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## INDEPENDENCE FOR WASHINGTON STATE'S PRIVILEGES AND IMMUNITIES CLAUSE

P. Andrew Rorholm Zellers

*Abstract:* Article I, section 12 of the Washington State Constitution prohibits special privileges and immunities. It provides: “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Since the 1940s, the Washington State Supreme Court has analogized article I, section 12 to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. As a result, it has treated claims under article I, section 12 and the Equal Protection Clause as a single inquiry and applied the U.S. Supreme Court’s Equal Protection analysis to article I, section 12. In the mid-1980s, the Washington State Supreme Court began to question this practice. In 2006, the Court divided on when and how to independently analyze article I, section 12. Justice James Johnson would have the Court independently analyze article I, section 12 in every case; Chief Justice Barbara Madsen would have the Court independently analyze article I, section 12 only where the law grants a privilege to a minority class; and Justice Mary Fairhurst would have the Court independently analyze article I, section 12 only where the state constitution provides greater protection to the right at issue than the Equal Protection Clause. This Comment argues that the Court should abandon the approaches advanced by Chief Justice Madsen and Justice Fairhurst and adopt Justice Johnson’s approach to interpreting and applying article I, section 12. Justice Johnson’s approach is consistent with the clause’s original intent, plain language, and the Court’s early decisions interpreting and applying it. Unlike the other approaches, Justice Johnson’s approach does not put judicial efficiency, finality, and the dignity of Washington courts and the state constitution at risk.

### INTRODUCTION

Adopted in 1889, article I, section 12 of the Washington State Constitution is the state’s privileges and immunities clause.<sup>1</sup> It provides, “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”<sup>2</sup> The Washington State Supreme Court has considered article I, section 12 to be substantially equivalent to the Equal Protection Clause because both provisions require that laws apply equally to all.<sup>3</sup> Due to this common treatment, the Court stopped independently analyzing claims

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1. WASH. CONST. art. I, § 12.

2. *Id.*

3. *See, e.g., State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101, 1104 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass’n v. Moos*, 92 Wash. 2d 939, 603 P.2d 819 (1979).

under article I, section 12 during the 1940s. Instead, the Court addressed claims under both article I, section 12 and the Equal Protection Clause as a single issue, resolving both using the tiered scrutiny the U.S. Supreme Court applies to the Equal Protection Clause.<sup>4</sup>

In 1986, the Court's approach to the state constitution (and to article I, section 12) changed with its adoption of the so-called *Gunwall* criteria.<sup>5</sup> The *Gunwall* criteria guide the Court's determination of when and how to analyze a state constitutional provision independent of an analogous federal provision.<sup>6</sup> In 2002, the Court applied the *Gunwall* criteria to determine that article I, section 12 warranted an analysis independent of the Equal Protection Clause.<sup>7</sup>

Several years later, the Court divided three ways on when and how to independently analyze article I, section 12.<sup>8</sup> Justice Johnson<sup>9</sup> rejected the assertion that article I, section 12 is analogous to the Equal Protection Clause and did not rely on the *Gunwall* criteria to determine when and how to independently analyze article I, section 12.<sup>10</sup> Under his approach the Court would independently analyze article I, section 12 in every case according to its plain language.<sup>11</sup> In contrast to Justice Johnson's approach, Chief Justice Madsen and Justice Fairhurst start with the presumption that article I, section 12 is analogous to the Equal Protection Clause and rely on the *Gunwall* criteria to determine when and how to independently analyze article I, section 12 in appropriate cases.<sup>12</sup> Under Chief Justice Madsen's approach, the Court would

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4. See *infra* Part II.B.

5. See *State v. Gunwall*, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986); see, e.g., *State v. Smith*, 117 Wash. 2d 263, 284, 814 P.2d 652, 662 (1991) (Utter, J., concurring).

6. *Gunwall*, 106 Wash. 2d at 58, 720 P.2d at 811.

7. *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant County I)*, 145 Wash. 2d 702, 725–31, 42 P.3d 394, 405–08 (2002), *vacated in part*, *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake (Grant County II)*, 150 Wash. 2d 791, 83 P.3d 419 (2004).

8. *Madison v. State*, 161 Wash. 2d 85, 92–98, 111–20, 127–28, 163 P.3d 757, 763–66, 773–77, 781–82 (2007); *Andersen v. King County*, 158 Wash. 2d 1, 13–19, 58–64, 120–28, 138 P.3d 963, 971–73, 993–96, 1040–43 (2006).

9. In this Comment, all references to Justice Johnson are to Justice James M. Johnson unless otherwise noted. Justice Charles Johnson also serves on the Washington State Supreme Court.

10. *Andersen*, 158 Wash. 2d at 62, 138 P.3d at 995 (J.M. Johnson, J., concurring) (“[T]he most apt analogy from the United States Constitution is its privileges and immunities clause, not the equal protection clause.”).

11. *Id.* at 58–59, 138 P.3d at 993; *Madison*, 161 Wash. 2d at 119, 163 P.3d at 777 (J.M. Johnson, J., concurring).

12. See *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring) (relying on *Grant County II* for the proposition that article I, section 12 requires an analysis independent of the Equal Protection Clause); *id.* at 93, 163 P.3d at 764 (plurality opinion); *Andersen*, 158 Wash. 2d at 14, 138 P.3d at 971.

independently analyze article I, section 12 “*only* where the challenged legislation grants a privilege or immunity to a minority class.”<sup>13</sup> “In other cases,” the Court would apply “the same analysis that applies under the federal [Equal Protection Clause].”<sup>14</sup> Under Justice Fairhurst’s approach, the Court would independently analyze article I, section 12 only where the state constitution provides greater protection to the right at issue than the Equal Protection Clause.<sup>15</sup>

Whether the Washington State Supreme Court adopts the approach of Chief Justice Madsen, or another justice, directly affects how the Court decides claims under article I, section 12. For example, under Chief Justice Madsen’s approach, a party claiming that a law grants a privilege or immunity to an individual citizen in violation of article I, section 12 and the Equal Protection Clause would not receive an independent state constitutional analysis because the law does not implicate a minority class.<sup>16</sup> The Court’s approach also matters because each approach is arguably more, or less, coherent in light of article I, section 12’s plain language, original intent, and the Court’s early decisions interpreting the clause.

The Washington State Supreme Court should adopt Justice Johnson’s approach to article I, section 12. Unlike the other two approaches, Justice Johnson’s approach is consistent with article I, section 12’s plain language, original intent, and the Court’s early decisions interpreting article I, section 12. Unlike the other two approaches, it does not pose threats to judicial efficiency, finality, and the independence and dignity of Washington courts and the state constitution. Part I of this Comment details the enactment of article I, section 12, and Part II describes how the Court has relied on the federal Constitution to interpret and analyze the provision. Part III explains the *Gunwall* criteria and their effect on article I, section 12 jurisprudence. Part IV shows how the Court applied the *Gunwall* criteria to article I, section 12 to determine that it warrants an analysis independent of the Equal Protection Clause. Finally, Part V explains the Court’s divided approaches to article I, section 12, and Part VI argues in favor of Justice Johnson’s approach in preference to Chief Justice Madsen’s and Justice Fairhurst’s.

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13. *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 14, 138 P.3d at 971 (emphasis added).

14. *Andersen*, 158 Wash. 2d at 16, 138 P.3d at 972; *see also Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring).

15. *Madison*, 161 Wash. 2d at 93–95, 163 P.3d at 764–65.

16. *Cf. Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 14, 16, 138 P.3d at 971–72.

I. ARTICLE I, SECTION 12 IS MODELED ON OREGON'S  
PRIVILEGES AND IMMUNITIES CLAUSE, NOT AN  
ANALOGOUS FEDERAL PROVISION

In 1889, Congress passed the Enabling Act, which invited the people of the Dakotas, Montana, and Washington to form constitutions, erect state governments, and join the Union.<sup>17</sup> That year, Washington Territory held the Washington Constitutional Convention.<sup>18</sup> Historical evidence demonstrates that the delegates to the Convention borrowed heavily from other state constitutions.<sup>19</sup> Specifically, the evidence indicates that the drafters of article I, section 12 relied on Oregon's privileges and immunities clause and not on either of the federal privileges and immunities clauses or the Equal Protection Clause.<sup>20</sup>

A. *The Delegates Borrowed Heavily from Other State Constitutions to Draft Article I of the Washington State Constitution*

To draft the Washington State Constitution, the delegates referred to other state constitutions, the federal Constitution, and a proposed constitution by W. Lair Hill—a noted lawyer in California and Oregon. Hill's proposal borrowed heavily from Oregon's constitution and was printed widely and distributed at the state convention.<sup>21</sup> As a result, article I of the state constitution, its Declaration of Rights, consists almost entirely of provisions that are identical or substantially similar to those in the Indiana, Oregon, and U.S. constitutions, and to Hill's proposed constitution.<sup>22</sup> Because the provisions mirror those in other state constitutions and the federal Constitution in letter or spirit,<sup>23</sup> one may conclude that the delegates knowingly adopted a given provision to the exclusion of others.<sup>24</sup> Of the thirty-two provisions in article I,

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17. Enabling Act of 1889, ch. 180, 25 Stat. 676.

18. Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 227 (1913).

19. See *infra* Part I.B.

20. See *infra* Part I.B.

21. ARTHUR S. BEARDSLEY, NOTES ON THE SOURCES OF THE CONSTITUTION OF THE STATE OF WASHINGTON, 1889–1939, at 1–5 (1939); Charles M. Gates, *Foreword* to THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, at v (Beverly P. Rosenow ed., 1962) [hereinafter JOURNAL].

22. BEARDSLEY, *supra* note 21.

23. *Id.*; JOURNAL, *supra* note 21.

24. See *State v. Smith*, 117 Wash. 2d 263, 285, 814 P.2d 652, 662 (1991) (Utter, J., concurring) (noting the difference in language between article I, section 12 and the Equal Protection Clause “suggests the drafters meant something different from the federal provision”).

twenty-five are textually identical or substantially similar to Oregon provisions.<sup>25</sup> By contrast, only twelve provisions bear similarities to federal provisions.<sup>26</sup> And of those twelve, ten resemble Oregon provisions as well, leaving only two provisions in article I of Washington's constitution with distinctly federal origins.<sup>27</sup> The comparison illustrates the Oregon constitution's imprint on the delegates' work, and suggests that Oregon state constitutional law has greater persuasive authority over Washington State constitutional law than federal constitutional law.<sup>28</sup>

*B. The Delegates Appropriated Oregon's Privileges and Immunities Clause and Extended It to Address Contemporary Concerns*

Like much of article I of the Washington State Constitution, the delegates borrowed from the Oregon State Constitution to craft article I, section 12. On July 11, 1889, Allen Weir, the Convention's temporary secretary, submitted to the Bill of Rights Committee a privileges and immunities provision identical to Oregon's.<sup>29</sup> It read: "No law shall be passed granting to any citizen or class of citizens any privileges or immunities which upon the same terms shall not equally belong to all citizens."<sup>30</sup> Two weeks later, the Committee put an edited version of Weir's proposed clause up for the delegates' vote.<sup>31</sup> The clause, which

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25. BEARDSLEY, *supra* note 21.

26. *Id.*

27. *Id.*

28. *Cf. Smith*, 117 Wash. 2d at 287, 814 P.2d at 663–64 (Utter, J., concurring) (treating Oregon precedent as persuasive authority for independently analyzing article I, section 12 because the clause is modeled after Oregon's); *see also Grant County II*, 150 Wash. 2d 791, 807–08 & 807 n.11, 83 P.3d 419, 426 & n.11 (2004) (looking to Oregon precedent to interpret article I, section 12).

29. JOURNAL, *supra* note 21, at 489, 501. *Compare id.* at 501, with OR. CONST. art. I, § 20. John P. Hoyt, the Convention's president, was a former Michigan legislator and a Washington Territory Supreme Court judge from 1878 to 1887. He also served on the Washington State Supreme Court from 1889 to 1897. JOURNAL, *supra* note 21, at 465. As Convention president, Hoyt appointed standing committees for each article of the constitution. RULES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF WASHINGTON 2 (Thos. H. Cavanaugh, 1889). To the seven-member Bill of Rights Committee, Hoyt appointed four former members of the Territorial Legislature, two of whom were also lawyers. *Id.* at 8. C.H. Warner was a former lawyer, law professor, and member of the Territorial Legislature. JOURNAL, *supra* note 21, at 488. George Comegys was a lawyer, member of the Territorial Legislature, and Speaker of the House. *Id.* at 469. Francis Henry served three terms in the Territorial Legislature and was a clerk to the Territorial Supreme Court. *Id.* at 475. J.C. Kellogg was a former member of the Territorial Legislature. *Id.* at 477.

