Supreme Court No. 75934-1
Consolidated with No. 75956-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HEATHER ANDERSEN and LESLIE CHRISTIAN *et al.*, Respondents,

v.

KING COUNTY *et al.*, Appellants.

Appeal from the Superior Court of King County
The Honorable William L. Downing

CELIA CASTLE and BRENDA BAUER *et al.*, Respondents,

v.

STATE OF WASHINGTON, Appellant.

Appeal from the Superior Court of Thurston County
The Honorable Richard D. Hicks

AMICI CURIAE BRIEF OF STATE LEGISLATORS REPRESENTATIVE FRED JARRETT, REPRESENTATIVE JIM MOELLER, REPRESENTATIVE EDWARD MURRAY, REPRESENTATIVE DAVE UPTHEGROVE, SENATOR DEBBIE REGALA AND SENATOR PAT THIBAUDEAU

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

Other Authorities

I. INTRODUCTION

The purpose of an *amicus curiae* brief is to assist the Court in thinking through the legal issues of a case.

In these consolidated cases, Respondents have asserted that RCW 26.04.010, which defines marriage as between a man and a woman, violates Article I, Section 12 of Washington's Constitution (the "Privileges and Immunities Clause"). Both trial courts below ruled that as a matter of law RCW 26.04.010 does violate several provisions of the Washington Constitution, including Article I, Section 12.

State Legislators Representative Fred Jarrett, Representative Jim Moeller, Representative Edward Murray, Representative Dave Upthegrove, Senator Debbie Regala and Senator Pat Thibaudeau (collectively "State Legislators") offer this *amicus curiae* brief to assist the court in thinking through the legal issues of a case. The State Legislators have a unique and special interest in understanding the scope of the Privileges and Immunities Clause because they desire to enact statutes that are constitutional. In addition, they have a special duty to understand the rights and duties entrenched in our constitution and to protect those provisions. These *amici* seek to assist the Court by focusing on the meaning of the Clause and by analyzing how courts can, and do, interpret constitutional provisions.

There are a number of methods that courts can use to interpret a constitution. The various parties' briefs in this case argue from one or more interpretive perspectives. A judge must be conscious of the variety

of available perspectives because deciding to apply a single approach – to the exclusion of the others – might box him/her into a decision that does not intuitively make sense. However, no matter which interpretive approach or combination of approaches the Court applies to Article I, Section 12, the result here is the same: committed same-sex couples, and their children, are entitled to the same benefits of the civil contract of marriage as opposite-sex couples enjoy.

II. ISSUE

What interpretative methods should the Court adopt for the interpreting the Privileges and Immunities Clause and how should Washington's current marriage statute, RCW 26.04.010, be evaluated under each of those methods?

III. SIX METHODS OF INTERPRETING THE CLAUSE

A. Six basic analytical approaches.

Courts and scholars use an analytical framework when determining or debating the meaning of a particular constitutional provision. Professor Philip Bobbitt of the University of Texas has developed a commonly used framework that considers the following six interpretative approaches: (1) **textual** (looking to the meaning of the words of a constitution alone, as they would be interpreted by the average contemporary community member); (2) **historical** (relying on the intentions of the framers and ratifiers of a constitution and their forerunners); (3) **structural** (inferring rules from the relationships that a constitution mandates among the structures it sets up); (4) **doctrinal** (applying rules generated by prior

court decisions); (5) **ethical** (deriving rules from the moral commitments of the political ethos that are reflected in a constitution); and (6) **prudential** (seeking to balance the costs and benefits of a particular interpretation). *See* Philip Bobbitt, CONSTITUTIONAL INTERPRETATION, 12-13 (1991).

This Court regularly uses **all** these approaches, depending on the facts of each case and the context and nature of the issues presented. In fact, when interpreting Washington's Constitution, lawyers are expressly asked to make use of these interpretive techniques by *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). The *Gunwall* criteria closely track Professor Bobbitt's modes of constitutional interpretation. The *Gunwall* factors focus briefing on: the State constitution's **text** (*Gunwall* criteria 1 and 2), its **history** (criteria 3 and 4), its **structure** (criterion 5), prior **doctrine** (criterion 3), **ethical concerns** (criterion 6) and **prudential considerations** (criterion 6).

The use of these interpretive methods is not exclusive to a formal *Gunwall* analysis.[1] *See, e.g., Young v. Clark*, 149 Wn.2d 130, 133, 65 P.3d 1192 (2003)(text of the constitution should be given its plain meaning); *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) ("This court may also examine the historical context of the constitutional provision for guidance."); *Southcenter Joint*

[1] A *Gunwall* analysis is typically used to determine when and how the Washington Constitution grants broader protections than the federal Constitution. *See, e.g., State v. Smith*, 150 Wn.2d 135, 149, 75 P.3d 934 (2003).

Venture v. National Democratic Policy Comm., 113 Wn.2d 413, 441-441, 780 P.2d 1282 (1989) (Utter J. concurring) (The "reason inherent to the structure of our state constitution argue against a generalized state action requirement in state constitution jurisprudence.").

Indeed, over the past decade this Court has moved away from using *Gunwall* as a key to unlocking the State constitution, and it no longer considers *Gunwall* as a "talisman."[2] The Court will "normally first consider [a] claimed violation of...individual rights under the provisions of the Washington Constitution,"[3] and relies on *Gunwall* mainly as the briefing guide and outline of interpretive principles intended by *Gunwall's* drafter, Justice James Andersen. *Gunwall*, 106 Wn.2d at 62.[4] *See also Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 663, 771 P.2d 711, 725 (1989). *Gunwall* provides a set of interpretive modes, much like Bobbitt's, and once a solid body of jurisprudence develops around a particular provision of Washington's Constitution the Court has clearly said it is no longer necessary for lawyers to "reinvent the wheel" and to rehash that provision's *Gunwall* analysis. *See, e.g., State v. Ferrier*, 136

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[2] *See* Justice Madsen's critique of the "talisman" approach in *State v. Gocken*, 127 Wn.2d 95, 110, 896 P.2d 1267, 1274 (1995).

[3] *State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797, 800 (1988), referring to *State v. Coe*, 101 Wn.2d 364, 679 P.2d 353 (1984).

[4] In *Gunwall*, Justice Andersen said that "The foregoing six criteria are aimed at: (1) suggesting to counsel where briefing might appropriately be directed in cases wherein they are urging independent state constitutional grounds; and (2) helping to ensure that if this Court does use independent state constitutional grounds in a given situation, it will consider these criteria to the end that our decision will be made for well-founded legal reasons . . . ." 106 Wn.2d at 62-63; *see also Gocken*, 127 Wn.2d at 110 (Madsen, J., concurring).

Wn.2d 103, 111, 960 P.2d 927, 930 (1998); *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982, 986 (1998).

This Court has already decided – correctly – that Article I, Section 12 of Washington's Constitution is to be interpreted based on its distinct text, history, doctrines and local interests and concern. *See Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419, 428 (2004). However, it is fair to say that our jurisprudence concerning Article I, Section 12 is still being developed, and that the interpretive techniques listed in Bobbitt, in *Gunwall*, and in other sources, continue to be useful in helping this Court better understand and apply Article I, Section 12.

This *amicus* brief approaches Article I, Section 12 using each of Bobbitt's analytical modes, *i.e.*, six separate angles that closely parallel the analytical approaches suggested in *Gunwall*.

B. Using a *text-based method*, same-sex couples and their families have a right to marry.

On its face, the **textual** approach to interpreting constitutions (*cf. Gunwall* criteria 1 and 2) is simple: the members of the Court read a provision, and assuming that the individual justices' understanding of vocabulary and syntax is relatively similar, the "plain meaning" is agreed upon and the provision is applied. Paul Brest, *The Misconceived Quest For the Original Understanding*, 60 B.U. L. Rev. 204, 206 (1980). In *Washington Water Jet Workers*, 151 Wn.2d at 477, Justice Bridge recently noted: "When interpreting constitutional provisions, we look first to the

plain language of the text and will accord it its reasonable interpretation." Assuming that the language seems clear enough to the justices, there is little need to proceed to more complicated methods of understanding the provision's meaning.

Article I, Section 12 of Washington's Constitution is plain enough:

> **Special privileges and immunities prohibited.** No law shall be passed granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Equally plain is its application here. The legislature has passed a law on marriage: RCW 26.04.010. In that law, the State grants a legal privilege: the ability to enter into a civil contract. Holding other, constitutionally justifiable, variables constant (such as legal age, competence and kinship), one class of citizens (gay and lesbian couples) is denied a legal privilege that is made available to others. Accordingly, the marriage statute, as written, violates Article I, Section 12.

Legal discussion under this interpretative mode could stop right there, but Appellants are not willing to make it that simple. Those opposing the application of Article I, Sections 12's protections to same-sex couples, ask, "Is same sex marriage a '*privilege*'?", "Are same sex couples a constitutional *class*?", and "Isn't there a constitutionally-permitted *justification* for discrimination here?"

The courts below disposed of these questions quickly within the text-based analytical approach. Judges Downing and Hicks each concluded that marriage is a "fundamental right" that qualifies as a

constitutional "privilege." *See* Opinion and Order, *Anderson v. King County*, Sup. Ct. Cause No. 04-2-04964-4 SEA (King County August 4, 2004) ("Downing Opinion") at 11-14; Opinion and Order, *Castle v. State of Washington*, Sup. Ct. Cause No. 04-2-00614-4 (Thurston County Sept. 7, 2004) ("Hicks Opinion") at 26 -30. Further, they each determined that committed gay and lesbian couples belong to a discernible class. Downing Opinion at 10; Hicks Opinion at 24-26. And they each concluded that this class of citizens was not equally accorded a privilege available to all of the citizens. Judge Downing took a pointedly textual approach, although both judges applied other analytical techniques as well.

C. An *historical* understanding of privileges and immunities establishes that the clause extends protections to minorities as well as majorities.

Often people find that a provision's clear meaning is just "too hard to swallow," or they simply desire to supplement the text-based understanding with other interpretive techniques to ensure that the **meaning** as well as the **text** make sense. *See* Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 435 (1985). This Court has often (although by no means always) used an historical approach to help it determine the meaning of a specific clause of the State Constitution. For example, in its recent *Water Jet Workers* decision, the majority opinion linked text and history by stating: "The words of the text will be given their common and ordinary meaning, as determined at the time they were drafted." *Water Jet*, 151 Wn.2d at 477. In *Sofie v. Fibreboard*, the Court state: "Our basic

rule in interpreting article I, section 21 is to look to the right as it existed at the time of the constitution's adoption in 1889." *See Sofie*, 112 Wn.2d at 645.

It has been argued in this case that Nineteenth Century Washingtonians thought of marriage as a "family structure of one man, one woman, and their children," and therefore Article I, Section 12 cannot be said to extend protections to same-sex couples today. Brief of Intervenors at 17. But there are innumerable concepts and circumstances that were not conceived of in 1889: Internet commerce, nuclear energy and LLCs, to name a few. Marriage between members of the same sex is in the same category. These concepts and circumstances should be protected regardless of the fact that Nineteenth Century Washingtonians may not have specifically envisioned protecting them. In the words of Justice Utter in *Sofie*, 112 Wn.2d at 645 (emphasis added), it is the "**right** as it existed at the time" that is to be understood historically and applied to today's facts and circumstances. The **right** is not restricted to social conditions and understandings that happened to prevail in the late Nineteenth Century. As Justice Hale of this Court observed in *State ex rel. State Finance Comm. v. Martin*, 62 Wn.2d, 645, 384 P.2d 833 (1963):

> Time is both enemy and friend to a good idea. Thoughts held clearly in the beginning may obscure and lose their outline as the present merges with the future and becomes the past again. Conversely, concepts vague in their beginnings may sharpen in form and shape by the passing of the years and the force of events.

