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How Do State Constitutions Evolve?

The Washington Supreme Court's changing interpretation of its state "Privileges or Immunities" Clause shows how state courts can diverge from federal precedent over time.

By **Martha F. Davis** | Published: June 22, 2023

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Earlier this year, the Washington Supreme Court upheld its state capital gains tax against a challenge that it violated the "Privileges or Immunities" Clause of the state constitution. In [*Quinn v. State*](#), the court reaffirmed that this clause has a meaning and force independent of the U.S. Constitution — a [departure](#) from a prior understanding that adhered closely to federal precedent. This evolving view offers a case study in how state courts come to depart from federal constitutional precedents,

and it provides a model of how to honor the intentions of state constitutional framers while also responding to changing times.

The Washington Constitution provides that “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.” Similar language appears in the constitutions of Arizona, California, Colorado, Illinois, Indiana, Iowa, Oregon, and Pennsylvania, among others. These provisions seem, on their face, to mandate absolute equal treatment of all state citizens, precluding any laws responding to special circumstances or providing expanded opportunities to historically excluded groups.

On the federal side, the U.S. Constitution mentions “privileges” and “immunities” in two places: the 14th Amendment and Article IV. The meaning of the 14th Amendment’s clause was famously limited in the [*Slaughter-House Cases*](#) of 1873, where the U.S. Supreme Court ruled that the “privileges or immunities” protected by the amendment were only those arising from federal citizenship — things like holding passports or running for federal office. Scholars have [*speculated*](#) that this limitation drove courts and litigants to focus on the Equal Protection and Due Process Clauses as sources of individual rights. Indeed, Justice Clarence Thomas, who has criticized expansive due process rulings, [*champions*](#) a revival of the federal Privileges or Immunities Clause. He views it as a vehicle for returning to the fundamental values of the founding generation.

The early history of Washington State’s clause was heavily influenced by both federal case law and the law of neighboring states. Washington’s constitution was adopted in 1889, and historical evidence indicates that its privileges or immunities clause was borrowed from Oregon’s constitution rather than from federal constitutional provisions. Nevertheless, Washington courts long looked to the federal Privileges or Immunities and Equal Protection Clauses to guide decision-making under the provision.

During this time, to avoid the strictures of the *Slaughter-House Cases*, the Washington Supreme Court looked to the federal interpretation of Article IV of the U.S. Constitution to ascertain the scope of the state provision. Article IV speaks to the

“privileges and immunities” that citizens can invoke when they cross state boundaries. Adapting this federal approach, the Washington court [concluded](#) that “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” must apply to equally to Washington state citizens and any other U.S. citizens present in the state.

Washington courts also looked to federal law to determine what constituted a violation of these privileges or immunities, using the tools of the 14th Amendment’s Equal Protection Clause to evaluate potential violations. Like federal equal protection claims, alleged violations of the Washington State provision were tested under different tiers of “scrutiny” (strict, intermediate, or rational basis) depending on the particular right involved.

However, beginning in the 1970s, individual judges began developing arguments for an independent state constitutional interpretation — perhaps influenced by a wave of attention nationwide to state constitutional development. This trend was strengthened by an influential [article](#) by Justice William J. Brennan, himself a former New Jersey Supreme Court justice, touting state constitutions as independent sources of rights. In Washington, the historical evidence that the state constitution was not strictly based on the federal version played a big role in supporting this effort, along with differences in text and the need to address specific local interests not contemplated by the federal Constitution.

After several decades of dissents and concurrences advancing an independent approach, in 2002, a majority of Washington’s supreme court finally [agreed](#). In a case challenging a method of property annexation, a majority concluded that the state’s Privileges or Immunities Clause should be analyzed independently of the federal Constitution.

In March 2023, the Washington Supreme Court reaffirmed this approach and cemented its methodology in the momentous decision of [Quinn v. State](#). The case challenged the Washington legislature’s 2021 law establishing a capital gains tax on the sale or exchange of certain long-term capital assets. The twin goals of the tax were to “to help meet the state’s paramount duty” to amply fund public education, while “making material progress toward rebalancing the state’s tax code,” which had been

characterized as the most regressive in the country. Among other claims, the wealthy plaintiffs bringing this challenge asserted that the new tax violated the state's Privileges or Immunities Clause.

The state supreme court conducted an independent analysis of the claim. Step one asked whether the challenged law granted a privilege or immunity from a fundamental right. If so, step two assessed whether there was a "reasonable ground" to support the grant.

In *Quinn*, plaintiffs' claims failed on both counts. The court found that the plaintiffs had no fundamental right to enjoy the same tax exemptions as all other Washingtonians — a right that would hobble any effort at progressive taxation, not to mention other affirmative initiatives aimed at increasing equal opportunities. And even if that were a fundamental right, the court found that the purpose was a "reasonable" one, given the legislature's wide discretion in setting tax policy.

In sum, the road to independent state constitutional construction involved many years and many steps, but in the *Quinn* case, this approach achieved its purpose of responding to contemporary local concerns in ways still consistent with the text and the framers' intentions.

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