30. JOURNAL, *supra* note 21, at 501.

31. *See id.* at 500–01.

remains unchanged, reads: “SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”<sup>32</sup> The final version is identical to Oregon’s privileges and immunities clause, except that the delegates extended its scope to apply to corporations as well as individual citizens and classes of citizens.<sup>33</sup> Thus, article I, section 12 provides broader protection for privileges and immunities than Oregon’s provision.

The delegates extended article I, section 12 to corporations to address contemporary concerns with governmental abuse and corporate influence, which had both run rampant under the Territorial Legislature.<sup>34</sup> In the mid-1800s, the Territorial Legislature was known for granting special acts or privileges to the benefit of monopolies.<sup>35</sup> For instance, in the 1862–63 session, the legislature passed 150 private acts, which were mostly monopolies for “roads, bridges, trails, ferries, and the like.”<sup>36</sup> The *Washington Standard* asserted that the legislature had “inaugurated a perfect system of logrolling for private interests against the general welfare.”<sup>37</sup> The extension of article I, section 12 to corporations was a counter to governmental abuse and corporate influence, making more suspect laws subject to judicial review.

In sum, the delegates to the Washington State Constitutional Convention relied predominantly on other state constitutions to draft the Washington State Constitution. Specifically, the Oregon State Constitution appears to have had the greatest influence on the drafting of Article I of the Washington State Constitution. Records from the convention show that the delegates started with a privileges and immunities clause identical to Oregon’s, and then extended it to apply to corporations in addition to natural persons. The decision to prohibit the State from granting privileges and immunities to corporations addressed contemporary concerns with governmental abuse and corporate influence. The delegates’ decision to model article I, section 12 on Oregon’s privileges and immunities clause rather than a similar federal

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32. WASH. CONST. art. I, § 12.

33. JOURNAL, *supra* note 21, at 500–01.

34. ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 26–27 (G. Alan Tarr ed., 2002).

35. Wilfred J. Airey, A History of the Constitution and Government of Washington Territory 208 (1945) (unpublished Ph.D. thesis, University of Washington) (on file with Gallagher Law Library).

36. *Id.* at 210.

37. *Id.* (internal quotation marks omitted).

provision such as the Equal Protection Clause is important because it suggests they intended something different than Equal Protection.<sup>38</sup>

## II. HISTORICALLY, THE WASHINGTON STATE SUPREME COURT HAS ANALOGIZED ARTICLE I, SECTION 12 TO THE FEDERAL PRIVILEGES AND IMMUNITIES AND EQUAL PROTECTION CLAUSES

While the Oregon State Constitution influenced the creation of article I, section 12, the U.S. Constitution has influenced the Washington State Supreme Court's interpretation of the clause. The U.S. Constitution's influence on article I, section 12 is complex because the Court has relied on two different federal provisions to interpret it: the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment. To define and interpret the term "privileges and immunities," the Washington State Supreme Court looks to the U.S. Supreme Court's interpretation of the same term in Article IV. Yet, to review claims under article I, section 12, the Court has often applied the tiered scrutiny the U.S. Supreme Court applies to Equal Protection claims.<sup>39</sup>

### A. *The Washington State Supreme Court Interprets the Term "Privileges and Immunities" the Same as the U.S. Supreme Court Interprets the Term in Article IV of the U.S. Constitution*

The Washington State Supreme Court defines the term "privileges and immunities" as "pertain[ing] alone to those fundamental rights

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38. See *State v. Smith*, 117 Wash. 2d 263, 285, 814 P.2d 652, 662 (1991) (Utter, J., concurring).

39. The Equal Protection Clause provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2. When reviewing challenges to class-based legislation under the Clause, courts ask whether the government's purpose justifies the challenged classification. See, e.g., *Railway Exp. Agency v. New York*, 336 U.S. 106, 109 (1949). Whether the government's justification is sufficient depends on the discrimination at issue. In general, strict scrutiny applies to distinctions based on national citizenship, race, or national origin. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986). Under strict scrutiny, courts uphold the law if it is proved necessary to meet a compelling government interest. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). Intermediate scrutiny applies to distinctions based on gender and legitimacy. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Craig v. Boren*, 429 U.S. 190, 197 (1976). Under intermediate scrutiny, courts uphold the law if it is proved substantially related to an important government purpose. *Boren*, 429 U.S. at 197. Rational basis review applies to all other laws challenged under the Clause. *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981). Under rational basis review, courts uphold the law if it is proved rationally related to a legitimate government purpose. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).



which belong to the citizens of the state by reason of such citizenship.”<sup>40</sup> More specifically, to define and interpret the “privileges and immunities” of Washington State citizenship, the Court has held that state courts should look to Article IV of the U.S. Constitution. In the 1902 case *State v. Vance*,<sup>41</sup> the Court reviewed a claim that a state law giving county bar associations the exclusive power to nominate candidates to serve as jury commissioners granted special privileges.<sup>42</sup> Rejecting this claim, the Court held that the “right simply of recommendation . . . is not, in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.”<sup>43</sup> The Court explained that federal privileges and immunities “secure in each state to the citizens of all states” the right to conduct business, to possess property, to remedy for debt collection, to enforce personal rights, and to exemption from taxes as others are in other states.<sup>44</sup> The Court held, “By analogy these words as used in the state constitution should receive like definition and interpretation as that applied to them when interpreting the federal constitution.”<sup>45</sup>

The U.S. Constitution contains two clauses related to privileges and immunities: the Privileges and Immunities Clause of Article IV and the Privileges or Immunities Clause of the Fourteenth Amendment. In *Vance*, the Washington State Supreme Court referred to the Privileges and Immunities Clause of Article IV, not the Fourteenth Amendment.<sup>46</sup> The Privileges and Immunities Clause of Article IV prohibits a state from discriminating against out-of-state citizens.<sup>47</sup> But, discrimination does not run afoul of the Clause if there is a “substantial reason” for the discrimination, and that reason is substantially related to a state

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40. *State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902).

41. 29 Wash. 435, 70 P. 34.

42. *Id.* at 454–55, 70 P. at 40.

43. *Id.* at 458–59, 70 P. at 41.

44. *Id.* at 458, 70 P. at 41.

45. *Id.*

46. In *Vance*, the Washington State Supreme Court referred to the federal privileges and immunities that “secure in each state to the citizens of all states.” *Vance*, 29 Wash. at 458, 70 P. at 41. Thus, it explicitly referred to the Privileges and Immunities Clause in Article IV of the U.S. Constitution, which reads, “The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,” and not the Fourteenth Amendment. Compare U.S. CONST. art. IV, § 2, with U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).

47. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939).

objective.<sup>48</sup> The Clause does not make the privileges and immunities under one state constitution the privileges and immunities under another state constitution.<sup>49</sup> In *Austin v. New Hampshire*,<sup>50</sup> Justice Thurgood Marshall explained that the “Clause thus establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment.”<sup>51</sup>

Federal case law suggests that the U.S. Supreme Court interprets “privileges and immunities” to include constitutional rights as well as rights or actions related to livelihood.<sup>52</sup> For example, the Court held that the Clause prohibits states from burdening out-of-state citizens’ access to state courts, their power to buy and sell property,<sup>53</sup> and even their ability to obtain abortions within the state.<sup>54</sup> The Court has also held that the Clause prohibits states from burdening out-of-staters’ right to practice a profession, obtain licenses, and gain employment, but not their right to sport or recreation.<sup>55</sup>

Case law suggests that the Washington State Supreme Court interprets the privileges and immunities of article I, section 12 consistently with the U. S. Supreme Court’s interpretation of privileges and immunities under the federal Constitution. For example, the Washington State Supreme Court has held that the state’s privileges and immunities include the right to practice a profession in a particular

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48. Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985). To determine whether the discrimination is related to the state’s objective, the Court employs the least restrictive alternative analysis. *Id.*

49. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180–81 (1869) (“Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States.”); see also *Hague*, 307 U.S. at 511.

50. 420 U.S. 656 (1975).

51. *Id.* at 660.

52. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.5.2 (3d ed. 2006).

53. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978) (citing *Canadian N. Ry. Co. v. Eggen*, 252 U.S. 553 (1920) and *Blake v. McClung*, 172 U.S. 239 (1898)).

54. *Doe v. Bolton*, 410 U.S. 179, 201 (1973) (holding that a state may not restrict out-of-state citizens’ ability to obtain in-state abortions).

55. Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (invalidating law that required state residency to practice law); *Hicklin v. Orbeck*, 437 U.S. 518, 533–34 (1978) (invalidating law that gave state residents job preference over out-of-state citizens on natural resource development projects); *Baldwin*, 436 U.S. at 388 (upholding a Montana State law that charged higher rates to out-of-staters for hunting licenses because “hunting by nonresidents in Montana is a recreation and a sport” and is not fundamental under the Clause); *Mullaney v. Anderson*, 342 U.S. 415, 420 (1952) (invalidating law that charged out-of-state citizens more for a licensing fee).

place,<sup>56</sup> to make deductions from taxes,<sup>57</sup> to sell goods,<sup>58</sup> and to obtain business licenses.<sup>59</sup> The Court has rejected rights that are unrelated to a person's livelihood, such as the right to recommend someone for public appointment<sup>60</sup> and the right to smoke in a private facility.<sup>61</sup> The Court has suggested that state privileges and immunities include those rights secured in the state constitution, such as the right to petition the government, to vote, and to a speedy trial.<sup>62</sup> Thus, consistent with the U.S. Supreme Court's interpretation of the privileges and immunities of Article IV, the Washington State Supreme Court interprets the privileges and immunities of article I, section 12 to include state constitutional rights and rights related to livelihood.

*B. The Washington State Supreme Court Has Applied the Standard of Review of the Equal Protection Clause to Article I, Section 12*

Originally, the Washington State Supreme Court reviewed claims under article I, section 12 without reference or resort to the Equal

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56. *See* *Nw. Nat'l Ins. Co. v. Fishback*, 130 Wash. 490, 494–96, 228 P. 516, 517–18 (1924) (holding that law permitting only one agent per insurance company in a city of fifty thousand or less or two agents in any city of greater population violated article I, section 12 and the Equal Protection Clause).

57. *See* *Nathan v. Spokane County*, 35 Wash. 26, 36, 76 P. 521, 524 (1904) (holding that law allowing a person who had paid certain property taxes to deduct the amount paid from the next assessment violated article I, section 12 because it “discriminate[d] between taxpayers of the same class” and granted a privilege or immunity to certain taxpayers).

58. *See Ex parte Camp*, 38 Wash. 393, 397–98, 80 P. 547, 549 (1905) (holding that a law prohibiting retailers from selling goods in a district but exempting producers of goods violated article I, section 12 because it granted a special privilege); *see also* *State v. Robinson Co.*, 84 Wash. 246, 250, 146 P. 628, 629 (1915) (holding that law regulating sales of feed stuffs, and excepting flour mills, violated article I, section 12 because it granted a privilege to cereal and flour mills).

59. *See* *City of Seattle v. Dencker*, 58 Wash. 501, 510–11, 108 P. 1086, 1090 (1910) (holding that law requiring a license to possess or control automatic vending machines, except for machines automating the sale of gas, telephone use, and candies, violated article I, section 12); *see also* *City of Seattle v. Gibson*, 96 Wash. 425, 432–33, 165 P. 109, 112 (1917) (finding that law authorizing a council to decide who among pharmacists should receive licenses to practice as druggists violated article I, section 12 because it involved granting a privilege unequally and provided for an arbitrary determination).

60. *State v. Vance*, 29 Wash. 435, 458–59, 70 P. 34, 41 (1902).

61. *Am. Legion Post No. 149 v. Wash. State Dep't of Health*, 164 Wash. 2d 570, 600–01, 192 P.3d 306, 322 (2008).