Judicial understanding and application of constitutional provisions change over time, even when judges initially believe they have correctly understood what the drafters meant.

Appellants have argued that because Washington framers were strongly opposed to railroads and other corporations gaining special benefits from corrupted lawmakers, Article I, Section 12 should be understood exclusively as a protection of the majority against powerful interests. Brief of Appellant King County at 42-45; Brief of Appellant State of Washington at 9 *et. seq.* But the fact that 1880's populist doctrines emphasized protections for the "common man" does not mean that the privileges and immunities **right**, as it was understood in 1889, had abandoned protections for individuals and disadvantaged groups. Quite the contrary. The concept of privileges and immunities has had a long history and meaning in Anglo-American law, and that history and meaning was both understood and integrated into Washington's Constitution.

Privileges and immunities include both enumerated and unenumerated rights. *See* Barbara Mahoney, *The Privileges or Immunities Clause In the Washington State Constitution: A Source of Substantive Rights?* 9 (February 12, 2002) (unpublished paper attached in the Appendix and available in the University of Washington Gallagher Law Library). "Privileges and immunities" began during the Middle Ages in canonical law as rights granted to specific individuals or groups, provided that the public as a whole benefited in some fashion. *Id.* at 4-6. Later,

however, these terms acquired the opposite meaning under English secular law. *Id.* at 6-8. They came to encompass basic rights of English citizenship that were individual rights granted to **all** citizens, not some privileged group. *Id.* at 9-11. Thus, while privileges and immunities began as special rights accorded to a few, they evolved into rights held in common. *Id.* at 9.

This all-inclusive definition of privileges and immunities was transferred to Britain's American colonies and then to the newly formed states. *Id.* at 9-12, 22-24. As illustrated by the late Professor Bernard Schwartz in THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971), there are numerous colonial American documents on "privileges" of Englishmen in America and the fundamental idea of equality. These documents make evident that the colonists had a broad definition of privileges and sought to ensure that all persons would be treated equally. For example, THE RIGHTS OF THE COLONISTS AND A LIST OF INFRINGEMENTS AND VIOLATIONS OF RIGHTS, 1772 states:

> Just and true liberty, equal and impartial liberty in matters spiritual and temporal, is a thing that all Men are clearly entitled to, by the eternal and immutable laws of God and nature, as well as the law of Nations, & all well grounded municipal laws, which must have their foundation in the former.

Schwartz *supra* at 200. The colonists held equality to be so fundamental that it was "of God." This belief in equality and inherent rights carried through to THE DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS, 1774, which stated:

> *Resolved*, N.C.D.2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.
>
> *Resolved,* N.C.D.3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

Schwartz *supra* at 216.

These beliefs in the fundamental nature of equality formed the foundation of the basic concept, *within* each of the states, that "privileges and immunities" means "those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments..." Thomas Cooley, CONSTITUTIONAL LIMITATIONS 21 footnote 4 (5th ed. 1883). These rights included, but were not limited to protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety. *Id.* This list of rights, however, was not exhaustive, and other, unenumerated rights of the same nature as those on the list were protected as well. *Id.*

With that historical foundation, Article I, section 12 protects broadly against all governmental actions that create unmerited favoritism. The clause protects against both laws for the exclusive benefit of the majority **and** the protection against laws for the exclusive benefit of a small minority. Any other reading of the clause would an anathema to the

origins of the clause, which recognize that **all** Washingtonians have access to the same broad array of rights and privileges. Thus, from an historical perspective, the clause prohibits a right such as marriage from being granted to the majority only.

D. Washington's *constitutional ethos* is part of an Anglo-American tradition that emphasizes equality of access to rights and privileges.

As explained above, the Anglo-American tradition broadly grants access to fundamental rights. This grant was meant to ensure equality of treatment for all groups. These traditions are evident in other Anglo-American bodies of law, such as in Canada. Several Canadian provincial high courts have held that prohibiting same sex marriage violates the equality provision, Section 15, of the Canadian Charter of Rights and Freedoms.[5] *See Halpern v. City of Toronto*, 36 R.F.L. 5th 127 (Ont. Canada 2003); *EGALE Canada Inc. v. Canada*, 38 R.F.L. 5th 32 (B.C. Canada 2003); *Dunbar & Edge v. Government of Yukon*, 2004 YKSC 54 (Yukon Canada 2004). As noted by the court in *Halpern*, a law violates Section 15 when it conflicts with the section's purpose. *Id.* at ¶ 61-63. The purpose is, in part, to prevent the withholding of benefits from persons. *Id.* at ¶¶ 77, 100-107. Those benefits include the ability to participate in fundamental societal institutions. *Id.* at ¶ 107. This denial

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[5] That section provides in relevant part:

> Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

Canadian Charter of Rights and Freedom, §15(1).

cannot be justified under any of the rationales put forth by the government. *Id.* at ¶¶ 108-126. And those rationales are similar to the claims of some Appellants in this case.

Canadian law sheds additional light on the Anglo-American traditions of equality.[6] This tradition makes evident that equality was, and remains, a sweeping concept. In fact, in Canada mere participation in fundamental social institutions is considered a benefit to be protected. *Id.* at ¶ 107. This body of law confirms that Washington's Privileges and Immunities Clause comes from an Anglo-American legal tradition that is encompassing rather than exclusionary and that it includes protections for groups of minorities, not just protections for majorities against powerful and well-heeled minorities.

E. The *structure* of Washington's constitution – and its focus on individual rights – supports the application of Article I, Section 12 to protect individuals and couples who wish to wed a member of the same sex.

States have broad powers. The United States Constitution reserves, to the states, all powers not delegated by that Constitution to the federal government. U.S. Const., amend. X. As such, state laws control property ownership (RCW 26.26 *et seq*), inheritance (RCW 11.02. *et seq.*), and domestic relations (RCW Title 26). Because a state potentially controls so much of a person's everyday life, state constitutions provide strong individual rights protections. *See State v. Smith*, 117 Wn.2d 263,

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[6] It is worth noting that the Canadian Charter provision does not expressly recognize the right to be free of discrimination based on sexual orientation. *See supra* note 5 (quoting text).

283, 814 P.2d 652 (1991). Such protections are entrenched in the Washington Constitution. There are numerous provisions that specifically use the word "individual" or "person." *See, e.g.*, Wash. Const. article I, §§ 3, 4, 5, 7, 9, and 24. These provisions all secure rights for Washingtonians as individuals. Therefore, the structure of the document itself indicates that the Clause should be read to protect lesbian and gay individuals in their most personal and private choices of whom to marry.

F. *Doctrine and case law* sustain the rights of same-sex couples under Article I, Section 12.

The doctrinal approach to determining the meaning of a particular clause requires examination of the rules generated by prior court decisions and their application to the case at hand. As noted above, Washington's current jurisprudence on Article I, Section 12 gives the clause an independent and broader meaning that the federal equal protection clause. This independent and broader doctrine stems, in part, from an historical background that emphasized individual rights.

Based on this background, this Court has held that the purpose of the clause is to protect the fundamental privileges and immunities of "**all citizens**." *Grant County*, 150 Wn.2d at 806 (emphasis added).[7] This

[7] Oregon's privileges and immunities clause was the model for Washington's privileges and immunities clause. *See* THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at 501 n. 20 (Beverly Paulik Rosenow ed., 1999). Oregon courts have long held that its clause had an meaning independent of federal equal protections and that the clause therefore afforded protection to individuals. *See State v. Clark*, 291 Or. 231 (1981). The clause has evolved to provide strong protections for individuals or classes who are denied legal rights on the basis of invidious discrimination. *See Tanner v. OHSU*, 157 Or. App. 502, 971 P.2d 435 (Or. Ct. App. 1998) (individuals are protected based on their sexual orientation, gender, ethnic background, legitimacy, and past or present residency).

doctrine holds that if a privilege or immunity is granted to a group of citizens, the right must be granted equally to everyone unless there are reasonable grounds for distinguishing those who do and do not receive disparate treatment relevant to the object of the law. *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984). The level of scrutiny applied to grounds for distinguishing between classes is different depending on the subject matter of the statute in question. *Id.* at 367. Therefore, if the statute is regulatory and it grants economic benefits the distinction must be based on a "real and substantial difference bearing a natural, reasonable, and just relation to the subject matter of the act." *State ex rel. Bacich v. Huse*, 187 Wn. 75, 84, 159 P.2d 1101 (1936).

In this case, marriage is a fundamental right and, therefore, a privilege. Washington's marriage statute, however, does not grant this privilege to all equally. Currently, the privilege of marriage is granted only to heterosexual couples, to the exclusion of homosexual couples. Further, there is no real and substantial difference between same sex couples and opposite sex couples. There are no reasonable grounds to deny the right to marry, and the disparate treatment is not germane to any justifications asserted by the State.

G. *Prudential concerns* ("balancing tests") irresistibly lead to the conclusion that same-sex marriages extend important fundamental rights to couples and their children with *no* adverse impact on others in the community.

The last interpretative tool for determining the meaning of Article I, section 12 of the Washington Constitution is provided by

prudential concerns. In a prudential framework, the Court seeks to balance the costs and the benefits of a particular rule. In this case, it is clear that the benefits of granting same sex marriage are great while the costs of the grant are non-existent or minimal and not granting the right has huge costs to particularly vulnerable parties, such as children.

Washington statutes link many legal rights and responsibilities to marital status. These rights include but are not limited to: community property laws (RCW 26.16); inheritance of property (RCW 11.04 and 11.28); employment benefits (RCW 48.44); wrongful death actions (RCW 4.20) and spousal testimonial privilege (RCW 5.60.060).[8] Thus, the benefits attached to marriage are substantial. Making a second group of families eligible to receive these privileges creates substantial community benefits that support allowing same sex couples to marry. Further, one of the main reasons cited by certain Appellants for excluding same sex couples from marriage is the encouragement of procreation and the raising of children in a healthy and nurturing environment. But the aim of raising children in a healthy environment is also enhanced by couples consisting of two men or two women who are allowed to have a relationship that is state-sanctioned. Such a relationship fosters stability and certainty for both the couple and their children. This stability

[8] It is estimated that there are at least 423 Washington code sections that treat people differently depending on whether they are civilly married or not. *See* Jamie D. Pedersen, *The RCW Project 2004: An Analysis of the Benefits and Burdens of Marriage Contained in the Revised Code of Washington* (2004), at http:// www.lmaw.org (last visited Jan. 25, 2005).

certainly constitutes a social benefit supporting the extension of marriage to same sex couples.

