 (1991) (Utter, J., concurring).

109. See, e.g., *Malyon v. Pierce County*, 131 Wash. 2d 779, 791-98, 935 P.2d 1272, 1277-81 (1997) (Sanders, J.); *State v. Russell*, 125 Wash. 2d 24, 58-62, 882 P.2d 747, 770-72 (1994) (Madsen, J.).

110. See, e.g., *State v. Manussier*, 129 Wash. 2d 652, 685-87, 921 P.2d 473, 489-90 (1996) (Madsen, J., dissenting); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113

causing a virtual battle of the six *Gunwall* factors.¹¹¹ Further, in one recent case upholding a controversial "three-strikes-you're-out" sentencing law,¹¹² Justice Sanders dissented, criticizing the majority for deciding the state constitutional issues in the matter without themselves analyzing the cruel-punishment provisions of the Declaration of Rights¹¹³ under the *Gunwall* criteria.¹¹⁴ He then proceeded to provide his own "*Gunwall* brief" to support his views.¹¹⁵

D. Interpretation Without *Gunwall*

Despite the court's usual insistence on *Gunwall* analyses before interpreting Declaration of Rights sections analogous to the Federal Bill of Rights, it has on occasion declared the meaning of provisions despite the lack of *Gunwall* briefing. The most notable example is *Sofie v. Fibreboard Corp.*,¹¹⁶ a 1989 decision holding that a state tort reform limit on jury awards of noneconomic damages violated the Washington Constitution's right to trial by jury.¹¹⁷ Dissenting justices complained that the litigants had not adequately briefed the state constitutional issues under the *Gunwall* criteria and urged the court to rely solely on federal jury trial law.¹¹⁸ But Justice Utter, writing for the majority, held that because the Seventh Amendment to the United States Constitution did not apply to the states through the Fourteenth Amendment, "[t]he right to jury trial in civil proceedings is protected solely by the Washington Constitution Therefore, the relevant analysis must follow state doctrine[, and] our result is based entirely on adequate and independent state grounds."¹¹⁹ Justice Utter stressed that there was no presumption in favor of federal constitutional interpretations.¹²⁰ Referencing *Wethered* and noting that federal cases were to be viewed as "educational rather than coercive,"¹²¹ he effectively limited mandatory *Gunwall* briefing to cases in which both

Wash. 2d 413, 434-49, 780 P.2d 1282, 1293 (1989) (Utter, J., concurring).

111. See, e.g., *State v. Gocken*, 127 Wash. 2d 95, 896 P.2d 1267 (1995) (Guy, J., writing for the majority; Madsen, J., dissenting); *State v. Ortiz*, 119 Wash. 2d 294, 831 P.2d 1060 (1992) (Durham, J., writing for the majority; Johnson, J., dissenting).

112. See *State v. Rivers*, 129 Wash. 2d 697, 921 P.2d 495 (1996).

113. See WASH. CONST. art. I, § 14.

114. See *Rivers*, 129 Wash. 2d at 723, 921 P.2d at 507 (Sanders, J., dissenting).

115. See *id.* at 723-35, 921 P.2d at 507-13.

116. 112 Wash. 2d 636, 638, 771 P.2d 711 (1989).

117. See WASH. CONST. art. I, § 21.

118. See *Sofie*, 112 Wash. 2d at 673, 688, 771 P.2d at 730, 738 (Durham, J., dissenting).

119. See *id.* at 644, 771 P.2d at 716.

120. See *id.* at 663, 771 P.2d at 725.

121. See *id.* at 648, 771 P.2d at 717.

the Declaration of Rights and the Bill of Rights applied.¹²² This is consistent with the hundreds of cases that interpret Washington constitutional provisions that have no federal counterparts whatsoever. But *Sofie* is important because of the converse principle it highlights. While the court is committed to independently interpreting the Declaration of Rights before the Bill of Rights in any properly briefed case,¹²³ when both constitutions *do* apply, the shadow cast by the federal document is very long indeed. Before litigants can effectively rely on the Washington constitution, the *Gunwall* criteria place upon them a burden of showing the differences between the Declaration of Rights and analogous federal provisions that may also apply.¹²⁴ Rutgers Professor Williams recently argued, in a discussion of *Sofie*, that unless those differences can be proven, the court usually presumes that the United States Supreme Court's approach is correct and hesitates to adopt its own interpretation.¹²⁵ Williams is critical of this approach, arguing that this "counterproductive fixation on the criteria" causes rigidity in the Washington court's thinking and cripples the development of state constitutional jurisprudence.¹²⁶