62. *See* *Madison v. State*, 161 Wash. 2d 85, 95, 120, 163 P.3d 757, 765, 777 (2007) (holding that the right to vote is a privilege); *Grant County II*, 150 Wash. 2d 791, 815–16, 83 P.3d 419, 429–30 (2004) (distinguishing the right to annexation from the right to petition under article I, section 4 and the right to vote under article I, section 19 to conclude that the right to annexation is not a privilege or immunity); *State v. Smith*, 117 Wash. 2d 263, 291, 814 P.2d 652, 666 (1991) (Utter, J., concurring) (treating the right to a speedy trial as a privilege).

Protection Clause.<sup>63</sup> In the 1892 case of *State v. Carey*,<sup>64</sup> the earliest case to interpret article I, section 12, the Washington State Supreme Court determined whether a law, which authorized the governor to appoint the members of the state medical examination board, violated article I, section 12 of the state constitution, the Privileges and Immunities Clause of Article IV, or the Equal Protection Clause.<sup>65</sup> The Court analyzed article I, section 12 independently and held the law did not violate any of these provisions.<sup>66</sup> Indeed, the Court independently analyzed article I, section 12 into the 1950s.<sup>67</sup> The Court's original practice, established

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63. See, e.g., *State v. Carey*, 4 Wash. 424, 426–30, 30 P. 729, 729–31 (1892) (applying separate state and federal analyses and holding that a law requiring medical practitioners to be licensed by state examining board did not violate article I, section 12, the Privileges and Immunities Clause of Article IV, or the Equal Protection Clause).

64. 4 Wash. 424, 30 P. 729.

65. *Id.* at 426–27, 30 P. at 729–30.

66. *Id.* at 426–30, 30 P. at 729–31. Three of the four justices who presided over the *State v. Carey* case were delegates to the state constitutional convention. Justice Ralph O. Dunbar, the author of the majority opinion in *Carey*, was a member of the Territorial Legislature from 1878 to 1887, a delegate to the convention, and a state Supreme Court justice from 1889 to 1912. JOURNAL, *supra* note 21, at 470; *Justice Ralph O. Dunbar*, TEMPLE JUST., <http://templeofjustice.org/justice/ralph-o-dunbar/> (last visited Feb. 21, 2012). Justice Theodore L. Stiles, who joined Justice Dunbar's opinion in *Carey*, was a delegate and a state Supreme Court justice from 1889 to 1895. JOURNAL, *supra* at 485; *Justice John P. Hoyt*, TEMPLE JUST., <http://templeofjustice.org/justice/theodore-l-stiles/> (last visited Feb. 21, 2012). Justice John P. Hoyt, who dissented in *Carey*, was a Washington Territory Supreme Court judge from 1878 to 1887, president of the convention, and a state Supreme Court justice from 1889 to 1897. JOURNAL, *supra* at 486; *Justice John P. Hoyt*, TEMPLE JUST., <http://templeofjustice.org/justice/john-p-hoyt/> (last visited Feb. 21, 2012).

67. See, e.g., *Larson v. City of Shelton*, 37 Wash. 2d 481, 490, 224 P.2d 1067, 1072 (1950) (holding that a law requiring a license to peddle goods, but exempting veterans from paying the fee, violated article I, section 12); *City of Seattle v. Rogers*, 6 Wash. 2d 31, 36–38, 106 P.2d 598, 600–01 (1940) (holding that an ordinance prohibiting certain charity campaigns without a license, but exempting the Seattle Community Fund, violated article I, section 12); *Pearson v. City of Seattle*, 199 Wash. 217, 227, 90 P.2d 1020, 1024 (1939) (holding that a tax on solid fuel dealers, which exempted liquid fuel dealers, violated article I, section 12); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 84, 59 P.2d 1101, 1105 (1936) (holding that a law prohibiting issuance of licenses for gill nets except for those holding licenses from 1932 to 1933 violated article I, section 12), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wash. 2d 939, 603 P.2d 819 (1979); *Sherman Clay & Co. v. Brown*, 131 Wash. 679, 690, 231 P. 166, 170 (1924) (holding that a city ordinance prohibiting second-hand dealers from disposing of goods for ten days after receipt, but exempting purchasers of stoves, furniture, etc., violated article I, section 12); *State v. Robinson Co.*, 84 Wash. 246, 250, 146 P. 628, 629 (1915) (holding that a state law that exempted cereal and flour mills from requirements placed on other companies selling the same goods violated article I, section 12); *City of Seattle v. Dencker*, 58 Wash. 501, 510–11, 108 P. 1086, 1090 (1910) (holding that an ordinance imposing a tax on the sale of certain goods by machine but not on merchants selling the same goods violated article I, section 12); *City of Spokane v. Macho*, 51 Wash. 322, 325–26, 98 P. 755, 756 (1909) (holding that an ordinance regulating employment agencies was unconstitutional because it imposed criminal penalties on such agencies engaging in false pretenses but not on other companies engaging in similar conduct); *Ex parte Camp*, 38 Wash. 393, 397–98, 80 P. 547, 549 (1905) (holding that a city ordinance prohibiting anyone from peddling fruits and vegetables within

just three years after statehood, suggests the delegates intended the Court to independently analyze article I, section 12.<sup>68</sup>

Despite this original independent approach, the Court has analogized article I, section 12 to the Equal Protection Clause. From the 1940s until early 2000, the Court has regularly applied the standard of review applicable under the Clause to article I, section 12. In the 1920s, Chief Justice Emmett M. Parker began to analogize article I, section 12 to the Equal Protection Clause. In *State ex rel. Makris v. Superior Court for Pierce County*,<sup>69</sup> then-Justice Parker stated that any state law that authorized an officer to issue or withhold licenses to engage in a legal enterprise without limits on his or her discretion violated the Equal Protection Clause.<sup>70</sup> In article I, section 12, then-Justice Parker remarked, “we find the same guaranty, in substance.”<sup>71</sup> In *State v. Hart*,<sup>72</sup> Chief Justice Parker held that an excise tax on wholesale, but not retail, sales of liquefied fuels did not violate article I, section 12 or the Equal Protection Clause.<sup>73</sup> Chief Justice Parker explained that the Court declined to discuss separately the appellants’ claims under the federal and state constitutions because “the reason and the result to be reached would necessarily be the same, in view of the manifest identity in substance of the rights guaranteed by the . . . provisions.”<sup>74</sup> In *Hart*, Chief Justice Parker did not explain why he thought article I, section 12 and the Equal Protection Clause are substantively the same. The opinion suggests that he believed the provisions guaranteed the same rights. To the extent that this is the case, Chief Justice Parker’s position was inconsistent with the fact that the Equal Protection Clause protects any right, while article I, section 12 protects only a privilege or immunity.<sup>75</sup>

In *State ex rel. Bacich v. Huse*,<sup>76</sup> the Court both distinguished and equated article I, section 12 with the Equal Protection Clause. In *Bacich*, the Court held that a law, which limited licenses to fish with gill nets in

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city limits, but exempting farmers, violated article I, section 12).

68. See *Madison v. State*, 161 Wash. 2d 85, 113, 163 P.3d 757, 774 (2007) (Madsen, J., concurring) (invoking the “precept that an interpretation of the state constitution made closest to [its] adoption . . . provides the best evidence of the drafters’ intent”).

69. 113 Wash. 296, 193 P. 845 (1920).

70. *Id.* at 302, 193 P. 845, 847.

71. *Id.*

72. 125 Wash. 520, 217 P. 45 (1923).

73. *Id.* at 524–25, 217 P. at 46–47.

74. *Id.* at 525–26, 217 P. at 47.

75. *Andersen v. King County*, 158 Wash. 2d 1, 124, 138 P.3d 963, 1042 (2006) (Chambers, J., concurring in dissent).

76. 187 Wash. 75, 59 P.2d 1101 (1936).

coastal waters to those persons and corporations who held them between 1932 and 1933, violated article I, section 12 and the Equal Protection Clause.<sup>77</sup> The Court stated that the “aim and purpose of [article I, section 12] and of the [Equal Protection Clause] is to secure equality of treatment of all persons, *without undue favor on the one hand or hostile discrimination on the other.*”<sup>78</sup> In other words, the Court recognized that while both provisions seek equal treatment under the law, article I, section 12’s purpose is to prevent unequal treatment related to undue favoritism whereas the Equal Protection Clause’s purpose is to prevent unequal treatment related to hostile discrimination.<sup>79</sup> Because of their similarity, the Court held that class-based legislation satisfied both provisions if it met two requirements.<sup>80</sup> First, “[t]he legislation must apply alike to all persons within the designated class; and [second,] reasonable ground must exist for making a distinction between those who fall within the class and those who do not.”<sup>81</sup> In light of this two-part test, it is noteworthy that the *Bacich* Court did independently analyze article I, section 12,<sup>82</sup> though the outcome was the same under both provisions.<sup>83</sup>

Yet, following *Bacich*, the Court regularly treated claims under both article I, section 12 and the Equal Protection Clause as a single issue.<sup>84</sup>

77. *Id.* at 84, 59 P.2d at 1105, *overruled on other grounds by* Puget Sound Gillnetters Ass’n v. Moos, 92 Wash. 2d 939, 603 P.2d 819 (1979).

78. *Bacich*, 187 Wash. at 80, 59 P.2d at 1104 (emphasis added).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 82, 59 P.2d at 1104–05 (noting that the state holds fish in trust for all people, not for a few persons or a minority, and that the act implicated a privilege).

83. *Id.* (finding that the law applied alike to all license holders, but holding that the distinction between license holders in 1932 and 1933 and those in other years did not rest on reasonable grounds).

84. *See, e.g.,* *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 640, 771 P.2d 711, 714 (1989) (stating that the Court has applied the “federal tiered scrutiny model of equal protection analysis” to claims under article I, section 12); *Childers v. Childers*, 89 Wash. 2d 592, 575 P.2d 201, 209 (1978) (“It is the well-established rule of law in this state that a statutory classification having some reasonable basis does not offend the equal protection clause or the privileges and immunities clause.” (quoting *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wash. 2d 584, 588, 478 P.2d 232, 235 (1970)); *Sonitrol Nw., Inc. v. City of Seattle*, 84 Wash. 2d 588, 589, 528 P.2d 474, 476 (1974) (referring to the “equal protection clause found in [article I, section 12]”); *Markham Adver. Co. v. State*, 73 Wash. 2d 405, 427, 439 P.2d 248, 261 (1968) (stating that article I, section 12 and the Equal Protection Clause have “the same import, and [that the Court] appl[ies] them as one”); *Clark v. Dwyer*, 56 Wash. 2d 425, 435, 353 P.2d 941, 947 (1960) (stating that the Equal Protection Clause and article I, section 12 “require that class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those within, and those without, a designated class”).

In doing so, the Court generally adhered to the two-pronged approach outlined in *Bacich*. To determine whether a distinction between classes was reasonable, the Court applied minimum, intermediate, or strict scrutiny,<sup>85</sup> as the U.S. Supreme Court does under the Equal Protection Clause.<sup>86</sup> The Washington State Supreme Court's approach is inconsistent with the U.S. Supreme Court's approach to the Privileges and Immunities of Article IV, where the Court applies intermediate scrutiny in every case.<sup>87</sup> The Washington State Supreme Court has never explained why it looks to Article IV to clarify article I, section 12, but the Fourteenth Amendment to review claims under it.<sup>88</sup>

### III. IN *STATE v. SMITH*, JUSTICE UTTER USED THE *GUNWALL* CRITERIA TO DETERMINE THAT THE COURT SHOULD INDEPENDENTLY ANALYZE ARTICLE I, SECTION 12

In the mid-1980s, the Washington State Supreme Court devised the *Gunwall* criteria to determine when and how the Court should consider the state constitution to extend broader rights than the U.S. Constitution.<sup>89</sup> In a concurring opinion in *State v. Smith*,<sup>90</sup> Justice Robert Utter used the *Gunwall* criteria to argue that the Court should independently analyze article I, section 12.<sup>91</sup> Justice Utter's *Smith*

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85. See, e.g., *Sofie*, 112 Wash. 2d at 640, 771 P.2d at 714 (noting that the Court has applied the "federal tiered scrutiny model of equal protection analysis" to claims under article I, section 12); *Hanson v. Hutt*, 83 Wash. 2d 195, 201–02, 517 P.2d 599, 603 (1973) (holding that a law making pregnant women ineligible for unemployment insurance benefits violated article I, section 12 and the Equal Protection Clause because it did not pass strict scrutiny).