On the other hand, there is **no cost** to allowing same sex couples to marry, and there is a **great cost** in denying them marriage. Both trial courts affirmed this analysis. "[A]ny children that result [from a marriage contract] are real, but not named parties to that contract. Same-sex couples can have children....Where is the protection for these children?" Hicks Opinion at 33. Judge Hicks went on:

> If the reason to protect marriage is the need for stable families then we need be clear as to what counts as a family upon which this stability rests....[F]or at least two generations we have understood 'family' as something more than a man mating with a woman to have a child...The children of same sex couples, a form of family already approved by the community which approves of same sex couples adopting, or otherwise having children, should not carry the stigma of coming from less than a family – a government approved family.

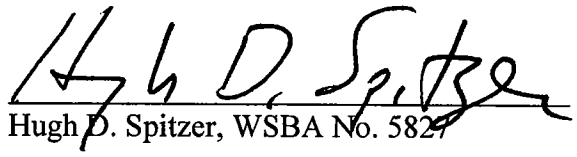
Id. at 33-35. This same concern was noted by Judge Downing: "Therefore, the goal of nurturing and providing for the emotional well-being of children would be rationally served by allowing same-sex couples to marry; that same goal is impaired by prohibiting such marriages." Downing Opinion at 20. The costs of keeping same sex couples from marrying are high and they effect children, a group which the law should be particularly concerned with protecting. Thus, the benefits of allowing same sex marriage outweigh any purported costs of such a rule.

IV. CONCLUSION

Under any of the six most common interpretative methods, the Washington Privileges and Immunities Clause protects committed same-sex couples and allows them access to benefits that heterosexual couples currently enjoy under Washington's marriage statute. The civil contract of marriage grants numerous rights and responsibilities. That right, marriage, is a fundamental right protected by the clause. There is no interpretative approach which suggests that same sex couples should be denied that right. In fact, just the opposite. All those approaches inescapably lead to the conclusion that the marriage right should be accorded equally to all.

RESPECTFULLY SUBMITTED this 4th day of February, 2005.

FOSTER PEPPER & SHEFELMAN, PLLC



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APPENDIX

The Privileges or Immunities Clause In the Washington State Constitution: A Source of Substantive Rights?

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February 12, 2002

(Updated version. Supplements version submitted in 2001 for State Constitutional Law, Law A581.)

I. INTRODUCTION

The Washington Privileges or Immunities Clause,[1] Article 1 § 12, states:

> 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.

This Clause, which is virtually identical to the Privileges or Immunities Clauses of eight other states,[2] has the potential of being the greatest safeguard of individual rights outside of the federal constitution by providing plaintiffs with a cause of action for rights commonly recognized in the state of Washington but for which no remedy has been designated in the constitution or by statute. Although the Washington Supreme Court has hinted that it is willing to hear a broader range of claims under this Clause,[3] Washington courts have treated the Clause routinely as the state equivalent of the Equal Protection Clause of the Fourteenth Amendment and subjected claims brought under Article I, § 12 to the restrictive analytical framework of federal equal protection review.[4]

The scope of this Clause has gone unrecognized in part because courts are wary of obligating governments to guarantee positive entitlements as it can profoundly affect

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[1] Washington has an additional privileges or immunities clause in art. 1 § 8, which states: "No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature." There are very few claims raised under this clause, which is very similar to Washington's prohibition against special legislation art. 2 § 28; and it is not the subject of this paper.

[2] Ariz. CONST. art. 2, § 13; Ark. CONST. art. 2, § 18; Ind. CONST. art. 1, § 23; Iowa CONST. art. I § 6; N.M. CONST. art. IV, § 26; N.D. CONST. art I, § 21; Okla. CONST. art. 5, § 51; Or. CONST. art.1, § 20; and SD CONST. art. 6 § 18.

[3] *See* Darrin v. Gould, 85 Wn.2d 859, 868, 540 P.2d 882 (1975) ("CONST. art. 1, § 12 may be construed to provide greater protection to individual rights than that provided by the Equal Protection Clause."); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 640, 771 P.2d 711 (1989) ("We have followed this approach because a separate analysis focusing on the language and history of our state constitution has not been urged."); In re Mota, 114 Wn.2d 465, 472, 788 P.2d 538 (1990) (addressing the possibility that the difference in language between the state provision and the federal Equal Protection Clause might require a different interpretation).

[4] *See, e.g.,* Lakeview Boulevard Condominium Association v. Apartment Sales Corp., 144 Wn.2d 570, 29 P.3d 1249 (2001) (holding that because the plaintiffs did not request that the court conduct an independent state constitutional analysis, the plaintiffs' state constitutional challenge under Article 1 § 12 would be treated in accordance with the rules for equal protection analysis).

policy decisions best entrusted to the legislative and executive branches.[5] However, as indicated below, the Privileges or Immunities Clause was intended as a *restraint* on state and local government;[6] thus, by deferring to the executive and legislative branches, courts undermine the purpose of the Clause.

Additionally, state courts are reluctant to recognize different rights under state constitutional provisions similar to provisions found in the federal constitution and its amendments.[7] The Washington provision resembles the Article IV § 2 Privileges and Immunities Clause of the federal constitution and the Privileges or Immunities Clause of the Fourteenth Amendment. The Supreme Court has interpreted both of these clauses very narrowly. It has interpreted the Privileges and Immunities Clause of Article IV § 2 as providing protection only when local regulation discriminates against non-residents.[8] More drastically, up until recently the Supreme Court refused to find any independent

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[5] *See, e.g.,* Hendrix v. City of Seattle, 76 Wn.2d 142, 143, 456 P.2d 696 (1969), ("Our approach to the constitutional aspects of the case must be guided by those concepts of judicial restraint which have in such large measure shaped the constitutional history of this country and laid the foundation for separating the powers of government into the legislative, executive and judicial functions, a doctrine upon which individual freedom seems so largely to depend.").

[6] *See infra* Section II, especially C. (colonial charters); D. c. (Fourteenth Amendment); and d. (state constitutions).

[7] *See, e.g.*, Ford Motor Co. v. Barrett, 115 Wn.2d 556, 568, 800 P.2d 367 (1990) ("Despite textual differences, the Washington constitutional privileges and immunities clause, CONST. art. 1, § 12, and the equal protection clause of the Fourteenth Amendment are substantially identical and have been considered by this court as the same."). *See also generally* Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 453, 455-56 (1970); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 382 (1980); Linde, E PLURIBUS: CONSTITUTIONAL THEORY AND STATE COURTS, 18 Ga. L. Rev. 165 (1984); Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, U. PUGET SOUND L. REV. 491 (1984); Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143 (1987).

[8] *See, e.g.*, Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287 (1998) (New York state statutory income tax provision effectively denying only nonresidents deduction for alimony paid held to violate privileges and immunities clause in Art IV, 2 of Federal Constitution). When confronted with a challenge under the Privileges and Immunities Clause, a State may defend its position by demonstrating that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against

significance in the Privileges or Immunities Clause of the Fourteenth Amendment,[9] effectively leaving only Due Process and Equal Protection review under the Fourteenth Amendment.[10]

The distinction between the Privileges or Immunities Clause of the Washington Constitution and the Equal Protection Clause of the Fourteenth Amendment, its perceived federal equivalent,[11] is not just a matter of historical interest but has significant, practical effects. Equal Protection review requires an evaluation of the classification schemes of state and local laws.[12] Its purpose is to "guarantee that all individuals are accorded fair treatment in the exercise of fundamental rights or the elimination of distinctions based on impermissible criteria."[13] Under equal protection analysis, "a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity."[14]

However, challenges to "a regulatory classification with evidence that a powerful economic group has manipulated the political process to obtain classification that disadvantages a competitor, or builds a wall against potential market entrants, or simply confers a privilege under cover of a health or safety objective does not trigger any real scrutiny."[15] Such cases are evaluated under the highly deferential[16] rational basis

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nonresidents bears a substantial relationship to the State's objective." Supreme Court of N. H. v. Piper, 470 U. S. 274, 284 (1985).

[9] The Slaughter-house Cases, 83 U.S. (16 Wall) 36 (1873).

[10] Id. at 78-79.

[11] *See* cases cited in notes 3 and 4.

[12] John E. Novak and Ronald D. Rotunda, CONSTITUTIONAL LAW § 14.1 (1995).

[13] Id.

[14] Heller v. Doe, 509 U.S. 312, 319 (1993) (placing the burden upon the challenging party to negate "any reasonably conceivable state of facts that could provide a rational basis for the classification.").

[15] Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: A Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1258 (1996).

[16] There is only one case on record in which the Supreme Court invalidated a statute under the rational basis test. Morey v. Doud, 354 U.S. 457, 457 (1957) (striking down an Illinois statute exempting American

standard.[17] Thus, if it can be shown that the Privileges or Immunities Clause was intended to protect against a broader range of governmental actions, it should embrace a different standard for more meaningful review than is allowed under the Equal Protection Clause.

Unfortunately, there is no direct evidence of the intent of the drafters of the Washington Constitution.[18] Instead intent must be inferred from an historical analysis of the terms and the context in which they were adopted.[19] This paper provides such an analysis. On the strength of this analysis, it evaluates the efforts of the Indiana and Oregon Courts at developing an independent standard of review under their respective privileges or immunities clauses.[20] Finally, it offers its own analytical framework for the independent review of claims brought under the Privileges or Immunities Clause of the Washington Constitution.[21]

II. ORIGIN OF THE PRIVILEGES AND IMMUNITIES CLAUSE

A. Canon Law

Until the legal reforms of the nineteenth century there were numerous sources of English secular law: kingdoms, principalities, lordships, cities, guilds, and corporations.[22] These institutions had rules and customs that defined the law of a geographically,

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Express from a licensing requirement for all firms selling or issuing money orders in the state), overruled by City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam).

[17] Cleburne v. Cleburne Living Center, Inc., 473 U. S. 432, 435 (1985).

[18] Thompson, *supra* note 15 at 1251 note 24.

[19] *See* State v. Clark, 291 Or 231, 236, 630 P2d 810, *cert. denied* 454 U.S. 1084 (1981) (interpreting Oregon's Privileges or Immunities Clause, Or CONST. art. I, section 20 not by direct evidence of the Drafters' intent, but from the historical context in which it was adopted.)

[20] *See infra* Section III. B. (Indiana) and C. (Oregon).

[21] *See infra* Section III. D. (recommendations for an independent state analysis) and IV. Conclusion (outlining the recommended standard).