Despite the potential for inflexibility in the criteria method, in recent years the court has found ways to elude its confines and to apply the Washington constitution when it desires. For example, in *Seattle v. Montana*,¹²⁷ the Washington Constitution's distinctive right to bear arms¹²⁸ was raised as a defense to a concealed-weapons conviction. Justice Talmadge's lead opinion noted that the litigants had not briefed the issues under *Gunwall*,¹²⁹ but in footnotes he nevertheless presented his own painstaking analysis of the history and meaning of the state provision.¹³⁰ Justice Alexander could not resist answering with an alternative analysis of the language in a concurring opinion.¹³¹ In other cases, to save lawyers and the court the trouble of "reinventing the wheel," the court has permitted less *Gunwall* analysis on Declaration of Rights sections for which independent Washington jurisprudence has already been fully developed. In *State v. Hobbie*, the court noted that additional jury-trial rights had

122. See *id.* at 662-63, 771 P.2d at 725.

123. See *supra* notes 84-94 and accompanying text.

124. 106 Wash. 2d at 65-67, 720 P.2d at 812-813.

125. See Williams, *supra* note 45, at 1026-27.

126. See *id.* at 1027.

127. 129 Wash. 2d 583, 919 P.2d 1218 (1996).

128. See WASH. CONST. art. I, § 24.

129. 129 Wash. 2d at 591, 919 P.2d at 1222.

130. See *id.* at 591 nn.1, 2, 919 P.2d at 1222 nn.1, 2.

131. See *id.* at 600-01, 919 P.2d at 1226 (Alexander, J., concurring).

previously been established through a previous *Gunwall*-briefed decision and did not have to be reexamined.¹³² In *State v. Johnson*, Justice Smith noted that "[t]his court previously analyzed Constitution article I, section 7 in *Gunwall*, covering factors (1), (2), (3) and (5). We need now only to analyze factors (4) and (6) in a different context."¹³³ Similarly, the extensive development of article I, section 7 jurisprudence caused one Court of Appeals judge to write:

We need not conduct an exhaustive examination of the *Gunwall* factors . . . because article 1, section 7 has already been often interpreted as providing broader protection of privacy interests than that provided by the Fourth Amendment. . . . Thus, we focus here only on those factors unique to the factual context of the present issue¹³⁴

Given that the Washington Supreme Court's stated objective with *Gunwall* briefing is to develop an adequate and independent jurisprudence regarding the State's own constitution, it is likely that as the document is analyzed case-by-case and clause-by-clause, lawyers will be permitted simply to reference existing case law on more and more provisions, presenting *Gunwall* analyses only with respect to those sections and based on those criteria that have not previously been reviewed by the court.

IV. MATCHING PRACTICE WITH THEORY

While the Washington court may permit the focus of *Gunwall* briefs gradually to narrow to those questions that have not been settled by state jurisprudence, the fact remains that in a huge number of cases, the court is declining to consider state constitutional issues because they have not been properly briefed according to the six criteria. As noted above, disregarding the ten cases in which *Gunwall* was cited for its substantive holdings on electronic eavesdropping and two cases that were unclear as to why *Gunwall* was cited, an astounding 65% of the State Supreme Court cases that cited *Gunwall* resulted in a decision based on the United States Constitution alone, partially due to a refusal to consider the Declaration of Rights for lack of adequate briefing.¹³⁵ Although the court has often repeated its commitment to analyze issues first under the Washington Constitution and has emphasized that there

132. 126 Wash. 2d 283, 298, 892 P.2d 85, 94 (1995).

133. 128 Wash. 2d 431, 445, 909 P.2d 293, 301 (1996).

134. *State v. Richman*, 85 Wash. App. 568, 573, 933 P.2d 1088, 1090-91, *review denied*, 133 Wash. 2d 1028, 950 P.2d 478 (1997).