86. See *supra* note 39.

87. To determine whether a challenged law violates the Clause, courts engage in a two-step inquiry. *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 218 (1984). First, the court asks whether the challenged state law discriminates against out-of-staters with respect to a privilege or immunity. *Id.* Second, the court asks whether the discriminatory law is sufficiently justified. *Id.* at 222. The law is sufficiently justified "where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 284 (1985). "In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means." *Id.* Professor Chemerinsky notes, "Thus far, the Court has not found that any law meets this rigorous test." CHEMERINSKY, *supra* note 52, § 5.5.3.

88. *But see Grant County II*, 150 Wash. 2d 791, 805 n.10, 83 P.3d 419, 425 n.10 (2004) (reasoning that the Court has always compared article I, section 12 to the Equal Protection Clause because "federal jurisprudence has focused on the [Clause] in cases involving differential treatment").

89. *State v. Gunwall*, 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986).

90. 117 Wash. 2d 263, 814 P.2d 652 (1991).

91. *Id.* at 284–85, 814 P.2d at 662 (Utter, J., concurring).

concurrence is the first post-*Gunwall* opinion to argue for a return to an independent analysis under article I, section 12.

A. *In 1986, the Washington State Supreme Court Adopted the Gunwall Criteria to Determine When and How to Independently Analyze the State Constitution*

During the mid-twentieth century, state courts across the country made state constitutional provisions dependent on the U.S. Supreme Court's interpretation of parallel provisions in the federal Constitution.<sup>92</sup> In mid-1970s, U.S. Supreme Court Justice William Brennan observed that increasingly state courts were "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased."<sup>93</sup> As state courts increasingly adopted independent interpretations of state constitutional provisions, they faced the practical concern of how to do so.<sup>94</sup> "[S]tate judges [and] the lawyers who appear before them," Oregon State Supreme Court Justice Hans Linde wrote, "face[d] problems of sources and methods to which they had given little thought."<sup>95</sup>

In the mid-1980s, the Washington State Supreme Court addressed the issue in *State v. Gunwall*.<sup>96</sup> In *Gunwall*, the Court adopted six non-exclusive criteria to determine "whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution."<sup>97</sup> The six *Gunwall* criteria are: (1) textual language of the state constitution; (2) textual differences between parallel provisions of the state and federal constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between the state and federal constitutions; and (6) state or local concerns.<sup>98</sup> Since *Gunwall*,

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92. See Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 166 (1984) ("State courts are returning to their state charters to deal with issues that for forty years they left to be debated and resolved by the national Supreme Court.").

93. William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977). For Justice Brennan, "[t]his pattern of state court decisions puts to rest the notion that state constitutional provisions were adopted to mirror the federal Bill of Rights." *Id.* at 501.

94. See Linde, *supra* note 92, at 166 ("The question in the state courts no longer is whether to give independent attention to state constitutional issues, but how.").

95. *Id.*

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

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

98. See *id.*



the Court has framed its decision whether to independently analyze article I, section 12 in terms of these criteria.

*B. In His Concurrence in State v. Smith, Justice Utter Argued That the Court Should Interpret Article I, Section 12 Independently of the Equal Protection Clause*

In *State v. Smith*, the Washington State Supreme Court examined whether a state law that created the right to move for revision of a juvenile court commissioner ruling—a right not enjoyed by juveniles appearing before a judge—violated article I, section 12 or the Equal Protection Clause.<sup>99</sup> Writing for the majority, Justice Andersen noted that article I, section 12 and the Equal Protection Clause require that similarly situated persons receive equal treatment under the law.<sup>100</sup> Justice Andersen rejected the appellant's request that the Court apply the *Gunwall* criteria to article I, section 12 and hold that the provision prohibits disparate treatment of juveniles in the context of judicial review.<sup>101</sup> Justice Andersen explained that the Court had recently held that article I, section 12 and the Equal Protection Clause “are substantially identical and considered by [the Court] as one issue.”<sup>102</sup> Instead, Justice Andersen determined that rational basis review was warranted under the Equal Protection Clause, and ultimately held there was no violation of “equal protection under either the state or federal constitution.”<sup>103</sup>

In a concurring opinion, Justice Utter noted that recent cases suggested that differences between article I, section 12 and the Equal Protection Clause “might require a different interpretation,”<sup>104</sup> and argued that to ignore the provisions' different histories and language “is to rewrite our constitution without [the] benefit of a constitutional

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99. *State v. Smith*, 117 Wash. 2d 263, 268, 814 P.2d 652, 654 (1991).

100. *Id.* at 276–77, 814 P.2d at 658.

101. *Id.* at 281, 814 P.2d at 660–61. Justice Andersen authored the *Gunwall* opinion. *Gunwall*, 106 Wash. 2d 54, 720 P.2d 808.

102. *Smith*, 117 Wash. 2d at 281, 814 P.2d at 660.

103. *Id.* at 279, 281, 814 P.2d at 659, 661.

104. *Id.* at 282, 814 P.2d at 661 (Utter, J., concurring) (citing *In re Mota*, 114 Wash. 2d 465, 472, 788 P.2d 538, 541–42 (1990) and *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989)). Later in his concurrence, Justice Utter noted that in *Sofie*, the Court stated, “We have followed this approach because a separate analysis focusing on the language and history of our state constitution has not been urged.” *Id.* at 284, 814 P.2d at 662 (quotation marks omitted). He also noted that in *Darrin v. Gould*, the Court stated that article I, section 12 “may be construed to provide greater protection to individual rights than that provided by the [Equal Protection Clause].” *Id.* (quoting *Darrin v. Gould*, 85 Wash. 2d 859, 868, 540 P.2d 882, 887–88 (1975)).

convention and to deprive the people of this state of additional rights.”<sup>105</sup> Justice Utter noted that the original purpose of the Equal Protection Clause was to prevent states from denying rights that had been bestowed on other classes whereas the purpose of article I, section 12 was to prevent the State from acting out of favoritism.<sup>106</sup> He further argued that “[t]he fact that [article I, section 12] was modeled after another state’s provision, and not the federal one, indicates it was meant to be interpreted independently.”<sup>107</sup>

After outlining his disagreement with the majority opinion’s portrayal of recent article I, section 12 precedent, Justice Utter applied the *Gunwall* criteria to reason and concluded that an independent analysis under article I, section 12 was warranted in the case.<sup>108</sup> In particular, Justice Utter’s *Gunwall* analysis found that rules of statutory and constitutional interpretation require that the Court give meaning to the provisions’ significant differences in language.<sup>109</sup> Also, state constitutional history directs the Court not to the Equal Protection Clause, but to Oregon’s privileges and immunities clause, which the Oregon State Supreme Court considers antithetical to the Equal Protection Clause and interprets independently.<sup>110</sup>

Justice Utter relied upon the Oregon State Supreme Court’s independent approach to privileges and immunities in *State v. Clark*<sup>111</sup> to analyze the defendant’s claim under article I, section 12 rather than the Equal Protection Clause.<sup>112</sup> Although *Smith* involved a privilege—the right to a speedy trial—Justice Utter concluded that the different treatment of juveniles appearing before juvenile court commissioners and superior court judges was constitutionally permissible, especially where all juveniles in the same forum are treated equally.<sup>113</sup> Thus,

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105. *Id.* at 282, 814 P.2d at 661.

106. *Id.* at 283, 814 P.2d at 661–62.

107. *Id.* at 283, 814 P.2d at 662.

108. *Id.* at 284–87, 814 P.2d at 662–63.

109. *Id.* at 285, 814 P.2d at 662 (“In *Gunwall*, we held the difference in language between [article I, section 7] and [the Fourth Amendment] ‘is material and allows us to render a more expansive interpretation’ to the state provision.”) (quoting *State v. Gunwall*, 106 Wash.2d 54, 65, 720 P.2d 808, 814 (1986)).

110. *Id.* at 285–86, 814 P.2d at 663. Justice Utter also noted that the “treatment of juveniles in criminal matters” is a matter of state and local concern (the sixth *Gunwall* criterion). *Id.* at 286–87, 814 P.2d at 663.

111. *State v. Clark*, 630 P.2d 810 (Or. 1981).

112. *Smith*, 117 Wash. 2d at 287–90, 814 P.2d at 664–65 (*Clark*, 630 P.2d 810).

113. *Id.* at 291, 814 P.2d at 666.

Justice Utter found that the law did not violate article I, section 12.<sup>114</sup>

In *Smith*, Justice Utter ultimately reached the same conclusion as the majority.<sup>115</sup> But Justice Utter's analysis of article I, section 12 differed and his *Gunwall* analysis laid the groundwork for future arguments over article I, section 12 and the Equal Protection Clause.<sup>116</sup> For approximately sixteen years after *Gunwall*, Justice Utter's *Smith* concurrence was the sole opinion arguing for independent analysis of article I, section 12.<sup>117</sup> In the majority of cases during this period, the Court refrained from independently analyzing article I, section 12 because the party failed to brief the *Gunwall* criteria or the Court rejected that party's *Gunwall* analysis.<sup>118</sup> In 2002, Justice Utter's position finally became the majority position in *Grant County Fire Protection District No. 5 v. City of Moses Lake*,<sup>119</sup> where the Court endorsed an independent analysis of article I, section 12.

#### IV. IN *GRANT COUNTY I*, THE WASHINGTON STATE SUPREME COURT HELD THAT ARTICLE I, SECTION 12 REQUIRES AN INDEPENDENT ANALYSIS

In its 2002 decision in *Grant County I*, the Washington State Supreme Court unanimously endorsed considering article I, section 12

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114. *Id.* (reasoning that (1) the state action was lawful; (2) the right to a speedy trial is a "privilege" under the state constitution; (3) the right is available to all juveniles; and (4) the class distinction between juveniles tried in state versus juvenile court is constitutionally permissible).

115. *Id.* at 279, 281, 290–91, 814 P.2d at 659, 661, 666.

116. *See infra* Part V.

117. *See Andersen v. King County*, 158 Wash. 2d 1, 14, 138 P.3d 963, 971 (2006) (observing that "[u]ntil *Grant County II* no recent decision, and none applying *Gunwall*, had applied or described circumstances under which a separate independent state analysis might apply under [article I, section 12]"). Here, the Court appears to have forgotten Justice Utter's *Smith* concurrence, although it goes on to cite it several lines later. *Id.*

118. *Compare* 1519–1525 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp., 144 Wash. 2d 570, 577, 29 P.3d 1249, 1253 (2001) (applying an equal protection analysis under the Equal Protection Clause and article 1, section 12 where the petitioner did not argue for the court to apply an independent state constitutional analysis), and *Clark v. Pacificorp*, 118 Wash. 2d 167, 192, 822 P.2d 162, 175 (1991) (considering only the federal argument where appellant did not argue that article I, section 12 should be "construed independently based upon the [*Gunwall*] factors"), with *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wash. 2d 954, 979, 948 P.2d 1264, 1276 (1997) (rejecting petitioners argument that article I, section 12 provided greater protection to corporate insurers challenging a rule regarding attorneys fees, and thus refraining from engaging in an independent analysis), and *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus. of Wash.*, 116 Wash. 2d 352, 362, 804 P.2d 621, 626 (1991) (noting that article I, section 12 and the Fourteenth Amendment "are substantially identical and have been so regarded by [the] court").

119. *Grant County I*, 145 Wash. 2d 702, 42 P.3d 394 (2002), *vacated in part*, *Grant County II*, 150 Wash. 2d 791, 83 P.3d 419 (2004).

independently of the Equal Protection Clause.<sup>120</sup> The majority used the *Gunwall* criteria to reach its position,<sup>121</sup> while the dissent rejected *Gunwall* and instead reached its conclusion through a plain-language approach.<sup>122</sup> The majority held that the right to petition was a privilege and that the petition method of municipal annexation at issue violated article I, section 12 because it granted some property owners a privilege not afforded to others.<sup>123</sup> On reconsideration in 2004 (*Grant County II*<sup>124</sup>), the Court reaffirmed its belief that article I, section 12 required consideration independent of the Equal Protection Clause, but vacated its holding that the petition method of annexation violated the state constitution.<sup>125</sup> *Grant County II*'s holding regarding the relationship between article I, section 12 and the Equal Protection Clause is important not only because it is the first time a majority held that article I, section 12 required independent consideration, but because the justices have relied upon, and disagreed over, the meaning of *Grant County II* in later decisions.<sup>126</sup>

A. *In Grant County II, the Majority Used the Gunwall Criteria to Hold that Article I, Section 12 Requires a Constitutional Analysis Independent from the Equal Protection Clause*

Writing for the majority in *Grant County II*, Justice Bobbe Bridge reaffirmed the Court's holding in *Grant County I* that article I, section 12 "requires an independent constitutional analysis from the [Equal Protection Clause]."<sup>127</sup> To reach this determination, Justice Bridge considered the six *Gunwall* criteria.<sup>128</sup> In particular, Justice Bridge explained that Oregon precedent, the original intent of the drafters of the

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120. *Id.*

121. *Id.* at 731, 42 P.3d at 408.