[22] Thomas Kuehn, *A Late Medieval Conflict of Laws: Inheritance by Illegitimates in Ius Commune and Ius Proprium*, 15 LAW & HIST. REV. 243, 243 (1997).

socially, and politically distinct entity.[23] In addition, there was Canon or Church law, which had a universal character that transcended local boundaries.[24] Canon law is a body of law that exists for the purpose of legitimizing ecclesiastical authority for the government of the Church.[25] Canon law borrowed both procedure and substance from Roman law where these were not contrary to principles of Christianity.[26]

In Canon law, the concept of immunity—frequently referred to as a "dispensation" was closely related to the concept of privilege.[27] In recognition that a uniform application of all the Church laws would create some unnecessary hardships, the Church provided clergymen with the authority to grant dispensations under appropriate circumstances.[28] Dispensations provided limited immunity from the effect of a general law.[29] Since all canonical laws were presumed to be reasonable and legitimate, a dispensation must also be reasonable and in due proportion to the gravity of the law from which the dispensation was sought.[30] For example, a party could receive dispensation from the general requirement of fasting, abstinence, or observation of the Holy Days, where to do otherwise would create unnecessary hardship.[31]

The word "privilege" originally was understood as a private law.[32] The Church concept of "privilege" covered "positive enactments concerning particular individuals and groups, variances of the general law in favor of special individuals or groups (ius

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[23] Id.
[24] Id.
[25] NEW CATHOLIC ENCYCLOPEDIA Vol. 3 at 29 (1967).
[26] Id.
[27] James A. Brundage, MEDIEVAL CANON LAW AND THE CRUSADER 140-45 (1969).
[28] NEW CATHOLIC, *supra* note 25, Vol. 4 at 905.
[29] Id.
[30] Id. at 906.
[31] Id.
[32] The word "privilege" was formed by a combination of "privus," meaning private and "legium," meaning law. Random House WEBSTER'S ENGLISH DICTIONARY (1998).

singulare), and also special status. . . . established by custom."[33] Privileges were justified on the notion that "public welfare could be promoted in certain circumstances by granting special rights to groups who served the general interests of the community in some specialized way."[34] Privileges were granted, for example, to soldiers, clergy and scholars.[35] Thus, under Church law, privileges and immunities represented exceptional rights limited to a select group or individual or to exceptional circumstances, but the power to grant such rights was limited to the promotion of the public good.

B. Secular Doctrine of Privileges and Immunities from the Middle Ages to the Early Renaissance

In the secular arena, the terms, "privileges" and "immunities," have recurred since the time of the Magna Carta.[36] They initially defined the special rights that allowed certain individuals to own real property under the feudal system, but with the collapse of that system, they came to be identified with rights inherent to all English subjects.[37] In feudal times, land was not individually owned but tenurially possessed in a hierarchical relationship of obligations that ultimately led back to the King.[38] At this time, the term "privilege" referred to specific relief from these obligations, i.e. an agreement by which the King surrendered his power to exact a duty from his subject either to reward the subject for services rendered or to delegate the power to another to collect on the

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[33] Brundage, *supra* note 27 at 140.
[34] Id. at 140.
[35] Id. at 140-41 n.2.
[36] R. Howell, *The Privileges and Immunities of State Citizenship*, 36 JOHN HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 291 (1918).
[37] John T. Kugler, *The Original Meaning of the Article IV "Privileges and Immunities" Clause: An Historical Approach* 9 (April 1990) (unpublished paper on file with the library of the University of Washington School of Law).
[38] David S. Bogen, *The Individual Liberties within the Body of the Constitution: A Symposium: The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. 794, 801 (1987).

subject's debt, for example relief from a tax or service obligation.[39] However, by the end of the sixteenth century, feudalism had ended in England and privileges from feudal burdens came to be generalized as privileges applicable to all English citizens.[40]

The term "immunities" was also used to distinguish between the limited rights of foreign residents from the more generous rights granted to English citizens.[41] English law provided foreign merchants residing in England with the right to travel freely within England, bring legal actions, and acquire and trade freely in personal property, but it precluded them from acquiring real property.[42] English citizens were said to be immune from restrictions on the ownership of English land.[43] A decision that illustrates this point is Calvin's Case.[44]

Calvin's Case involved an inheritance dispute.[45] The dispositive issue was whether Calvin was an alien, and thus barred from bringing an action for real property in England.[46] The court defined "alien" as one who was not a natural born subject of the king.[47] Calvin was born in Scotland three years after the crown of England passed to Scotland's King James IV.[48] However, the defendants pointed out that King James held the crowns of England, Scotland, Ireland, and France, and had several distinct political capacities in each of these kingdoms.[49] The defendants argued that the relationship of the

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[39] Id. at 802.
[40] Id.
[41] Kugler, *supra* note 37 at 10.
[42] Id.
[43] Bogen, *supra* note 38 at 797.
[44] 77 Eng. Rep 377 (K.B. 1608).
[45] Id.
[46] Id. at 379.
[47] Id. at 396.
[48] Id. at 379.
[49] Id.

subjects of the several states to their common sovereign was "several and divided."[50] They argued that Calvin was an alien to James's crown in England, and thus barred from bringing a suit over land in the courts of England.[51] The court rejected the argument,[52] reasoning that because England and Scotland shared the same monarch, subjects of a common king could not be aliens to each other.[53]

C. Colonial Charters

The principle articulated in *Calvin's Case*[54] had important ramifications for the American colonists because it meant that English subjects throughout the colonies would enjoy the same rights as Englishmen at home.[55] In this respect they differed from French and Spanish colonists, to whom the legal rights of their respective homelands did not apply when residing outside its borders.[56] This principle was, in fact, anticipated in the Virginia Charter of 1606, which granted "all Liberties, Franchises,[57] and Immunities" to persons dwelling or inhabiting within "every or several Colonies . . . to all intents and Purposes, as if they had been abiding and born [in] . . . *England.*"[58]

Because the colonial charters ensured that as English subjects the colonists would be entitled to the full rights of English citizenship, the charters added an additional feature to the Anglo-American understanding of the terms "privileges" and

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[50] Id. at 399.
[51] Id. at 396.
[52] Id. at 388-89.
[53] Id.
[54] 77 Eng. Rep 377.
[55] Bogen, *supra* note 38 at 797-98.
[56] Id. at 799.
[57] The original meaning of franchise is "freedom," esp. from imprisonment, servitude, or moral restraint, but it also applied to a legal immunity or exemption from a particular burden or tax. Eventually it came to be known as a privilege arising from the grant of a sovereign or government. *See* Random House Webster's English Dictionary (1998).
[58] Virginia Charter of 1606.

"immunities."[59] Next to the positive grant of rights to all English subjects, there was the added recognition that this guarantee placed limitations on the authority of colonial governments against infringement of the colonists' individual rights.[60]

D. Independence

1. Privileges and Immunities Clause in the Articles of Confederation

Once the colonists committed to a campaign for independence, there began a crisis for preserving the rights they had enjoyed as English subjects.[61] The Articles VI and VII of the first draft of the Articles of Confederation were intended to address this need.[62] Article VI guaranteed that rights commonly recognized among the colonies would continue to be recognized by all states. It provides that "Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in other Colonies, which said Inhabitants now have, in all cases, whatever, except in those provided by [Article VII]."[63] Article VII guaranteed that emerging rights—with respect to trade, navigation and commerce—would be granted equally to citizens of all states.[64] It states that "[i]nhabitants of each colony shall enjoy all Rights, Liberties, Privileges, Immunities and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy."[65]

In the final version of the Articles of Confederation, the two privileges and immunities clauses were combined in Article IV to represent both concerns. Article IV

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[59] Bogen, *supra* note 38 at 800.
[60] Id.
[61] J.R. Pole, *Introduction* to THE AMERICAN CONSTITUTION—FOR AND AGAINST: THE FEDERALIST AND ANTI-FEDERALIST PAPERS (selected and edited by J.R. Pole) (1987) 3, 3-5.
[62] Id. at 5-11.
[63] Art. VI, Articles of Confederation (draft) (July 12, 1776).
[64] Art. VII, Articles of Confederation (draft) (July 12, 1776).

guaranteed "all privileges and immunities of free citizens in the several states" to citizens of every state, and provided "free ingress and egress to and from any other State, [along with] . . . the privilege of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants" of the respective state. [66]

2. Privileges and Immunities Clause in the Federal Constitution

For a number of reasons, the Articles of Confederation proved ineffective at securing these guarantees.[67] For example, state legislatures passed laws clearly favoring their own citizens at the cost of citizens of other states.[68] Virginia and Maryland provided some of the more blatant examples of favoritism by attaching duties to goods imported on vessels built out-of-state.[69] In response, the Framers of the federal constitution took drastic action, changing the structure of the government and the relationship of the American people to it.[70] The Constitution transformed Article IV of the Articles of Confederation into the Commerce Clause,[71] guaranteeing free, uninhibited commerce and travel among the states and the Privileges and Immunities Clause granting to all U.S. citizens "all Privileges and Immunities of Citizens in the several States."[72] Americans became dual citizens of the United States and their respective states:

> "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[73]

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[65] Id.
[66] Articles of Confederation and Perpetual Union, art. IV.
[67] *See* Pole, *supra* note 61 at 5-11.
[68] Kugler *supra* note 37 at 29.
[69] Id., citing Laws of Virginia, 1783, ch. XXXVIII and Maryland Laws, 1784, ch. LXXXIV.
[70] Kugler, *supra* note 37 at 48.
[71] U.S. CONST. art. I § 8.
[72] U.S. CONST. art. IV, § 2, cl.1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
[73] Saenz v. Roe, 526 U. S. 489, 504, n.17 (1999) (citing U. S. Term Limits, Inc. v. Thornton, 514 U. S. 779, 838 (1995) (Kennedy, J., concurring)).

So central was the inclusion of the Privileges and Immunities Clause in Article IV of the federal constitution that it "occasioned little recorded debate in the Constitutional Convention of 1787."[74] In the Federalist Papers, Alexander Hamilton called the Privileges and Immunities Clause "fundamental," going so far as to say that it was "the basis of the Union."[75] However, the question remained, whether the federal government had the authority to enforce the Privileges and Immunities Clause of Article IV § 2 where the challenged laws fell within the traditional province of state law.[76]

The leading case on this issue was Justice Bushrod Washington's opinion in *Corfield v. Coryell*.[77] In *Corfield*, a Pennsylvania resident challenged a New Jersey law prohibiting nonresidents from harvesting oysters from New Jersey waters.[78] The plaintiff argued "that, as oysters constituted an article of trade, a law which abridges the right of the citizens of other states to take them" violates Article IV's Privileges and Immunities Clause.[79] Justice Washington, sitting as Circuit Justice, rejected the argument, stating that the right to regulate the harvest of oysters fell within the authority of the state and did not constitute illegal regulation of interstate commerce.[80] Washington held that Article IV only had the power to protect "fundamental rights" that belong to all citizens of the United States.[81] Justice Washington concluded:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which

[74] Kimberly C. Shankman and Roger Pilon, Reviving the Privileges or Immunities Clause To Redress the Balance Among States, Individuals, and the Federal Government, 3 TEX. REV. LAW & POL. 1, 8 (1998).
[75] Id. n.20.
[76] Id. at 8.
[77] 4 Wash. C. C. 371, 6 F. Cas. 546 (No. 3, 230) (CCED Pa. 1825).
[78] Id. at 550.
[79] Id. at 551.
[80] Id.
[81] Id.