135. See *supra* notes 57-58 and 101 and accompanying text.

is no presumption in favor of the United States Supreme Court's interpretations,¹³⁶ there can hardly be any presumption in favor of the Washington Constitution if the court is unable or unwilling to consider it. The State Supreme Court reached results different than those of the United States Supreme Court based on an independent analysis in only 8 of the 108 cases studied. These effectively involved only two of the twenty-one Washington Declaration of Rights provisions with analogous language in the United States Constitution.¹³⁷ The Washington court has firmly asserted that federal decisions are advisory only.¹³⁸ But after *Gunwall*, it has never, with respect to cases governed by both the Declaration of Rights and similar Bill of Rights provisions incorporated by the Fourteenth Amendment, chosen to differ with the United States Supreme Court's views unless the *Gunwall* analysis has shown differences in the two constitutions' texts, histories, or structures. Although *Gunwall* criterion number six permits the Washington court to reach different conclusions based on "matters of particular state interest or local concern,"¹³⁹ the court has refrained from reaching different conclusions simply because it views the federal high court's reasoning to be wrong for Washington State.

How might the Washington court act to make its practice more consistent with the theory of state constitutional primacy that it consistently espouses? It is inappropriate for the court to use the Washington Constitution as a pretext for reaching a different result than the United States Supreme Court when reliance on the state's constitution is not founded on a principled jurisprudence. But how might the court accelerate the development of Washington's constitutional jurisprudence? The following might be considered:

1. The state court should be willing, in the right case, to interpret the Washington Declaration of Rights differently than the United States Supreme Court's view of Bill of Rights sections that concurrently apply through the Fourteenth Amendment. That "right case" would likely be one in which the United States Circuit Courts of Appeals, or the United States Supreme Court itself, have been sharply divided, i.e., a case in which thoughtful judges can disagree and in which Washington's judges determine that the minority view on the federal court is the right view for Washington, given matters of particular interest or concern to the state as a community. The court

136. See *supra* notes 84-93 and accompanying text.

137. See *supra* note 72 and accompanying text.

138. See *supra* note 93 and accompanying text.

139. *Gunwall*, 106 Wash. 2d at 62, 720 P.2d at 812. See *infra* Appendix A.

has on occasion interpreted the Bill of Rights itself differently than the United States Supreme Court, including a 1936 instance in which the United States Supreme Court then followed the Washington court's lead.¹⁴⁰ There is no reason that the State Supreme Court should not pursue its own interpretation of any of Washington's own constitutional provisions in appropriate circumstances. Furthermore, the state court has a vital role to play beyond Washington's borders. It is one of many interpretive centers of national constitutional law that include the fifty state high courts and the federal courts of appeal. Although the United States Supreme Court's pronouncements are ultimately authoritative with respect to the federal constitution, one of the strengths (and protections) of our system is the multiplicity of sources of constitutional interpretation.¹⁴¹ Washington's court should neither abandon its responsibility to the state's citizens nor to the other states and the federal bench, by shrinking from interpreting the law as it applies within Washington State.

2. The *Wethered* approach of rejecting improperly briefed state arguments has slowed the development of state constitutional jurisprudence rather than sped it along.¹⁴² Consequently, following the practice of the Vermont Supreme Court,¹⁴³ the Washington court should send briefs back to legal counsel for rewriting when the Declaration of Rights has been cited without an accompanying *Gunwall*

140. In *Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379 (1937), the Washington court upheld a state law governing wages and working conditions for women and minors against a challenge based on the Fifth Amendment's Due Process Clause. In its opinion the court extensively quoted dissents by Justices Taft and Holmes in an earlier case that blocked enforcement of a similar law in the District of Columbia. Although the Washington court distinguished that case in *Parrish*, it was clearly pushing the limits. But the United States Supreme Court was itself changing under pressure from the Roosevelt administration's Court-packing scheme, and on appeal that Court followed the Washington decision. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See Michael Ariens, *A Thrice Told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 628-29 (1994); see also *State v. Jackson*, 102 Wash. 2d 432, 439-40, 688 P.2d 136, 141 (1984), in which the Washington court declined to reverse its earlier cases in order to follow a change in the national high court's approach to the Fourth Amendment. Further, in the area of land use and substantive due process, the State Supreme Court has interpreted the Fifth Amendment quite differently than the United States Supreme Court and most other state courts. Richard Settle, *Exploring Regulatory Taking Doctrine*, in *LAND USE AND ENVIRONMENTAL LAW: A CHECKLIST APPROACH TO THE FUNDAMENTALS* 9-1 (Wash. St. Bar Ass'n 1997).

141. See Kahn, *supra* note 1. Kahn points out that because state court judges typically do not hold life appointments, they often reflect popular concerns more than do federal judges. Consequently, they add a different and important voice to the development of national constitutional law. *Id.* at 1155-56.