122. *Id.* at 745–46, 42 P.3d at 415–16 (Sanders, J., dissenting).

123. *Id.* at 735, 42 P.3d at 410.

124. 150 Wash. 2d 791.

125. *Grant County II*, 150 Wash. 2d at 814, 83 P.3d at 429.

126. The Court's holding with respect to the petition method of annexation is less important for purposes of this Comment than its reasons for independently analyzing article I, section 12.

127. *Grant County II*, 150 Wash. at 805 n.10, 83 P.3d at 425 n.10. Justice Bridge noted:

Although the United States Constitution also has a privileges and immunities clause, federal jurisprudence has focused on the federal equal protection clause in cases involving differential treatment. Therefore, when determining whether the Washington privileges and immunities clause provides more protection than the United States Constitution, this Court has always compared it with the federal Equal Protection Clause rather than the federal Privileges and Immunities Clause. *Id.*

128. *Id.* at 806–11, 83 P.3d at 425–28.

Washington State Constitution, and early judicial interpretations of article I, section 12 suggest the Court should independently analyze the clause where the issue concerns favoritism.<sup>129</sup> She also explained that preexisting state law supports an independent analysis of article I, section 12.<sup>130</sup> Based on her *Gunwall* analysis, Justice Bridge concluded “that article I, section 12 . . . requires an independent constitutional analysis from the [Equal Protection Clause].”<sup>131</sup> According to an independent analysis under article I, section 12, Justice Bridge stated that a law “must confer a privilege to a class of citizens” to violate the provision.<sup>132</sup> She concluded that the right to petition for annexation is not a privilege under the clause.<sup>133</sup>

Justice Bridge’s majority opinion in *Grant County II* is subject to multiple interpretations of when and how the Court should independently analyze article I, section 12. Twice in the opinion, Justice Bridge stated simply that article I, section 12 “requires an independent constitutional analysis from the [Equal Protection Clause],”<sup>134</sup> and in later cases some justices have argued that the *Grant County II* court held without qualification that article I, section 12 requires an independent analysis.<sup>135</sup> Alternatively, one might focus on Justice Bridge’s *Gunwall*

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129. *Id.* at 807–09, 83 P.3d at 426–27. The provisions’ underlying concerns suggest that article I, section 12 might be more protective of individual rights where a “small class is given a special benefit, with the burden spread among the majority” while the Equal Protection Clause would be more protective “where majority interests are advanced at the expense of minority interests.” *Id.* at 807, 83 P.3d at 426. Because the delegates modeled article I, section 12 on Oregon’s privileges and immunities clause, the Oregon State Supreme Court’s independent interpretation of its provision is persuasive in Washington. *Id.* at 807–08, 83 P.3d at 426. Early Washington State Supreme Court decisions invalidated laws that unjustifiably favored one person or class at the expense of others. *Id.* at 809 n.12, 83 P.3d at 427 n.12.

130. *Id.* at 811, 83 P.3d at 428. Prior to the state constitution’s adoption in 1889, the Organic Act as revised prohibited the Territorial Legislature from granting special privileges. *Id.* at 810, 83 P.3d at 427 (quoting Act of March 2, 1867, ch. 150, 14 Stat. 426 (as amended by Act of June 10, 1872, ch. 1534, 17 Stat. 390); see also *Hayes v. Territory of Wash.*, 2 Wash. Terr. 286, 288, 5 P. 927 (1884). In early cases after 1889, the Washington State Supreme Court “interpreted article I, section 12 independently from the federal provision and in a manner that focused on the award of special privileges rather than the denial of equal protection.” *Grant County II*, 150 Wash. at 810, 83 P.3d at 427. In 1936, in *Bacich*, the Court “distinguished between the prohibition of ‘undue favor’ (drawn from the state provision) and ‘hostile discrimination’ (drawn from the Fourteenth Amendment).” *Id.* (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101, 1104 (1936), overruled on other grounds by *Puget Sound Gillnetters Ass’n v. Moos*, 92 Wash. 2d 939, 603 P.2d 819 (1979)).

131. *Grant County II*, 150 Wash. 2d at 811, 83 P.3d at 428.

132. *Id.* at 812, 83 P.3d at 428.

133. *Id.* at 814, 83 P.3d at 429.

134. *Id.* at 805, 811, 83 P.3d at 425, 428.

135. See, e.g., *Andersen v. King County*, 158 Wash. 2d 1, 122, 138 P.3d 963, 1040 (2006) (Chambers, J., concurring in dissent) (asserting that the Court held that article I, section 12 protects

analysis, and conclude that the Court held that article I, section 12 requires an independent analysis in the context of annexations (the subject of the sixth *Gunwall* criterion).<sup>136</sup> Justice Bridge's *Gunwall* analysis also discussed article I, section 12's concern with favoritism towards a class of citizens,<sup>137</sup> and Chief Justice Madsen subsequently focused on this part of the opinion to assert that *Grant County II* held that article I, section 12 requires an independent analysis *only* where the law exhibits favoritism towards a class of citizens.<sup>138</sup> Indeed, in her opinion, Justice Bridge stated that a law "must confer a privilege to a class of citizens" to violate article I, section 12.<sup>139</sup> Justice Bridge did not specify, however, whether this is the only way a law may violate article I, section 12.<sup>140</sup> Accordingly, one can argue that *Grant County II* stands for the proposition that a law conferring a privilege on an individual citizen does not violate article I, section 12 because it does not implicate a class of citizens.<sup>141</sup> Justice Sanders faulted the majority on these grounds.<sup>142</sup>

*B. In Grant County I and II, Justice Sanders Rejected the Assertion that Article I, Section 12 Is Analogous to the Equal Protection Clause*

In his *Grant County I* dissent and *Grant County II* concurrence, Justice Richard Sanders asked whether the right to petition for annexation is a privilege and concluded that it is not.<sup>143</sup> More importantly, Justice Sanders disagreed with the majority's assertion that article I, section 12 is analogous to the Equal Protection Clause.<sup>144</sup> In

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the privileges and immunities of "all citizens" in *Grant County II*); see also *Madison v. State*, 161 Wash. 2d 85, 94 n.6, 163 P.3d 757, 764 n.6 (2007) (plurality opinion) (rejecting Justice Madsen's interpretation and asserting that the Court simply held that article I, section 12 requires an independent analysis in *Grant County II*).

136. *Grant County II*, 150 Wash. 2d at 811, 83 P.3d at 428.

137. *Id.* at 806–07, 809, 83 P.3d at 425–27.

138. See *Madison*, 161 Wash. 2d at 111, 117, 163 P.3d at 773, 776 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 14, 138 P.3d at 971.

139. *Grant County II*, 150 Wash. 2d at 812, 83 P.3d at 428 (emphasis added).

140. *Id.*

141. Cf. *Andersen*, 158 Wash. 2d at 14, 138 P.3d at 971 (plurality opinion) (maintaining that *Grant County II* stands for the proposition that an independent analysis applies only where the law grants a privilege or immunity to a minority class).

142. *Grant County II*, 150 Wash. 2d at 817–18, 83 P.3d at 431 (Sanders, J., concurring).

143. *Id.* at 820, 83 P.3d at 432; *Grant County I*, 145 Wash. 2d 702, 748, 42 P.3d 394, 417 (2002) (Sanders, J., dissenting).

144. *Grant County II*, 150 Wash. 2d at 816–17, 83 P.3d at 430–31 (Sanders, J., concurring);

*Grant County I*, Justice Sanders noted that the references in the Fourteenth Amendment to privileges or immunities and equal protection in “separate and distinct phrases . . . preclud[e] the inference that each could possibly refer[s] to the same thing.”<sup>145</sup> He went on to recognize that the U.S. Supreme Court itself had distinguished the privileges and immunities of federal citizenship from those of state citizenship.<sup>146</sup>

In his *Grant County II* concurrence, Justice Sanders asserted that the “true comparison” is to the privileges and immunities clauses of Article IV and the Fourteenth Amendment.<sup>147</sup> Comparison to the Equal Protection Clause, he asserted, is inconsistent with the majority’s independent approach under article I, section 12 where it first determines whether “the right in question is a ‘privilege’ or ‘immunity’ within the scope of the clause and, if so, whether it has been denied.”<sup>148</sup>

Justice Sanders criticized the majority’s *Gunwall* analysis. He asserted that it allowed the “analytic framework” of the Equal Protection Clause to control “its review of [the] parties’ article I, section 12 . . . challenges.”<sup>149</sup> Specifically, he observed that the majority’s “tilt” toward the Equal Protection Clause also narrowed its interpretation of article I, section 12, as evidenced by its frequent reference to “favoritism of one ‘class’ over another.”<sup>150</sup> “Although a privilege or immunity violation may be class based,” he asserted, “the text of article I, section

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*Grant County I*, 145 Wash. 2d at 745, 42 P.3d at 415 (Sanders, J., dissenting).

145. *Grant County I*, 145 Wash. 2d at 745, 42 P.3d at 415 (Sanders, J., dissenting).

146. *Id.* at 746, 42 P.3d at 416 (quoting *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872)). Justice Sanders briefly traced the history of “privileges and immunities” from pre-colonial England to American independence, finally noting that the terms appeared in the Articles of Confederation and in Article IV of the federal Constitution. *Id.* at 746–47, 42 P.3d at 416.

147. *Grant County II*, 150 Wash. 2d at 817, 83 P.3d at 431 (Sanders, J., concurring).

148. *Id.* (citing *State v. Smith*, 117 Wash. 2d 263, 288, 814 P.2d 652, 664 (1991) (Utter, J., concurring)). Justice Sanders also criticized the majority’s reliance on the *Slaughter-House Cases*, arguing that the case is less relevant for its treatment of the Equal Protection Clause than for its treatment of the Privileges or Immunities Clause of the Fourteenth Amendment, “which limits those privileges and immunities to those secured by national, as opposed to state, citizenship.” *Id.* at 818, 83 P.3d at 431.

149. *Id.* at 817, 83 P.3d at 431 (citing *id.* at 805–08, 83 P.3d at 425–426 (majority opinion)).

150. *Id.* (citing *id.* at 807, 812, 83 P.3d at 426, 428). Justice Sanders’ contention does not acknowledge or admit that the majority also referenced article I, section 12’s application to individual persons. *See, e.g., id.* at 808, 83 P.3d at 426 (noting that Oregon holds that its privileges and immunities clause is “triggered whenever a *person* is denied a privilege” (emphasis added)); *id.* at 809 n.12, 83 P.3d at 427 n.12 (noting that under early case law, Washington upheld a law if it “did not favor a particular *person* or class” (emphasis added)); *id.* at 810, 83 P.3d at 427–28 (quoting *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936), for the proposition that the purpose of article I, section 12 is to secure equal treatment for all *persons*).

12 also protects 'any citizen' as well as 'class of citizens.'"<sup>151</sup>

In sum, *Grant County II* opened several doors to approaching article I, section 12 independently. One can argue that the Court held that article I, section 12 requires an independent analysis in all cases, that article I, section 12 requires an independent analysis in the case of annexations, or where the law exhibits favoritism towards a minority class.<sup>152</sup> But *Grant County II* arguably shut one door opened by Justice Utter's concurrence in *State v. Smith*. For while the *Grant County II* majority opinion cited to Justice Utter's *Gunwall* analysis in his *Smith* concurrence, it did not follow him in adopting Oregon's approach to state privileges and immunities.<sup>153</sup> The Court did not explicitly reject Oregon's approach, but its silence appears to have served as an implicit rejection. That reading finds further support in later decisions, such as *Andersen v. King County*<sup>154</sup> and *Madison v. State*,<sup>155</sup> where the Washington State Supreme Court split further on when and how to independently analyze article I, section 12.<sup>156</sup> In *Andersen* and *Madison*, the justices offered three visions of when and how the Court should independently analyze article I, section 12, none of which aligns with Oregon's approach to its own privileges and immunities clause.<sup>157</sup>

#### V. IN *ANDERSEN* AND *MADISON*, THE WASHINGTON STATE SUPREME COURT DIVIDED ON WHEN AND HOW TO INDEPENDENTLY ANALYZE ARTICLE I, SECTION 12

Two cases since *Grant County II* suggest that the Washington State Supreme Court has divided into three camps as to when and how to independently analyze article I, section 12.<sup>158</sup> In 2006 in *Andersen v. King County*, the Court considered whether the Defense of Marriage Act (DOMA) violates article I, section 12.<sup>159</sup> In 2007 in *Madison v. State*, the Court considered whether the State's disenfranchisement scheme, which

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151. *Id.* at 817, 83 P.3d at 431.