> have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.[82]

Justice Washington added another element to the evolving definition of "privileges and immunities." Under *Corfield*, privileges and immunities represent fundamental rights, whether or not those rights have been specifically enumerated.[83]

a) The Limited Applicability of the Clause

Unfortunately, the scope of protection provided by Article IV, § 2's Privileges and Immunities Clause was defined by state law. This first became apparent in 1821, when the state of Missouri sought admission into the union. Some members of Congress objected to a provision of the Missouri state constitution requiring its legislature "to prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever"[84] because it violated the Privileges and Immunities Clause.[85] After intense debate, the argument was settled finally in favor of Missouri.[86] Southern and Western states had passed laws similar to the Missouri provision, and Congress had not objected to the passage of those laws.[87] Thus, it was argued that the state of Missouri could take this congressional acquiescence as a tacit admission that free blacks and

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[82] Id. at 551-552.
[83] *See* id; *see also* Shankman and Pilon, *supra* note 74 *passim*.
[84] Art. III, Sec. 26 Missouri Constitution (1820), reprinted in Hermine Herta Meyer, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 28 (1977).
[85] Meyer, *supra* note 84 at 28.
[86] Representative Pinckney, one of the original Framers of the Constitution settled the debate. Id. at 28 He began by describing the rights of citizens in his home state of South Carolina. Id. These rights included the right to vote, be on a jury, hold office, hold property, to marry, to sue and be sued. Id. Pinckney then compared the status of free blacks in abolitionist states. Id. Blacks in free states were not allowed to serve in the army or on a jury, were not entrusted to serve as credible witnesses in suits involving whites, were prevented from marrying whites. Id. Pinckney concluded that until these states changed their laws to admit Blacks to full participation in the political process, "neither the Supreme Court, nor any other could consider" them to be citizens. Id.
[87] Meyer, *supra* note 84 at 30.

mulattoes were not considered citizens in the United States and therefore not subject to the protections of the Clause.[88]

Federal challenges brought in state courts reached similar results.[89] For example, in 1822, the Court of Appeals in Kentucky decided that a black man could not be a citizen because he was not afforded the same rights as white men.[90] The court acknowledged that under this definition, neither white women, nor white infants could be considered citizens, when in fact no one doubted that they were.[91] The court reasoned, however, that white women and infants are accorded citizenship by virtue of their adult male counterparts.[92]

In 1833, the state of Connecticut passed a law prohibiting people from teaching persons of African descent who were not residents of the state. Prudence Crandhall challenged the law under the Privileges and Immunities Clause, but the court held that persons of African descent were not entitled to protection under the Clause for two reasons.[93] First, the court noted that all states allowed slavery at the time the constitution was drafted. Second, it found that even though Connecticut had abolished slavery soon after it adopted the federal constitution, it continued to discriminate against persons of the African race. Therefore persons of African descent could not be considered citizens within the meaning of the Constitution.[94]

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[88] Id.
[89] *See, e.g.*, Amy, a woman of color v. Smith, 11 Kentucky (1 Little) 327; and Crandhall v. State of Connecticut, Connecticut Reports, 339 (1834).
[90] Amy, a woman of color v. Smith, 11 Kentucky (1 Little) 327: 333-334.
[91] Id.
[92] Id.
[93] Crandhall v. State of Connecticut, Connecticut Reports, 339, 341-347 (1834).

b) Dred Scot

In 1857, in the infamous *Dred Scot*[95] case, the United States Supreme Court agreed with the state court decisions that had held that persons of African descent were not entitled to the protections of the Privileges and Immunities Clause of Article IV, § 2. In *Dred Scot*, the claimant, an African American, sued for his freedom and that of his family on the grounds that their slaveholder had taken them to live in the free state of Illinois, where slavery was illegal, and thus no longer had a legal claim to ownership.[96] The defendant slaveholder moved to dismiss for lack of jurisdiction on the grounds that the plaintiff was not a citizen.[97] Chief Justice Roger Taney, arguing for the majority of a divided court, agreed with the defendant.[98]

The Court held that a state, by laws it has passed since the adoption of the Constitution, may put a foreigner or any other description of persons upon equal footing with its own citizens, as to all the rights and privileges enjoyed by them within its dominion and by its laws.[99] However, that will not make him a citizen of the United States, nor entitle him to sue in its courts, nor lay claim to any of the privileges and immunities of a citizen in another State.[100] The Court concluded that Americans of African descent were never intended by the Framers to be considered U.S. citizens and thus such persons would not be entitled to protection under the Privileges and Immunities Clause.[101]

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[94] Id.
[95] Scot v. Sanford, 60 U.S. (19 How.) 393 (1857).
[96] Id. at 397.
[97] Id.
[98] Id. at 418.
[99] Id. at 405.
[100] Id. at 405-06.
[101] Id. at 418.

Nowhere in *Dred Scott* does the Supreme Court discuss fundamental rights.[102] Instead, out of a misguided deference to state sovereignty, it held that the Privileges and Immunities Clause of Article IV, § 2 merely placed a noncitizen of a State "upon a perfect equality with its own citizens" as to those fundamental rights already created by state law.[103] It required, for example, that if a State gave its own citizens a right to enter into a lawful business, it could not arbitrarily deny the same right to out-of-state citizens solely because they came from out of State.[104] In light of the Supreme Court's extreme deference to state authority, it remained for Congress to authorize greater federal authority for the protection of fundamental rights.

3. Privileges and Immunities Clause in the Fourteenth Amendment

In the wake of the Civil War, Congress moved quickly to overrule the *Dred Scot* case and to recognize persons of African descent as citizens of the United States.[105] Congressional drafters of the Fourteenth Amendment realized that the Privileges and Immunities Clause of the federal constitution provided insufficient guarantees of equal status under the law.[106] It provided no guarantee that a person eligible for citizenship in one state would be eligible in any others.[107] Senator Poland of Vermont summed it up as follows:

> [T]he radical difference in the social systems of the several States, and the great extent to which the doctrine of States rights or State sovereignty was carried, induced mainly . . . for protection of the . . . the South, led to a practical repudiation of the [Privileges and Immunities Clause of Article IV, § 2] and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the

[102] Corfield v. Corvell, 6 F. Cas. 546.
[103] Scott, 19 How. at 407.
[104] *See, e.g.*, Ward v. Maryland, 12 Wall. 418, 430 (1871).
[105] Afroyim v. Rusk, 387 U.S. 253, 262 (1967).
[106] Id.
[107] Id.

Constitution granted to Congress to enforce it, it became really a dead letter.[108]

The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."[109] It authorizes the federal government to enforce civil rights against encroachment by state actors.[110] Congressional debates over the passage of the Fourteenth Amendment make it clear that Congress intended that the Privileges or Immunities Clause of the Fourteenth Amendment to be tied to the Privileges and Immunities Clause of Article IV of the Constitution as interpreted by Justice Bushrod Washington in *Corfield v. Coryell*.[111] By giving the federal courts sweeping authority over disputes between states and individuals, Congress intended a fundamental alteration of the relationship between state and federal government, providing constitutional guarantees that could be raised against both the state and federal governments.[112]

a) The Slaughter-House Cases

The Fourteenth Amendment should have expanded the protection of individual rights against encroachment by the state government, and yet the federal courts refused to recognize the Privileges or Immunities Clause of the Fourteenth Amendment as an independent source of rights.[113] That was the conclusion of Justice Miller, writing for the

[108] Cong. Globe, 39th Cong., 1st Sess., at 2961.
[109] U.S. CONST. amend. XIV, § 1.
[110] *See, e.g.,* Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (holding that the First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State).
[111] Shankman and Pilon *supra* note 74 at 3.
[112] Id.
[113] Shankman and Pilon, *supra* note 74 *passim*.

Majority in *The Slaughter-House Cases*,[114] decided not five years after the enactment of the Fourteenth Amendment. The plaintiffs, slaughterhouse operators, challenged legislation that purported to protect public health and safety by restricting slaughterhouse operations within the city of New Orleans.[115] They argued that the Fourteenth Amendment's protection of privileges and immunities embraced economic property rights and that the legislation unconstitutionally encroached on their rights to continue slaughterhouse operations.[116] The Court summarily rejected the argument and with it any suggestion that the Privileges or Immunities Clause was meant "to bring within the power of Congress the entire domain of civil rights [that had previously] belonged exclusively to the States."[117]

Instead, Justice Miller's majority opinion determined that the eradication of slavery was the "pervading spirit" of all of Section 1 of the Fourteenth Amendment's provisions.[118] The Court found that the drafters intended to provide only the minimal federal powers to ensure that the newly freed slaves received due process and equal protection of the law of their states of residence.[119]

It decided that because Section 1 of the Fourteenth Amendment included a definition of U.S. citizenship, as distinct from state citizenship, the amendment necessarily spoke "only of privileges and immunities of citizens of the United States, and does not speak of" state rights.[120] Examples of strictly federal rights "include the right to exercise federal rights to assemble and petition for redress of grievances and to apply for

[114] 83 U.S. (16 Wall.) 36, 96 (1872).
[115] Slaughterhouse Cases, 83 U.S. (16 Wall.) at 51-55.
[116] Id.
[117] Id at 77.
[118] Id. at 71.
[119] Id. at 78-79.
[120] Id. 74.

a writ of habeas corpus; to visit the seat of the federal government and participate in its offices; [and] to receive federal protection while abroad. . . ."[121]

The Court concluded that "nearly every civil right for the establishment and protection of which organized government is instituted," including "those rights which are fundamental," are *not* protected by the clause.[122] Privileges and immunities "belonging to [a] citizen of the State as such ... must rest for their security and protection where they had heretofore rested; for they are not embraced by [the Privileges or Immunities Clause]."[123] In other words, state residents must look to their own state constitution for protection of *fundamental rights*.

The Slaughter-house Cases was wrongly decided.[124] In the words of one critic, "the Court stared at a constitutional clause and steadfastly refused to acknowledge it—only later to carve out an oblique channel into a conveniently adjacent clause of the same amendment, into which it poured, without textual basis, protections similar to those destined for the other."[125] Although the drafters were primarily concerned with race discrimination, "their natural rights-declaratory theory led them to use broad, sweeping language to accomplish specific, historically defined ends."[126] The decision is wrong because it ignores the drafters' of the Amendment efforts "to elevate the protections it

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[121] Derek Shaffer, Note: *Answering Justice Thomas in Saenz: Granting the Privileges or Immunities Clause Full Citizenship Within the Fourteenth Amendment*, 52 STAN. L. REV. 709, 714 (2000).
[122] Slaughterhouse, 83 U.S. at 76.
[123] Id. at 75.
[124] *See, e.g.*, Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 627 & n.4, 628 (1994); Walter Dellinger, *Remarks on Jeffrey Rosen's Paper*, 66 GEO. WASH. L. REV. 1293, 1294 (1998). John Hart Ely, DEMOCRACY AND DISTRUST 22 (1980); Howard Jay Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN L. REV. 3, 38 (1954); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387 (1992); William E. Nelson, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 123 (1988); Shaffer *supra* note 121; Shankman and Pilon, *supra* note 70.
[125] Shaffer *supra* note 121 at 733.
[126] Id.

embodied above the political fray" by drafting "broad language that would create principles of lasting permanence and vitality."[127]

It is also wrong to have singled out the Equal Protection and Due Process Clauses as the only sources of substantive rights.[128] Throughout the debates on the Fourteenth Amendment the drafters referred to Equal Protection as one of the privileges and immunities.[129] Thus, the drafters likely intended the Equal Protection and Due Process Clauses to serve as examples "of the privileges or immunities they meant to secure."[130] They likely mentioned these specific guarantees because they believed that Due Process and Equal Protection "were so thoroughly controverted in the southern states" that they needed to be stated specifically and "convincingly for them to have the requisite force."[131] As soon as it is accepted "that Equal Protection constitutes a new and independent source of substantive protections, it follows a fortiori that privileges and immunities, a broader principle, which in the framers' abstract conception embraced Equal Protection, is a distinct source of substantive protections."[132]

b Saenz v. Roe

Indeed, in *Saenz v. Roe*,[133] the U.S. Supreme Court appeared to appreciate this fact when it attached the right to travel to the Privileges or Immunities Clause of the Fourteenth Amendment.[134] *Saenz* involved a class action suit challenging the constitutionality of an amendment to California's Aid to Families with Dependent

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[127] Id at 720.
[128] Id. at 731-34.
[129] Id. at 731 n.114, citing Jeffrey Rosen, *Translating the Privileges or Immunities Clause*, 66 GEO. WASH. L. REV. 1241, 1245 (1998).
[130] Shaffer *supra* note 121 at 734.
[131] Id.
[132] Id. at 731-32.
[133] 526 U.S. 489 (1999).
[134] Id. at 502-03.