142. See *supra* notes 96-104 and accompanying text.

143. See *State v. Jewett*, 500 A.2d 233, 234 (Vt. 1985).

analysis.¹⁴⁴ In *State v. Jewett*, the Vermont court required supplemental briefs and set the case for reargument.¹⁴⁵ Justice Thomas J. Hayes wrote for a unanimous court:

The state constitutional issue has been squarely raised, but neither party has presented any substantive analysis or argument on this issue. This constitutes inadequate briefing, and we decline to address the state constitutional question on the basis of the record now before this Court The standard we have set is clear: what is adamantly asserted must be plausibly maintained. Yet our duty is not met by simply drawing the line. On the subject of briefing, we have said many times what we are *against*! Now the hour has come to say what we are *for*. To put it in another way, we who have the mind to criticize must have the heart to help.¹⁴⁶

After a half-dozen Washington briefs are sent back with an order to promptly rewrite, word will get around that the court means business.

3. The court might also consider sanctioning lawyers who plead state constitutional issues but fail to brief them. After all, it is the clients who suffer under the current system, particularly low-income parties, who find it difficult to bring successful malpractice actions against their attorneys.¹⁴⁷ If lawyers consistently raise potential state issues the first time around (preferably at the trial court level) all parties will be spared future delays. The court might also develop a system of sanctions, or favorably consider negligence actions, for lawyers who *should* have raised state constitutional issues but failed to do so. Oregon Justice Linde J. Jones once observed: "Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice."¹⁴⁸

4. The Washington court should continue its insistence that low-income criminal defendants receive experienced, competent

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

145. *Jewett*, 500 A.2d at 234.

146. *Id.*

147. A low-income criminal defendant's only recourse after conviction for a lawyer's failure to adequately present state constitutional claims appears to be a personal restraint petition. Despite attempts to make the forms simple and accessible to inmates, a lawyer's assistance is likely needed only when the court finds the petition worthy, and in noncapital cases such petitions are rarely successful. See WASH. R. APP. P. 16. For recent use of a personal restraint petition based on failure of counsel to adequately brief a state constitutional issue, see *In re Maxfield*, 133 Wash. 2d 332, 945 P.2d 196 (1997).

148. *State v. Lowry*, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring).

appellate representation by lawyers who have the time to research and present good *Gunwall* briefs. Local elected officials should adequately fund prosecutors so that they can properly brief state constitutional issues. Such briefs take time, and neither indigent defendants nor prosecutors should be disadvantaged because their attorneys' caseloads are too high to allow them to adequately brief the Washington Constitution.

5. The State Supreme Court, which oversees the bar examination process, should consistently require the inclusion of a substantive state constitutional question on each exam. This would increase the number of students taking Washington Constitutional Law at each of the state's law schools, and others taking the bar would have the opportunity to learn something about the subject in preparatory courses for the exam. Appropriate topics for such a question might be those on which Washington constitutional law has a distinctive character, including search and seizure,¹⁴⁹ religion,¹⁵⁰ gifts and loans of government funds,¹⁵¹ and sex equality.¹⁵²

If the justices were to adopt these simple measures, the court's practice might move closer toward its theory. An independent jurisprudence of the Washington Declaration of Rights would develop more rapidly, and the court would find it easier to fulfill its stated goal of "turning to our own constitution first . . . [to] grant the proper respect to our own legal foundations and fulfill our sovereign duties."¹⁵³

149. WASH. CONST. art. I, § 7.

150. *Id.* art. I, § 11.

151. *Id.* art. VIII, §§ 5, 7.

152. *Id.* art. XXXI.

153. *State v. Coe*, 101 Wash. 2d 364, 374, 679 P.2d 353, 359 (1984).

APPENDIX A

THE GUNWALL CRITERIA

From *State v. Gunwall*, 106 Wash. 2d 54, 61, 720 P.2d 808, 812-13 (1986), (Anderson, J.)

I deem the following six nonexclusive neutral criteria synthesized from a burgeoning body of authority, 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.

1. The textual language of the state constitution. The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may have no precise federal counterpart at all.

2. *Significant differences in the texts of parallel provisions of the federal and state constitutions.* Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.

3. *State constitutional and common law history.* This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.

4. *Preexisting state law.* Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

5. *Differences in structure between the federal and state constitutions.* The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence 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.

6. *Matters of particular state interest or local concern.* Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.