152. *See supra* Part IV.A.

153. *See supra* Part III.B.

154. 158 Wash. 2d 1, 138 P.3d 963 (2006).

155. 161 Wash. 2d 85, 163 P. 3d 757 (2007).

156. *See infra* Part V.

157. *See infra* Part V.

158. *Madison*, 161 Wash. 2d 85, 163 P.3d 757; *Andersen*, 158 Wash. 2d 1, 138 P.3d 963. For purposes of this Comment, the Court's holdings in *Andersen* and *Madison* with respect to DOMA and disenfranchisement are less important than its approach to article I, section 12.

159. *Andersen*, 158 Wash. 2d 1, 138 P.3d 963.



denies felons the right to vote, violates article I, section 12.<sup>160</sup> In those cases, Justice Johnson—with the support of Justices Tom Chambers, Susan Owens (in *Andersen*), and Sanders—argued the Court should independently analyze article I, section 12 in every case according to its plain language.<sup>161</sup> By contrast, Justice Madsen,<sup>162</sup> with the support of Chief Justice Gerry Alexander and Justice Charles Johnson, argued the Court should independently analyze article I, section 12 only when the challenged law grants a privilege or immunity to a minority class.<sup>163</sup> Finally, Justice Fairhurst, with the support of Justices Bridge and Owens (in *Madison*), argued the Court should independently analyze article I, section 12 only when the state constitution is more protective of the right at issue than the Equal Protection Clause.<sup>164</sup>

*A. Justice Johnson Argues That the Court Should Independently Analyze Article I, Section 12 in Every Instance*

In *Andersen* and *Madison*, Justice Johnson rejected the assertion that article I, section 12 is analogous to the Equal Protection Clause.<sup>165</sup> Justice Johnson also refrained from performing a *Gunwall* analysis.<sup>166</sup> Instead, Justice Johnson argued the Court should independently analyze

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160. *Madison*, 161 Wash. 2d 85, 163 P. 3d 757.

161. *Madison*, 161 Wash. 2d at 119, 163 P.3d at 757 (J.M. Johnson, J., concurring); *id.* at 127–28, 163 P.3d at 781–82 (Chambers, J., concurring in dissent); *Andersen*, 158 Wash. 2d at 58–59, 138 P.3d at 993 (J.M. Johnson, J., concurring); *Anderson*, 158 Wash.2d at 123 n.91, 138 P.3d at 1041 n.3 (Chambers, J., concurring in dissent).

162. Justice Madsen became the sitting Chief Justice of the Washington State Supreme Court upon Chief Justice Alexander's retirement in 2009. Biography of *Chief Justice Barbara Madsen*, WASH. COURTS, [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=madsen](http://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=madsen) (last visited Feb. 28, 2012). Subsequent references to Chief Justice Madsen in the context of her opinions in *Madison* and *Anderson* use her title at the time the opinions were written.

163. *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 16, 53, 138 P.3d at 972, 990 (plurality opinion).

164. *Madison*, 161 Wash. 2d at 93–97, 111, 163 P.3d at 764–66, 773 (majority opinion).

165. See *Andersen*, 158 Wash. 2d at 62, 138 P.3d at 995 (J.M. Johnson, J., concurring) (“[T]he most apt analogy from the United States Constitution is its privileges and immunities clause, not the equal protection clause.”); see also *id.* at 124, 138 P.3d at 1041–42 (Chambers, J., concurring in dissent) (arguing that there are important analytic differences between article I, section 12 and the Equal Protection Clause).

166. See *id.* at 58, 138 P.3d at 993 (J.M. Johnson, J., concurring) (stating that a constitutional analysis should begin, and generally end, with the text). But see *Madison*, 161 Wash. 2d at 118, 163 P.3d at 776 (J.M. Johnson, J., concurring) (noting that *Grant County II* held that article I, section 12 requires an independent analysis, but then arguing that an “independent examination of article I, section 12 should be conducted in accordance with its plain language”).

article I, section 12 in all cases.<sup>167</sup> The plain language of article I, section 12, Justice Johnson argued, requires a two-part analysis: (1) Does the law grant a citizen, class of citizens, or corporation privileges or immunities; and, if yes, (2) are those privileges or immunities equally available to all?<sup>168</sup> If the answer to both questions is yes, then the law does not violate article I, section 12. In no case, Justice Johnson asserted, should the Court review the claim under an Equal Protection analysis.<sup>169</sup>

In his *Andersen* concurrence, Justice Johnson applied the two-part analysis to the challenge that DOMA “confers the ‘privilege’ of marriage to opposite-sex couples while withholding it to same-sex couples.”<sup>170</sup> Asking whether “same-sex marriage” is a privilege under the state constitution, Justice Johnson concluded that it is not, and dismissed the article I, section 12 claim rather than review it under an Equal Protection Clause analysis.<sup>171</sup> Justice Johnson’s approach is consistent with Justice Sanders’ minority approach in *Grant County II* and with an interpretation that the majority opinion in *Grant County II* held that article I, section 12 requires an independent analysis in all cases.

*B. Chief Justice Madsen Argues the Court Should Independently Analyze Article I, Section 12 Only Where the Challenged Law Grants a Privilege or Immunity to a Minority Class*

In *Andersen* and *Madison*, Justice Madsen presumed that article I, section 12 is analogous to the Equal Protection Clause and relied on the *Gunwall* criteria to determine when the Court should analyze article I, section 12 independently of the Clause.<sup>172</sup> She argued that the Court

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167. See *Madison*, 161 Wash. 2d at 118–22, 163 P.3d at 777–78 (J.M. Johnson, J., concurring) (independently analyzing article I, section 12); *Andersen*, 158 Wash. 2d at 58–64, 138 P.3d 993–96 (J.M. Johnson, J., concurring) (independently analyzing article I, section 12).

168. See *Madison*, 161 Wash. 2d at 119, 163 P.3d at 777 (J.M. Johnson, J., concurring); *Andersen*, 158 Wash. 2d at 58–59, 138 P.3d at 993–94 (J.M. Johnson, J., concurring); *id.* at 121, 123 & n.91, 138 P.3d at 1040–41, 1041 n.3 (Chambers, J., concurring in dissent) (concluding that “properly read, article I, section 12 of the Washington constitution protects us against all governmental actions that create unmerited favoritism in granting fundamental personal rights”). Justice Johnson additionally argued that early cases also require the court to first ask whether the right at issue is a privilege or immunity. *Andersen*, 158 Wash. 2d at 61–62, 138 P.3d at 963. He noted that if there is not a privilege or immunity at issue, then there is not a violation of article I, section 12. *Id.*

169. Cf. *Andersen*, 158 Wash. 2d at 59–65, 138 P.3d at 993–96 (J.M. Johnson, J., concurring); *id.* at 121, 123, 138 P.3d at 1040–41 (Chambers, J., concurring in dissent).

170. *Id.* at 62, 138 P.3d at 995 (J.M. Johnson, J., concurring).

171. *Id.*

172. See *id.* at 14, 138 P.3d at 971 (plurality opinion) (noting that in *Grant County II*, the Court

should independently analyze article I, section 12 “only where the challenged legislation grants a privilege or immunity to a minority class.”<sup>173</sup> “In other cases,” Justice Madsen argued, article I, section 12 requires “the same analysis that appl[ies] under the federal [Equal Protection Clause].”<sup>174</sup>

Justice Madsen’s approach to article I, section 12 is based on her reading of *Grant County II* as concluding that the Court should independently analyze the provision only where its underlying concern with undue favoritism is at issue.<sup>175</sup> In Justice Madsen’s view, under article I, section 12 favoritism is an issue only “where a privilege or immunity is granted to a minority class.”<sup>176</sup> In other words, under Justice Madsen’s reading, *Grant County II* did not hold that an independent analysis is always appropriate under article I, section 12.<sup>177</sup>

Justice Madsen’s plurality opinion in *Andersen* illustrates her approach to article I, section 12. In *Andersen*, Justice Madsen found that DOMA did not grant a privilege or immunity to a minority class.<sup>178</sup> “[T]he article I, section 12 issue,” Justice Madsen argued, “is whether plaintiffs are discriminated against as members of a minority class.”<sup>179</sup> “Accordingly,” Justice Madsen “appl[ied] the same constitutional analysis that applies under the equal protection clause.”<sup>180</sup> After finding that homosexuals are not a suspect class and the right to same-sex marriage is not fundamental, Justice Madsen applied rational basis review.<sup>181</sup> Justice Madsen concluded that “limiting marriage to opposite-sex couples furthers the State’s interests in procreation and encouraging families with a mother and father and children biologically related to

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determined when article I, section 12 requires an analysis independent of the Equal Protection Clause); see also *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring) (relying on *Grant County II* for the proposition that article I, section 12 requires an analysis independent of the Equal Protection Clause).

173. *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 14, 138 P.3d at 971 (emphasis added).

174. *Madison*, 161 Wash. 2d at 111–12, 163 P.3d at 773 (Madsen, J., concurring); *Andersen*, 158 Wash. 2d at 14, 16, 138 P.3d at 971–72.

175. *Andersen*, 158 Wash. 2d at 14–16, 138 P.3d at 971–72.

176. *Id.* at 16, 138 P.3d at 972 (referring to minority class as “a few” and, therefore, referring to minority in the quantitative rather than qualitative sense).

177. *Madison*, 161 Wash. 2d at 111, 163 P.3d at 773 (Madsen, J., concurring).

178. *Andersen*, 158 Wash. 2d at 18, 138 P.3d at 973.

179. *Id.* at 18, 138 P.3d at 973.

180. *Id.*

181. *Id.* at 21, 30–31, 138 P.3d at 974–75, 979–80.

both.”<sup>182</sup> Finding this to be a rational basis for the law’s distinction between same- and opposite-sex couples with respect to marriage, Justice Madsen determined that DOMA does not violate article I, section 12.<sup>183</sup>

*C. Justice Fairhurst Argues the Court Should Independently Analyze Article I, Section 12 Only Where the State Constitution Is More Protective of the Right at Issue than the United States Constitution*

In *Madison*, Justice Fairhurst presumed that article I, section 12 is analogous to the Equal Protection Clause, and relied on the *Gunwall* criteria to determine when the Court should analyze article I, section 12 independently of the Clause.<sup>184</sup> Justice Fairhurst argued that article I, section 12 requires an independent analysis only where the state constitution provides greater protection for the right at issue than the U.S. Constitution.<sup>185</sup>

Justice Fairhurst advocates for a two-step inquiry to determine whether the state constitution is more protective of the right at issue than the U.S. Constitution.<sup>186</sup> With respect to article I, section 12, Justice Fairhurst actually engages in a three-step inquiry, where she asks (1) whether the *Gunwall* criteria support analyzing article I, section 12 independent of the Equal Protection Clause, (2) whether the challenged law implicates a privilege or immunity, and (3) whether the state constitution provides greater protection to the right at issue than the Equal Protection Clause.<sup>187</sup> If the state constitution does not provide greater protection to the right at issue than the Equal Protection Clause, Justice Fairhurst does not proceed to apply the tiered scrutiny of Equal Protection to article I, section 12.<sup>188</sup>

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182. *Id.* at 42, 138 P.3d at 985.

183. *Id.*

184. *Madison v. State*, 161 Wash. 2d 85, 93–95, 163 P.3d 757, 764–65 (2007) (plurality opinion).

185. *Id.* at 94, 163 P.3d at 764.

186. *Id.* at 93, 163 P.3d at 764. Justice Fairhurst states that the Court first considers the *Gunwall* criteria to determine whether the state constitutional provision requires an analysis independent of the federal Constitution, and second whether the provision is more protective of the right at issue than the federal Constitution.