Children program, which limited new residents, for the first year they lived in California, to the benefits they would have received in the state of their prior residence.[135] The Court held that a State cannot enact durational residency requirements in order to inhibit the migration of needy persons into the State and that a classification that has the effect of imposing a penalty on the right to travel violates the Equal Protection Clause.[136] The Court also held that the right of newly arrived citizens to the same privileges and immunities enjoyed by other citizens of their new State, one of the aspects of the right to travel, is plainly identified in the Privileges or Immunities Clause of the Fourteenth Amendment.[137] The majority's reliance on the Privileges or Immunities Clause was an unexpected move. As Justice Thomas explains in his dissenting opinion:

> [I]t comes as quite a surprise that the majority relies on the Privileges or Immunities Clause at all in this case. That is because . . . The Slaughter-House Cases sapped the Clause of any meaning. Although the majority appears to breathe new life into the Clause today, it fails to address its historical underpinnings or its place in our constitutional jurisprudence.[138]

Notwithstanding the inadequacies of its historical analysis, *Saenz* indicates a turning point in the Court's assessment of the Fourteenth Amendment's Privileges or Immunities Clause and has aroused renewed scholarly interest in the Clause.[139] Indeed, *Saenz* has immediate and important consequences for the interpretation of state clauses like Washington's Article I § 12. By implication, if the Court has traced a substantive right to the Privileges or Immunities Clause of the Fourteenth Amendment, then state residents may look to the Privileges or Immunities Clauses in state constitutions as an

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[135] Id. at 496.
[136] Id. at 505.
[137] Id. at 490.
[138] Id. at 527, Thomas, J. dissenting.
[139] *See e.g.,* Tim A. Lemper, *Recent Case: The Promise and Perils of "Privileges or Immunities":* Saenz v. Roe, 119 S. Ct. 1518 23 HARV. J.L. & PUB. POL'Y 295 (1999); Shaffer, *supra* note 121; Shankman and Pilon, *supra* note 74.

independent source of state rights. Where the federal government lacks the power to enforce restrictions on state governments, state constitutions may provide state citizens with an enforceable right to invalidate state actions that violate recognized individual rights or force the state to provide services to which they were implicitly entitled under the state constitution.

Even if the Supreme Court does not continue this line of interpretation,[140] but instead returns to its holding in *The Slaughter-House Cases*[141]—that the Privileges or Immunities Clause of the Fourteenth Amendment is a "dead letter"[142]—that decision does not preclude an assertion of state rights guarantees because *The Slaughter-House Cases* only affected the assertion of federally protected rights, not state protected rights. As Justice Miller explained:

> It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States -- such, for instance, as the prohibition against ex post facto laws, bills of attainder, and laws impairing the obligation of contracts. *But* with the exception of these and a few other restrictions, *the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States*, and without that of the Federal government.[143]

Thus, the *Slaughter-House* decision leaves undisturbed state guarantees of individual rights.

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[140] Once before in Colgate v. Harvey, 296 U.S. 404 (1935), *overruled by* Madden v. Kentucky, 309 U.S. 83 (1940), the Supreme Court invoked the Fourteenth Amendment's privileges or immunities clause as a source of substantive rights. Critics attacked the Court for reading "privileges or immunities" into a case properly involving only the Equal Protection Clause, supporters hailed it as a means to extend substantive rights beyond the limits of the due process and Equal Protection Clauses. Lemper, *supra* note 139 at 295. Five years later, in Madden v. Kentucky, the Supreme Court overruled Colgate v. Harvey. Id.

[141] 83 U.S. (16 Wall) 36.

[142] Cong. Globe, 39th Cong., 1st Sess., at 2961.

[143] Id. at 76 (emphasis added).

4. The Privileges or Immunities Clause in State Constitutions

The state constitutions written during the presidency of Andrew Jackson were rights-conscious documents supporting popular sovereignty.[144] Nearly all nineteenth century state constitutions added or expanded Declarations of Rights and most placed them at the beginning of the document.[145] The terms "privileges" and "immunities" appear in several state constitutional provisions aimed at eliminating commercial monopolies.[146] "Although the description of the right to do business as a privilege or immunity granted by the state may seem strange to modern ears, these provisions reflect an earlier tradition in which access to the market was not free but required a special grant of royal privilege."[147] In the context of these Jacksonian state constitutions, the terms "privileges" and "immunities" acquired additional meaning; it was acknowledged that there were some privileges and immunities that were not inherent, but revocably granted.[148] These "special grants" of "privileges and immunities" were presumed to be invalid state actions that favored the few at the expense of the general public.[149]

E. Conclusions regarding the Historical Development of the Terms "Privileges" and "Immunities"

The terms "privileges" and "immunities" have acquired numerous meanings during the course of history. Under Canon Law, they represented exceptional rights

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[144] State v. Clark, 291 Or. 231, 236, 630 P.2d 810 (1981).
[145] Daniel Webster & Donald L. Bell, *First Principles for Constitution Revision*, 22 NOVA L. REV. 391, 406 n.67 (1997) (citing James A. Henretta, *Forward: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 819-839 (1991)).
[146] Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1123 (1988); *see generally* Thompson, *supra* note 15 at 1258; David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988).
[147] Gergen, *supra* note 146 at 1123.
[148] *See, e.g.*, State v. Carey, 4 Wash. 424, 30 P. 729 (1892) (finding regulations in the practice of medicine not to violate the Privileges or Immunities Clause).

granted to the few for the benefit of the community as a whole.[150] Drafters of Jacksonian era state constitutions would return to this definition, when they included a blanket prohibition against any legislation providing special rights or exemptions, not available to all.[151] At the close of the Middle Ages, under secular law, the terms represented the basic rights common to all Englishmen.[152] Under colonial law, the Privileges and Immunities Clause represented a limit on the authority of the local government.[153] In the federal constitution, the Clause represented fundamental federal rights, both enumerated and unenumerated.[154] Finally, when Congress drafted the Fourteenth Amendment, it intended that the Privileges or Immunities Clause serve as a general guarantor of both enumerated and unenumerated, federally protected rights.[155]

In light of the history of privileges and immunities, it is apparent that the current, restrictive interpretations of the Privilege and Immunities Clause of the U.S. Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment are contrary to both the framers' intent and the literal language of the Clauses. In addition, state constitutional provisions, like Washington's Article I, § 12, add an additional element that proscribes grants of special privileges or immunities not available to all. Thus, by identifying the Privileges or Immunities Clause of the state constitution with the Equal Protection Clause of the Fourteenth Amendment, the courts have adopted an unnecessarily narrow scope of review and have failed to take into account the textual and historical differences between these provisions.

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[149] Id. at 429 (suggesting that if the state regulations of medical practise were to discriminate between rival or different schools of medicine, it would violate Wa CONST. art. I § 12).
[150] *Supra* Section II. A. (canon law)
[151] *Supra* Section II. D. d. (state constitutions).
[152] *Supra* Section II. B. (secular law from middle ages to Renaissance)
[153] *Supra* Section II C. (colonial rule).
[154] *Supra* Section II. D. b. (U.S. Constitution).

III. DISTINGUISHING FEDERAL EQUAL PROTECTION FROM THE PRIVILEGES OR IMMUNITIES CLAUSES UNDER STATE CONSTITUTIONS

From the foregoing historical analysis, it should be apparent that the terms "privileges" and "immunities" had preeminent importance in the Anglo-American political tradition. In the following section, it should also become evident that the federal Equal Protection Clause serves a more limited purpose than that envisioned by the drafters of the state privileges or immunities clauses like Washington's Article I, § 12. Thus, the analytical framework of federal equal protection review is a poor fit for claims brought under this provision.

Currently, there are thirty-five states[156] that have clauses prohibiting grants of privileges and immunities on an unequal basis. Nine states use language virtually identical to Washington's Article I, § 12 : Arkansas, Arizona, Indiana, Iowa, New Mexico, North Dakota, Oklahoma, Oregon, and South Dakota.[157] Although state courts

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[155] *Supra* Section II. D. c. (Fourteenth Amendment)

[156] It is easier to list those that do not than those that do. Presently all but the following states have Privileges and Immunities Clauses in their state constitutions: Delaware, Florida, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nevada, New York, Rhode Island, Utah, Vermont, Wisconsin and West Virginia.

[157] Ariz. CONST. art. 2, § 13 states: "No law shall be enacted 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"; Ark. CONST. art 2, § 18 states: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens"; Ind. CONST. art. 1, § 23 states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens"; Iowa CONST., art. I § 6 states: "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens"; NM CONST. art. IV § 26 states: The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state"; N.D. CONST. art I, § 21 states: "No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens"; Okla. CONST. art. 5, § 51 states: "The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State"; Or. CONST. art.1, § 20 states: "No law shall be passed granting to any citizen or class of citizens privileges, or

need not apply federal Equal Protection analysis to challenges under state privileges or immunities clauses, most courts have.[158]

In order to preserve the broad scope of the state privileges or immunities clauses, it is necessary to develop an independent analytical framework tailored to the language and the history of the provision. A comparison of these states indicates that only Oregon and Indiana presently claim broader protection under their respective state constitutional provisions, than under federal Equal Protection.[159]

This section outlines the analytical framework of equal protection review and evaluates the efforts of the states of Indiana and Oregon to develop an independent basis of review. It then provides guidelines for adopting an independent analytical framework that combines the merits of these approaches.

A. Federal Equal Protection Analysis

The Fourteenth Amendment provides that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[160]

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immunities, which, upon the same terms, shall not equally belong to all citizens"; and SD CONST. art. 6 § 18. Equal privileges or immunities states: "No law shall be passed granting to any citizen, class of citizens, or corporation, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." Compare WA CONST. art. I § 12: "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."

[158] *See, e.g.,* Schuff Steel Co. v. Industrial Comm'n, 181 Ariz. 435, 891 P.2d 902 (Ct. App. 1994); J.W. Black Lumber Co. v. Arkansas Dep't of Pollution Control & Ecology, 290 Ark. 170, 717 S.W.2d 807 (1986); Mennonite Bd. of Missions, Inc. v. Adams, 427 N.E.2d 686 (Ind. App. 1981), *rev'd on other grounds*, 462 U.S. 791 (1983); State v. Ceaser, 585 N.W.2d 192, 196 (Iowa 1998); St. Paul Fire & Marine Ins. Co. v. Getty Oil Co., 1989 OK 139, 782 P.2d 915 (1989); Baillie v. State Board of Higher Educ., Lindberg v. Benson, 1955.ND.20, 70 N.W.2d 4279 (1955); Or App 705, 719 P2d 1330 (1986); State v. Laible, 1999 SD 58, 594 NW 2d 328 (1999); and State v. Sigler, 85 Wn. App. 329, 932 P.2d 710 (1997).

[159] *See, e.g.,* Ledbetter v. Hunter, 652 N.E.2d 543 (Ind. App. 1995) (finding the state Privileges and Immunities Clause found in Ind. CONST., art. I, § 23 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are not coextensive and the state and federal clauses should be given independent interpretation and application.); State v. Clark, 291 Or. 231,630 P.2d 810 (1981).

[160] U.S.C. Const Amend. XIV, § 1.

The rule mandates similar treatment of persons in similar situations.[161] Nevertheless, for the purpose of preserving federalism,[162] the Supreme Court has consistently recognized the state's authority to create laws that affect various classes of individuals differently if it serves a legitimate governmental purpose and the reasons for the differential treatment are sufficiently strong to justify the discriminatory classification.[163]

The function of the Equal Protection Clause is to measure the validity of classifications created by state laws to determine whether the difference in treatment is warranted.[164] Under the Supreme Court's analytical framework, there are three levels of scrutiny under traditional Fourteenth Amendment analysis, depending on the type of interest at risk.[165] A challenged classification is subject to strict scrutiny only if a suspect class is disadvantaged,[166] or, when it impermissibly interferes with the exercise of a fundamental right.[167] If gender or illegitimacy is involved, the challenged classification is subject to intermediate scrutiny and will be sustained only if there is a fair and substantial relation to important government objectives.[168] All other designations require only a rational relation to a legitimate governmental interest.[169]

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[161] Lemper, *supra* note 139 at 295.
[162] San Antonio School District v. Rodriquez, 411 U.S. 1, 44 (1973). ("Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.").
[163] Seoane v. Ortho Pharmaceuticals, Inc., 660 F.2d 146, 149 (5th Cir. 1981).
[164] *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 351 (1979).
[165] Seoane, 660 F.2d at 149.
[166] Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).
[167] Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Bullock v. Carter, 405 U.S. 134 (1972) (right to vote); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); NAACP v. Alabama, 357 U.S. 449 (1958) (freedom of association); Roe v. Wade, 410 U.S. 113 (1973) (right of privacy).
[168] Craig v. Boren, 429 U.S. 190 (1976) (gender); Levy v. Louisiana, 391 U.S. 68 (1968) (legitimacy).
[169] San Antonio School District v. Rodriquez, 411 U.S. 1 (1973).

For all practical purposes, a challenge to a legislative provision is defeated if it is placed under rational basis review.[170] Classifications subject to rational review comply with the Equal Protection Clause so long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.[171] A rational basis is presumed unless the plaintiff can prove that the statute could under no conceivable state of facts serve any legitimate state goal identified by the statute, the state's attorneys, or the court.[172] This standard is so deferential that there is only one case in which the Supreme Court invalidated a statute under the rational basis review.[173]

This deference to the decisions of state lawmakers that underlies federal equal protection review is, however, inappropriate when adopted by a state court towards its own legislature. This is so because the state Privileges or Immunities Clause is intended as a safeguard against infringement of individual rights by the state government. Deference to the legislature's decision, thus runs contrary to the intent of the Clause.

Within the federal analytical framework Washington has arrived at independent results, notably applying strict review, rather than intermediate, for laws that implicate gender.[174] However, Washington has also expressed a willingness to revise its approach to Article I, § 12's Privileges or Immunities Clause altogether.[175] As indicated, only Indiana and Oregon currently provide an independent state constitutional review under

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[170] *See generally* Thompson, *supra* note 15 at 1256-59.
[171] Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).
[172] United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 (1938).
[173] Morey v. Doud, 354 U.S. 457, 457 (1957), *overruled by* City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curium).
[174] Griffin v. Eller, 130 Wn.2d 58, 64- 65, 922 P.2d 788 (1996).
[175] Lakeview Boulevard Condominium Association v. Apartment Sales Corp., 144 Wn.2d 570, 29 P.3d 1249 (2001) (declining to conduct an independent state constitutional analysis under art. I § 12 because the plaintiffs did not request it).

their Privileges or Immunities Clauses. Before developing its own standard of review, Washington would to well to look to the efforts of these states.

B. Indiana's Implementation of a Stricter Standard of Review

Article I, § 23 of the Indiana Constitution provides:

> The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.[176]

This provision was adopted against a backdrop of a financial ruin.[177] Beginning in 1836, the State of Indiana sought to develop its infrastructure and stimulate its economy by authorizing large scale public works projects.[178] To finance these projects, it issued bonds, "which were then sold in the market at a heavy discount, with the resulting money 'squandered on various railroads and canals,' none of which were completed."[179] The bonds greatly depreciated in value, and in 1842, the state's credit was ruined and its projects abandoned.[180] The state legislature "authorized the continuance of these public works by private companies and empowered counties to purchase stock therein, financed by issuing bonds or levying taxes."[181] That decision wreaked still more havoc; by the time the constitutional convention met in late 1850 and early 1851,[182] the state was bankrupt.[183]

The substance of Indiana's Article I, § 23 was proposed by Monroe County delegate Daniel Read on December 31, 1850.[184] Mr. Read's remarks to delegates at the

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[176] Ind. CONST. art I § 23.
[177] Collins v. Day, 644 N.E.2d 72, 76 (IN 1994).
[178] Id.
[179] Id., citing Lafayette, M. & B. R.R. v. Geiger 34 Ind. 185, 205 (1870).
[180] Collins, 644 N.E.2d at 76.
[181] Id.
[182] Id.
[183] Id.
[184] Id.

convention leave no doubt as to his intent.[185] Read asserted that the state "ought not in any way to become the partner of the merchant, the manufacturer, or the banker."[186] He quoted to the convention sections of Andrew Jackson's farewell address, urging that:

> unless you become more watchful in your States, and check this spirit of monopoly and thirst for exclusive privileges, you will, in the end, find that the most important powers of government have been given or bartered away, and the control over your dearest interests has passed into the hands of these corporations[187]

Speaking against perpetuities and monopolies, Read declared, "I think both are contrary to the spirit of a free State, and that we ought to make a declaration of that kind in our Bill of Rights."[188] Records of the convention reveal that many other delegates shared these views.[189]

In the years following the adoption of the state constitution, the Indiana Court expanded the meaning of the provision.[190] "Section 23 was often applied to invalidate enactments which, rather than granting special privileges, imposed special burdens."[191] By failing to restrict its application to legislation granting, rather than abridging, privileges or immunities, and by repeatedly applying Article I, § 23 to matters unconnected with the state's involvement in commercial enterprise, the Indiana Court

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[185] Id.
[186] Id., citing 1 James Albert Woodburn, HISTORY OF INDIANA UNIVERSITY, 1820-1902 at 192 (1940).
[187] Collins, 644 N.E.2d at 76, citing 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850 at 221-22 (1850).
[188] Collins, 644 N.E.2d at 76, citing 1 REPORT, *supra* note 187 at 975.
[189] Collins, 644 N.E.2d at 76-77.
[190] Id. at 77.
[191] Id.

gave "preference to the literal language of Section 23 rather than to the intent of its framers."[192]

The Indiana Court was anything but consistent in its treatment of its Privileges or Immunities Clause.[193] In the years following the adoption of the constitution, it "assumed various postures with respect to the applicability of federal Fourteenth Amendment standards to Section 23 questions."[194] In some cases, the court distinguished between the state constitutional provision and the Fourteenth

[192] Id., citing Needham v. Proffitt (1942), 220 Ind. 265, 41 N.E.2d 606 (invalidating prohibition of newspaper advertisement of funeral prices); State Bd. of Barber Examiners v. Cloud, 220 Ind. 552, 44 N.E.2d 972 (1942) *reh'g denied* (finding a regulation of barbershop hours to be violation); Martin v. Loula, 208 Ind. 346, 194 N.E. 178 (1935), *reh'g denied*, (finding in violation a law permitting wage garnishment notwithstanding statutory exemptions); Sperry & Hutchinson Co., 188 Ind. 173, 122 N.E. 584 (1919) (invalidating prohibitory license fee for distribution and redemption of trading stamps); Cleveland, C., C. & St. L. Ry. v. Schuler 182 Ind. 57, 105 N.E. 567 (1914) (striking down employee termination pay requirement imposed exclusively on railroads); Dixon v. Poe, 159 Ind. 492, 65 N.E. 518 (1902) (invalidating prohibition on issuing merchandise tokens in exchange for coal miners' wage assignments); In re Leach, 134 Ind. 665, 34 N.E. 641 (1893) (preventing the exclusion of women from admission to law practice); City of Evansville v. State, 118 Ind. 426, 21 N.E. 267 (1888) (overturning political and local residency requirements for certain city employees); State ex rel. Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1888) (precluding residency and political limitations for fire and police commissioners); Graffty v. City of Rushville, 107 Ind. 502, 8 N.E. 609 (1886) (invalidating fee for sale of goods not manufactured or grown in local county). *But see* Thompson, *supra* note 15 *passim* (arguing that equal protection is not encompassed within the state constitutional provision).

[193] Collins, 644 N.E.2d at 74-75.

[194] Id. at 74.

Amendment,[195] in others it maintained that the state and federal provisions shared substantially the same considerations.[196]

That state of confusion was brought to a close in *Collins v. Day*,[197] which squarely addressed the issue of "whether the requirements of the Privileges and Immunities Clause, Article 1, § 23, of the Constitution of Indiana, are independent of and distinguishable from those imposed by the Fourteenth Amendment to the Constitution of the United States."[198] *Collins* involved a state constitutional challenge to the exclusion of agricultural workers from the coverage of the Indiana Worker's Compensation Statute.[199] The plaintiff argued that the agricultural exemption violated Article I, § 23 because it extended to a special class of employers an immunity denied to the general class of

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[195] Id. at 74-75, citing Graffty, 107 Ind. at 509 (finding that Section 23 considerations were to be analyzed independently from the "provisions of the National Constitution"); Sperry, 188 Ind. 173 (holding that the statute complied with the federal Privileges and Immunities Clause but violated Indiana's Section 23); Hammer v. State, 173 Ind. 199, 206, 89 N.E. 850 (1909) (acknowledging that Section 23 "is the antithesis of the 14th amendment to the federal Constitution"); *accord* Midwestern Petroleum Corp. v. State Bd. of Tax Comm'rs, 206 Ind. 688, 187 N.E. 882 (1934) *reh'g denied*; Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465 (1934); Cincinnati, H. & D. Ry. Co. v. McCullom, 183 Ind. 556, 109 N.E. 206 (1915), *aff'd* 245 U.S. 632 (undertaking a separate analysis of constitutional claims under the state and federal provisions); *accord* Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171 (1977), *cert. denied*, 434 U.S. 825; Phillips v. Officials of Valparaiso, 233 Ind. 414, 120 N.E.2d 398 (1954); Shedd v. Automobile Ins. Co., 208 Ind. 621, 196 N.E. 227, (1935); Davis Constr. Co. v. Board of Comm'rs, 192 Ind. 144, 132 N.E. 629 (1921); Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N.E. 229 (1909); Levy v. State, 161 Ind. 251, 68 N.E. 172 (1903); Street v. Varney Elec. Supply Co., 160 Ind. 338, 66 N.E. 895 (1902); Pennsylvania Co. v. State, 142 Ind. 428, 41 N.E. 937 (1895); Warren v. Sohn, 112 Ind. 213, 13 N.E. 863 (1887); Cory v. Carter, 48 Ind. 327 (1874).