187. *Id.* at 93–95, 163 P.3d at 764–65.

188. *Cf. id.* at 97–98, 163 P.3d at 766 (dismissing the respondents’ article I, section 12 claim where the state constitution was not more protective than the federal Constitution with respect to felons’ right to vote). Note that in *Madison*, Justice Fairhurst also found that the respondents failed to assert an article I, section 12 claim. *Id.* Thus, her *Madison* opinion does not provide a clear indication that she would not apply an Equal Protection analysis to article I, section 12 where the state constitution is not more protective than the U.S. Constitution.

In *Madison*, Justice Fairhurst noted that the Court determined in *Grant County II* that article I, section 12 requires an independent analysis and that repeated *Gunwall* analyses are unnecessary.<sup>189</sup> Thus, *Madison* suggests that Justice Fairhurst's first prong is not, or is no longer, an inquiry at all. Justice Fairhurst next asked whether the right to vote—the right at issue in *Madison*—was a privilege or immunity.<sup>190</sup> Relying on state precedent and article I, section 19, which “prohibits interference with ‘the free exercise of the right of suffrage,’” she held that the right to vote is a privilege.<sup>191</sup>

“Having determined that [article I, section 12] warrants an independent state constitutional analysis and that the right to vote is a privilege,” Justice Fairhurst next asked “whether and to what extent the clause provides greater protection in the context of felon voting.”<sup>192</sup> To make the determination, Justice Fairhurst employed the *Gunwall* criteria selectively.<sup>193</sup> Invoking the fourth *Gunwall* criterion, Justice Fairhurst reviewed preexisting state law.<sup>194</sup> She noted that while the Court had previously held that the state constitution provides greater protection for the right to vote than the federal Constitution, the Court had not done so with respect to felons' right to vote.<sup>195</sup> In conclusion, Justice Fairhurst held that the state constitution “is not more protective of the right to vote in this context,” and declined to independently analyze article I, section 12.<sup>196</sup>

In sum, Chief Justice Madsen and Justices Johnson and Fairhurst offer three approaches to independently analyzing article I, section 12. Justice Johnson's approach rejects the assertion that article I, section 12 is analogous to the Equal Protection Clause and permits the Court to independently analyze article I, section 12 in every case. Justices Madsen and Fairhurst assert that article I, section 12 is analogous to the Equal Protection Clause. Chief Justice Madsen's approach permits the Court to independently analyze article I, section 12 only where the challenged law grants a privilege or immunity to a minority class. In all

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189. *Id.* at 94–95, 163 P.3d at 764–65.

190. *Id.* at 95, 163 P.3d at 765.

191. *Id.*

192. *Id.*

193. *Id.* at 96, 163 P.3d at 765.

194. *Id.*

195. *Id.* at 96, 163 P.3d at 765–66.

196. *Id.* at 96–98, 163 P.3d at 766 (noting, however, that the respondents also “failed to assert an article I, section 12 violation” because the state's “disenfranchisement scheme does not involve a grant of favoritism”).

other cases, Chief Justice Madsen's approach directs the Court to apply the tiered scrutiny of the Equal Protection Clause under article I, section 12. Justice Fairhurst's approach effectively permits the Court to independently analyze article I, section 12 only when the state constitution provides greater protection to the right at issue than the federal Constitution. Because the Court is split three ways on how best to address article I, section 12, it is worthwhile to weigh the merits of the three current approaches.

VI. THE COURT SHOULD ADOPT JUSTICE JOHNSON'S APPROACH, WHICH IS CONSISTENT WITH THE ORIGINAL INTENT, PLAIN LANGUAGE, AND EARLY DECISIONS UNDER ARTICLE I, SECTION 12

Justice Johnson's approach to article I, section 12 is sounder than the approaches advanced by his fellow justices. Chief Justice Madsen's and Justice Fairhurst's approaches both rely on the *Gunwall* criteria to determine when the Court should independently analyze article I, section 12 and are therefore susceptible to much of the criticism that has been lodged against *Gunwall* itself. Their approaches also perpetuate the dependency of state constitutional analysis on the federal Constitution and thereby sacrifice judicial economy, finality, and the dignity of Washington courts and the state constitution. Moreover, Chief Justice Madsen's approach is inconsistent with the text, original intent, and early judicial interpretations of article I, section 12. And Justice Fairhurst's approach is internally inconsistent in its treatment of the Equal Protection Clause. Justice Johnson's approach avoids these pitfalls and offers a straightforward approach to article I, section 12 that accounts for its original intent and plain language and early precedent interpreting it.

A. *Chief Justice Madsen's and Justice Fairhurst's Approaches Do Not Address the Deficiencies of Gunwall and Undermine Judicial Economy, Finality, and the Dignity of Washington Courts and the State Constitution*

The approaches to article I, section 12 advanced by Chief Justice Madsen and Justice Fairhurst are subject to some of the same criticism. Both approaches rely on the *Gunwall* criteria, and are therefore vulnerable to the same criticism that has been lodged against the *Gunwall* criteria themselves. Also, both approaches perpetuate the dependency of state constitutional analysis on the U.S. Constitution. In doing so, they sacrifice judicial economy, finality, and the dignity of

Washington courts and the state constitution.

The *Gunwall* criteria offer a distorted comparative analysis of the Washington State Constitution and U.S. Constitution.<sup>197</sup> They suggest that the Court compare only the text and structure of the state and federal constitutions, but not relevant intent, precedent, and values.<sup>198</sup> Instead, *Gunwall* suggests that the Court consider only the original intent, precedent, and values associated with the state constitutional provision.<sup>199</sup> The result is an incomplete and imbalanced comparative analysis of the state and federal constitutions.<sup>200</sup>

The *Gunwall* criteria are more problematic in the case of article I, section 12 because the clause parallels three federal provisions: the Equal Protection Clause, the Privileges and Immunities Clause of Article IV, and the Privileges or Immunities Clause of the Fourteenth Amendment. Yet, the Court's *Gunwall* analyses of article I, section 12 have only compared it to the Equal Protection Clause. In *Grant County II*, Justice Bridge incorrectly reasoned that the Court has always compared article I, section 12 to the Equal Protection Clause because "federal jurisprudence has focused on the [Clause] in cases involving differential treatment."<sup>201</sup> The Court has not always compared article I, section 12 to the Equal Protection Clause; in earlier cases, it also compared article I, section 12 to the Privileges and Immunities Clause of Article IV.<sup>202</sup> Furthermore, federal jurisprudence has not focused solely on the Equal Protection Clause to address differential treatment. The U.S. Supreme Court has also focused on the Privileges and Immunities Clause of Article IV to address state and local differentiation between state citizens and out-of-state citizens.<sup>203</sup> The U.S. Supreme Court interprets and analyzes the Privileges and Immunities Clause of Article IV and the Equal Protection Clause differently.<sup>204</sup> *Grant County II*'s *Gunwall* analysis, upon which both Chief Justice Madsen's and Justice Fairhurst's approaches rely, fails to consider similarities and differences

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197. James W. Talbot, Comment, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1108 (1991).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Grant County II*, 150 Wash. 2d 791, 805 n.10, 83 P.3d 419, 425 n.10 (2004).

202. *See, e.g., State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902).

203. *See supra* note 47 and accompanying text.

204. *See supra* note 47 and accompanying text. The Privileges and Immunities Clause of Article IV protects a narrower set of rights than the Equal Protection Clause, and the U.S. Supreme Court applies intermediate scrutiny rather than tiered scrutiny under it.

between article I, section 12 and the Privileges and Immunities Clause of Article IV. For that reason, they also fail to account for the U.S. Supreme Court's different treatment of Article IV and the Fourteenth Amendment.<sup>205</sup> In *Grant County II*, Justice Sanders criticized the majority's *Gunwall* analysis for this reason.<sup>206</sup> Because the approaches advanced by Chief Justice Madsen and Justice Fairhurst build on the deficiencies in *Grant County II*'s *Gunwall* analysis, the Court should not adopt their approaches to article I, section 12.

The approaches advanced by Chief Justice Madsen and Justice Fairhurst are also objectionable because they both make state constitutional analysis dependent on federal constitutional analysis.<sup>207</sup> In *State v. Gocken*,<sup>208</sup> Justice Madsen warned the Court against hitching state constitutional analysis to the federal Constitution. Specifically, she argued that reliance on federal precedent to interpret the state constitution would sacrifice judicial efficiency because a shift at the federal level could force the Court to revisit issues that it might otherwise leave undisturbed.<sup>209</sup> Finality, she argued, would also be sacrificed "because state decisions tied to federal law may be open to reversal by the [U.S.] Supreme Court."<sup>210</sup> Moreover, she argued, hitching state constitutional analysis to federal precedent diminishes the Court and the state constitution.<sup>211</sup> For the reasons Chief Justice Madsen laid out in *Gocken*, the Washington State Supreme Court should not

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205. Cf. *Grant County I*, 145 Wash. 2d 702, 745, 42 P.3d 394, 415–16 (2002) (Sanders, J., dissenting) (criticizing the majority's failure to account for the U.S. Supreme Court's different treatment of the Privileges and Immunities Clause of the Fourteenth Amendment and the Equal Protection Clause).

206. *Grant County II*, 150 Wash. 2d at 817, 83 P.3d at 431 (Sanders, J., concurring). Justice Sanders argued that the majority erred by allowing the "analytic framework" of the Equal Protection Clause to "hold sway over its review of [the] parties' article I, section 12 . . . challenges." *Id.*

207. The reader will recall that Chief Justice Madsen would perpetuate article I, section 12's dependence on the Equal Protection Clause by continuing to apply its tiered scrutiny to article I, section 12 whenever the challenged law does not grant a privilege or immunity to a minority class. *Madison v. State*, 161 Wash. 2d 85, 111, 163 P.3d 757, 773 (2007) (Madsen, J., concurring); *Andersen v. King County*, 158 Wash. 2d 1, 14, 138 P.3d 963, 971 (2006). Justice Fairhurst would perpetuate article I, section 12's dependence on the Equal Protection Clause by independently analyzing claims under it only where the federal Constitution provides less protection than the state constitution. *Madison*, 161 Wash. 2d at 93–95, 163 P.3d at 764–66.

208. 127 Wash. 2d 95, 896 P.2d 1267 (1995).

209. *Id.* at 110–11, 896 P.2d at 1274–75 (Madsen, J., concurring).

210. *Id.* at 111, 896 P.2d at 1274.

211. See *id.* at 111, 896 P.2d at 1274–75 ("[I]ndependent state constitutional analysis [gets] lost somewhere in the ever-shifting shadow of the federal courts which are no less political and perhaps more so than . . . state courts.").



adopt her or Justice Fairhurst's approach to article I, section 12.<sup>212</sup>

B. *Chief Justice Madsen's Argument that Article I, Section 12 Applies Independently Only Where a Law Grants a Privilege or Immunity to a Minority Class Is Inconsistent with the Provision's Text, Original Intent, and Early Precedent*

Chief Justice Madsen's approach is inconsistent with the text of article I, section 12. Despite the fact that article I, section 12 prohibits laws that grant privileges or immunities unequally "to any citizen, class of citizens, or corporation," Chief Justice Madsen's approach limits independent analysis under the provision to laws which grant a privilege or immunity to a minority class.<sup>213</sup> To the extent that Justice Madsen's approach reinterprets article I, section 12 as inapplicable to grants to individual citizens or treats majority and minority classes differently in terms of available protections, it is inconsistent with the provision's text.

Chief Justice Madsen's departure from the text of article I, section 12 is inconsistent with her reliance on the text to argue against independently analyzing the provision. In *Andersen*, Justice Madsen argued that the text and history of article I, section 12 justify not following the Oregon State Supreme Court's practice of independently analyzing article I, section 12.<sup>214</sup> She asserted that inclusion of the word "corporations" in article I, section 12 creates a difference in language, which shows the delegates' concern with the outsized political influence of wealthy interests.<sup>215</sup> Yet, by the same reasoning, the delegates' retention of the words "any citizen" from Oregon's provision suggests the delegates were also concerned about the influence of individual citizens. Chief Justice Madsen did not make this further point in *Andersen*, and it is inconsistent with her assertion that the underlying

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212. For a similar argument, see generally Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491 (1984). Justice Utter argued that deciding cases on independent state constitutional grounds is "consistent not only with the dignity and independence of [Washington State] courts and [its] constitution, but also with the oft-stated 'fundamental principle' that [state] courts should not rule on constitutional issues when a case can be resolved on lesser grounds." *Id.* at 505. The purpose of the rule is to protect what Justice Madsen found compelling in *Gocken*. From Justice Utter: "[J]udicial economy, respect for the authority of lower law, and a concern for the propriety of unnecessary judicial application of the highest law to invalidate lower laws or governmental actions." *Id.*

213. *Madison v. State*, 161 Wash. 2d 85, 111, 163 P.3d 757, 773 (2007) (Madsen, J., concurring) (emphasis added); *Andersen v. King County*, 158 Wash. 2d 1, 13–14, 138 P.3d 963, 971 (2006).

214. *Andersen*, 158 Wash. 2d at 16, 138 P.3d at 972.

215. *Id.* at 15, 138 P.3d at 972.

concern of article I, section 12 is only grants of favoritism to minority classes. Furthermore, the addition of “corporations” to Oregon’s provision suggests continuity, not difference, in light of the fact that Oregon’s provision is still contained within article I, section 12. It also suggests that article I, section 12 is broader than the Oregon provision, not narrower as Chief Justice Madsen’s reading suggests.

Chief Justice Madsen’s position that article I, section 12 applies independently only where the challenged law implicates a minority class is also inconsistent with early precedent interpreting the provision. In *City of Seattle v. Rogers*,<sup>216</sup> the Washington State Supreme Court struck down a law that exempted “the annual campaign of the Seattle Community Fund” from a prohibition on certain charity campaigns because it violated article I, section 12.<sup>217</sup> *Rogers* stands for the proposition that article I, section 12 does not apply only to classes. Similarly, in *Altschul v. State*,<sup>218</sup> the Oregon State Supreme Court struck down a law granting an individual citizen the right to sue the state because it violated Oregon’s privileges and immunities clause.<sup>219</sup> *Altschul* is persuasive authority that article I, section 12 applies to individual citizens. Finally, in *Fitch v. Applegate*,<sup>220</sup> Justice Dunbar stated that a law’s “constitutionality is not affected by the number of persons within the scope of its operation” for article I, section 12 purposes.<sup>221</sup> As *Rogers*, *Altschul*, and *Fitch* suggest, early interpretations of article I, section 12 were broader than Chief Justice Madsen’s.

Chief Justice Madsen has suggested that her approach is based on article I, section 12’s underlying concern with favoritism toward minority classes. However, the provision’s text, original intent, and early precedent suggest that Chief Justice Madsen’s interpretation is unjustifiably narrow. Thus, the Washington State Supreme Court should not adopt Chief Justice Madsen’s approach to article I, section 12.

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216. 6 Wash. 2d 31, 106 P.2d 598 (1940).

217. *Id.* at 36–38, 106 P.2d at 600–01.

218. 144 P. 124 (1914).

219. *Id.* at 125–26. The Oregon State Supreme Court maintains that its privileges and immunities clause applies to individual citizens. *State v. Clark*, 630 P.2d 810, 814–15 (Or. 1981).

220. 24 Wash. 25, 64 P. 147 (1901).

221. *Id.* at 31, 64 P. at 148. Justice Dunbar was a delegate to the state constitutional convention. JOURNAL, *supra* note 21, at 470; Justice Ralph O. Dunbar, *supra* note 66.

C. *Justice Fairhurst's Approach to Article I, Section 12 Is Internally Inconsistent Because It Presumes that the Provision Is Analogous to the Equal Protection Clause*

Justice Fairhurst's decision not to apply an Equal Protection Clause analysis to claims that fail to trigger an independent analysis under article I, section 12 creates internal inconsistency. Justice Fairhurst's approach to article I, section 12 presumes that the provision is analogous to the Equal Protection Clause.<sup>222</sup> Like Chief Justice Madsen, Justice Fairhurst relies on the *Gunwall* criteria to first determine whether the Court should analyze article I, section 12 independently of the Equal Protection Clause in a particular case.<sup>223</sup> Yet, unlike Chief Justice Madsen, Justice Fairhurst does not go on to examine a claimed violation of article I, section 12 under an Equal Protection Clause analysis if she determines that a party's claim does not trigger an independent analysis under article I, section 12.<sup>224</sup> This approach is inconsistent with the presumption that article I, section 12 is analogous to the Equal Protection Clause and should therefore be rejected by the Court.

D. *Justice Johnson's Approach Preserves Judicial Economy, Finality, and the Dignity of Washington Courts and the State Constitution, and Is Consistent with the Original Intent, Plain Language, and Early Decisions Under Article I, Section 12*

Justice Johnson's approach to article I, section 12 avoids the pitfalls of the approaches advanced by Chief Justice Madsen and Justice Fairhurst. His approach does not rely on the *Gunwall* criteria and does not make article I, section 12 dependent on the U.S. Constitution. And unlike Chief Justice Madsen's approach, his approach is consistent with the original intent, plain language, and early judicial interpretations of article I, section 12.

The original intent of article I, section 12 is distinct from that of the Equal Protection Clause. Article I, section 12's original purpose was "to prevent people from seeking certain privileges or benefits to the disadvantage of others."<sup>225</sup> That purpose "clearly differs from the main goal of the equal protection clause, which was primarily concerned with

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222. *Madison v. State*, 161 Wash. 2d 85, 93–95, 163 P.3d 757, 764–65 (2007).

223. *Id.* at 93–95, 163 P.3d at 764–65.

224. *See id.* at 98, 163 P.3d at 766.

225. *State v. Smith*, 117 Wash. 2d 263, 283, 814 P.2d 652, 661 (1991) (Utter, J., concurring).

preventing discrimination against former slaves," a minority group.<sup>226</sup> The creation of article I, section 12 supports the conclusion that the delegates intended something different than the Equal Protection Clause.

The delegates who drafted article I referred to the constitutions of Oregon, Indiana, California, Alabama, Iowa, Missouri, Wisconsin, New Hampshire, and the United States.<sup>227</sup> Yet the Committee hewed closest to the state constitutions, especially Oregon's, and only selectively to the federal Constitution.<sup>228</sup> The choice to follow state constitutions rather than the federal Constitution in letter and spirit suggests that the delegates sought to adopt individual rights that were substantively similar to those in other state constitutions rather than those guaranteed by the U.S. Constitution.<sup>229</sup> This choice is especially clear with respect to article I, section 12, where the committee appropriated language from the Oregon State Constitution rather than from the federal Constitution and broadened the prohibition on privileges and immunities to apply to corporations.<sup>230</sup> Justice Johnson's approach to article I, section 12 is consistent with the delegates' intent because, unlike Chief Justice Madsen and Justice Fairhurst's approaches, he does not presume that article I, section 12 is analogous to the Equal Protection Clause. Because Justice Johnson's approach is most consistent with the original intent of article I, section 12, the Washington State Supreme Court should adopt it.

The plain language of article I, section 12 is significantly different from that of the Equal Protection Clause.<sup>231</sup> The plain language of article I, section 12 suggests a two-part analysis for reviewing challenged legislation, which asks (1) whether the challenged law grants a privilege or immunity to any citizen, class of citizens, or corporation other than municipal, and (2) whether the grant applies to all citizens or corporations equally.<sup>232</sup> As the plain language of article I, section 12 and the Equal Protection Clause suggest, both clauses "seek to prevent the State from distributing benefits and burdens unequally."<sup>233</sup> The plain language of the provisions also shows that the Equal Protection Clause

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226. *Grant County II*, 150 Wash. 2d 791, 808, 83 P.3d 419, 426 (2004).

227. BEARDSLEY, *supra* note 21.

228. *Id.*

229. *See supra* Part I.A.

230. *See supra* Part I.B.

231. *State v. Smith*, 117 Wash. 2d 263, 285, 814 P.2d 652, 662 (1991) (Utter, J., concurring).

232. *Andersen v. King County*, 158 Wash. 2d 1, 58–59, 138 P.3d 963, 993 (2006) (J.M. Johnson, J., concurring).

233. *Smith*, 117 Wash. 2d at 283, 814 P.2d at 661 (Utter, J., concurring).

applies to any right, while article I, section 12 only applies to a privilege or immunity.<sup>234</sup> In this respect, article I, section 12 has more in common with the Privileges and Immunities Clause of Article IV than the Equal Protection Clause.<sup>235</sup> Of the three approaches, Justice Johnson's approach incorporates the plain language of article I, section 12 and best recognizes its differences from the Equal Protection Clause. Justice Johnson's approach applies the plain language of article I, section 12 to every claim brought under the provision, and rejects the presumption that article I, section 12 is analogous to or coterminous with the Equal Protection Clause. Because his approach is most consistent with the provision's plain language, the Court should adopt it.

In early cases, the Court analyzed claims under article I, section 12 independently of the Equal Protection Clause. In *State v. Carey*,<sup>236</sup> for example, the Court reviewed claimed violations of article I, section 12, Article IV, and the Fourteenth Amendment in independent analyses.<sup>237</sup> Similarly, in *Henry v. Thurston County*<sup>238</sup> and *State ex rel. Lindsey v. Derbyshire*,<sup>239</sup> the Court reviewed claimed violations of article I, section 12 and the Fourteenth Amendment in independent analyses.<sup>240</sup> In a series of other cases, the Court interpreted claims under article I, section 12 without resort or reference to the Equal Protection Clause.<sup>241</sup> And in *State v. Vance*, the Court held that article I, section 12 should be defined and interpreted as the U.S. Supreme Court had defined and interpreted

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234. *Andersen*, 158 Wash. 2d at 124, 138 P.3d at 1042 (Chambers, J., concurring in dissent) (quoting *Smith*, 117 Wash. 2d at 283, 814 P.2d at 652 (Utter J., concurring)) (internal quotation marks omitted).

235. *State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902).

236. 4 Wash. 424, 30 P. 729 (1892).

237. *Id.* at 426–28, 30 P. 729–30.

238. 31 Wash. 638, 72 P. 488 (1903).

239. 79 Wash. 227, 140 P. 540 (1914).

240. *Id.* at 231, 234, 237, 140 P. 542–44; *Henry*, 31 Wash. at 641–42, 72 P. at 489.

241. *See, e.g., State v. Robinson Co.*, 84 Wash. 246, 250, 146 P. 628, 629 (1915) (holding that state law that exempted cereal and flour mills from its provisions and authorized them to sell mixed feeding stuffs while placing conditions on other persons, companies, corporations, or agents selling the same thing violated article I, section 12); *City of Seattle v. Dencker*, 58 Wash. 501, 510–11, 108 P. 1086, 1090 (1910) (holding a Seattle ordinance unconstitutional under article I, section 12 where it imposed a tax on the sale of certain goods by machine but not on merchants selling the same goods); *City of Spokane v. Macho*, 51 Wash. 322, 323–26, 98 P. 755, 755–56 (1909) (holding that a Spokane ordinance regulating employment agencies was unconstitutional because it imposed criminal penalties on such entities engaging in false pretenses but not on other companies engaging in similar conduct); *Ex parte Camp*, 38 Wash. 393, 397–98, 80 P. 547, 549 (1905) (holding that a Spokane ordinance prohibiting anyone from peddling fruits and vegetables within city limit but exempting farmers who grew the produce themselves violated article I, section 12).

the Privileges and Immunities Clause of Article IV.<sup>242</sup> By contrast, the Court's treatment of article I, section 12 as analogous to the Equal Protection Clause did not begin until the 1920s, and became its general approach only in the 1940s, fifty years after the creation of the state constitution.<sup>243</sup> As the only approach that rejects the presumption that article I, section 12 is analogous to the Equal Protection Clause, Justice Johnson's approach to article I, section 12 is most consistent with this early precedent.

### CONCLUSION

The Washington State Supreme Court has applied the federal tiered scrutiny of the Equal Protection Clause to article I, section 12 from the 1940s through the present day. But, since the mid-1980s, the Court has been questioning this practice. Recently, the Court has divided on when and how to independently analyze article I, section 12. Chief Justice Madsen and Justices Fairhurst and Johnson have put forth three different approaches to independently analyzing article I, section 12. The Court should adopt Justice Johnson's approach. Unlike Chief Justice Madsen's and Justice Fairhurst's approaches, it does not sacrifice judicial efficiency, finality, and the dignity and independence of Washington courts and the state constitution. Perhaps most importantly, it is consistent with the original intent, plain language, and early decisions interpreting article I, section 12.

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242. *State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902).

243. *See supra* Part II.B.