[196] Collins, 644 N.E.2d at 75, citing Dortch v. Lugar, 255 Ind. 545, 567, 266 N.E.2d 25 (1971) (holding that Section 23 and the Fourteenth Amendment "concerning the abridging of privileges and immunities of citizens protect substantially identical rights"); Johnson v. St. Vincent Hosp., 273 Ind. 374, 397, 404 N.E.2d 585 (1980) (finding the two provisions to be essentially synonymous); *accord* Sidle v. Majors, 264 Ind. 206, 210, 341 N.E.2d 763 (1976); State ex rel. Miller v. McDonald, 260 Ind. 565, 569, 297 N.E.2d 826 (1973) *cert. denied*, 414 U.S. 1158; Haas v. South Bend Community Sch. Corp., 259 Ind. 515, 526, 289 N.E.2d 495 (1972); Murphy v. Schilling, 271 Ind. 44, 389 N.E.2d 314 (1979) (treating the two provisions simultaneously, without any explicit statement as to equivalence or separateness); *accord* State v. Hi-Jinks, Inc., 242 Ind. 621, 181 N.E.2d 526 (1961); W. A. Barber Grocery Co. v. Fleming, 229 Ind. 140, 96 N.E.2d 108 (1951); Vandalia R.R. v. Stilwell, 181 Ind. 267, 104 N.E. 289 (1913), *aff'd* (1916), 239 U.S. 637; Indianapolis Union Ry. Co. v. Houlihan, 157 Ind. 494, 60 N.E. 943 (1901); State v. Hogriever, 152 Ind. 652, 53 N.E. 921 (1899).

[197] 644 N.E.2d 72 (1994).

[198] Id. at 73.

[199] Id.

employers.[200] Noting the varying approaches the Indiana courts had taken in prior cases as to the relationship between Indiana's Article I, § 23 and the federal Equal Protection Clause, the plaintiff urged that Section 23 be held to apply separately from and in addition to the federal Equal Protection guarantee.[201] He asserted that, although Fourteenth Amendment principles could be appropriate to Equal Protection issues under Section 23, a different analysis should be applied to address a grant of special privileges or immunities to a favored class.[202]

The court agreed.[203] After analyzing the history of the provision, *Collins* concluded that the drafters intended Section 23

> to prohibit the state legislature from affirmatively granting any exclusive privilege or immunity involving the state's participation in commercial enterprise. Section 23 does not appear to have been enacted to prevent abridgement of any existing privileges or immunities, nor to assure citizens the *equal protection* of the laws.[204]

Turning to the case law, *Collins* similarly concluded, "that there is no settled body of Indiana law that compels application of a federal *equal protection* analytical methodology to claims alleging special privileges or immunities under Indiana Section 23 and that Section 23 should be given independent interpretation and application."[205]

Excluding the line of cases which applied federal equal protection methodology to Section 23, the court discerned two general factors from the considerable body of case law reviewing the state constitutional question.[206] Both "factors focus upon the nature of the classifications of citizens upon which the legislature is basing its disparate

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[200] Id at 74.
[201] Id.
[202] Id.
[203] Id. at 75.
[204] Id. at 77.
[205] Id. at 75. The court also acknowledged that notwithstanding the Drafters' intent, early case law had interpreted the Clause as implicitly including an equal protection clause. Id at 78.

treatment."[207] First, the classification must "inhere in the subject matter."[208] "[T]his requirement incorporates and satisfies the often expressed concerns that such legislative classifications be "just," "natural," "reasonable," "substantial," "not artificial," "not capricious," and "not arbitrary."[209] Second, the preferential treatment must be uniform and equally available to all persons similarly situated.[210]

Collins expressly rejected the analytical framework of federal equal protection review that calls for varying degrees of scrutiny for different protected interests.[211] Whereas federal equal protection review applies varying degrees of scrutiny for different protected interests, the "protections assured by Section 23 apply fully, equally, and without diminution to prohibit any and all improper grants of unequal privileges or

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[206] Id. at 78.
[207] Id.
[208] Id. at 78-79, citing Railroad Comm'n v. Grand Trunk W. R.R. 179 Ind. 255, 262, 100 N.E. 852 (1913); Hirth-Krause Co., 177 Ind. 1, 10, 97 N.E. 1 (1912); Bank of Commerce v. Wiltsie 153 Ind. 460, 474, 53 N.E. 950 (1899) *reh'g denied*; Heckler v. Conter 206 Ind. 376, 381, 187 N.E. 878 (1934) ("holding that the classification must be "based upon substantial distinctions germane to the subject matter and the object to be attained").
[209] Collins, 644 N.E.2d at 79, citing Barrett v. Millikan, 156 Ind. 510, 516, 60 N.E. 310 (1901) ("just, natural, and reasonable"); Hirth-Krause, 177 Ind. at 10 ("natural and substantial"); Sperry & Hutchinson Co., 188 Ind. 173, 183, 122 N.E. 584 (1910) ("just and reasonable," not "manifestly and unmistakably arbitrary," resting on some "substantial and not merely artificial reason"); School City of Elwood, 203 Ind. at 635, 635-36, 180 N.E. 471 (1932) ("reasonable and natural, not capricious and arbitrary"); Dowd v. Stuckey, 222 Ind. 100, 104, 51 N.E.2d 947 (1943) ("rational and substantial").
[210] Collins, 644 N.E.2d at 79, citing Heckler v. Conter, 206 Ind. 376, 381, 187 N.E. 878 (the classification "must embrace all who possess the attributes or characteristics which are the basis of classification, and their difference from those excluded must be substantial and related to the purpose of the legislation"); School City of Elwood, 203 Ind. at 635, (classification "must embrace all who naturally belong to the class"); Railroad Comm'n v. Grand Trunk W. R.R. 179 Ind. 255, 262, 100 N.E. 852 (1913); (classification "must operate equally upon all within the class" and "must also embrace all within the class to which it naturally belongs"); State v. Richcreek, 167 Ind. 217, 224, 77 N.E. 1085 (1906) ("the provisions of the restrictive act be in fact open alike to all citizens who may bring themselves within its terms"); Seeleyville Coal & Mining Co. v. McGlosson, 166 Ind. 561, 566, 77 N.E. 1044 (1906) (upholding statute, finding that it "operates upon all persons who come within the class to which it applies"); Barrett v. Millikan, 156 Ind. 510, 516, 60 N.E. 310 (1901) ("applies equally to all the citizens of the state who bring themselves within the remedial scope of this act"); Hancock v. Yaden, 121 Ind. 366, 374, 23 N.E. 253 (1890) ("All who are members of the classes named are entitled to its benefits or subjected to its burdens. It is open to every citizen to become a member of any of the classes designated, and the privileges conferred belong on equal terms to all.").
[211] Id.

immunities...."[212] Nevertheless it called for judicial restraint in the exercise of state rights under Section 23, stating that "So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification."[213]

Applying the required deferential standard of review, the court found that the statutory exemption in the state worker's compensation law for agricultural workers satisfied the first factor because it held that there were inherent distinctions between the class of agricultural employers and non-agricultural employers that were reasonably related to the challenged statute.[214] The second factor was also met as the court found that "within the classification of agricultural employers, the exemption from worker's compensation coverage for employees [was] uniformly applicable and equally available to all persons who [were] or may become agricultural employers."[215] Thus, it concluded that the statutory agricultural exemption to the Indiana Worker's Compensation Act,[216] did not currently "constitute a special immunity in violation of the Indiana Privileges and Immunities Clause, Article I, Section 23 of the Indiana Constitution."[217]

The single standard embraced by the Indiana Court has the advantage of being simpler than federal equal protection review and truer to the drafters' intent. However, the Indiana Court's deference to legislative classifications is misplaced in view of the fact

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[212] Collins, 644 N.E.2d at 80.
[213] Id.
[214] Id. at 81.
[215] Id.
[216] Ind.Code § 22-3-2-9(a).
[217] Collins, 644 N.E.2d at 82.

that the Privileges or Immunities Clause places a limit on state and local government.[218] As a practical matter, it has been a significant obstacle to constitutional challenges under Article I, § 23.[219] Thus, in order to provide a legitimate alternative to equal protection analysis, Washington courts should be wary about adopting the deferential standard of *Collins*.

C. Oregon's Departure from the Federal Analytical Framework

The Oregon Court was the first to take steps to distinguish its state constitutional protections from those guaranteed under federal law.[220] Article I, § 20 of the Oregon Constitution states:

> No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.[221]

This guarantee, like most of Article I of the Oregon Constitution, was taken from Indiana's Constitution of 1851 and has been a part of the Bill of Rights since Oregon became a state in 1859.[222]

The Oregon provision, which predates "the Civil War and the Equal Protection Clause of the Fourteenth Amendment, . . . reflects early egalitarian objections to favoritism and special privileges for a few rather than the concern of the Reconstruction

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[218] *See supra* Section II. C. (describing the Clause in the Virginia Charter of 1606 as a prohibition on the local government's authority to abridge the colonists' right to the full privileges and immunities entitled to them as English subject.)
[219] Rosalie Berger Levinson, *State and Federal Constitutional Law Developments*, 34 IND. L. REV. 557, 558-59 (2001) (citing only one successful attempt to invalidate state legislative enactments under this provision because the Indiana Supreme Court in Collins emphasized that substantial deference must be given to legislative judgment and that only where the legislature drew lines in an arbitrary and manifestly unreasonable manner could the court intervene).
[220] *See* Collins, 644 N.E.2d at 81 n.2, citing State v. Clark, 291 Or. 231, 630 P.2d 810 (1981).
[221] Or. CONST. art. I § 20.
[222] State v. Clark, 291 Or. 231, 236, 630 P.2d 810 (1981).

Congress about discrimination against disfavored individuals or groups."[223] Because the Clause would ordinarily be invoked by persons who wanted a privilege or immunity for themselves rather than to withdraw it from others, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism.[224]

Nevertheless, the Oregon Court has referred to Article I, § 20 as the "antithesis" of the Equal Protection Clause.[225] The court explained that while the Equal Protection Clause "forbids the curtailing of rights belonging to a particular group or individual, [the Privileges or Immunities Clause] prevents the enlargement of rights" for a select few.[226]

In *Olsen v. State*,[227] the Oregon Court rejected the analytical framework of federal equal protection review for claims brought under Article I, § 20 of the Oregon Constitution.[228] As indicated, under federal equal protection review, strict scrutiny is applied where fundamental interests are at stake or a suspect class is involved.[229] Instead of adopting a single standard of review, like the Indiana Court,[230] Oregon fundamentally altered the federal analytical framework. It rejected the rule requiring strict scrutiny for fundamental rights, replacing it with a balancing test[231] and added an additional requirement with respect to suspect classes.[232]

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[223] Id.
[224] State v. Clark, 291 Or 231, 236, 630 P.2d 810 (Or. 1981), citing State v. Wright, 53 Or 344, 100 P 296 (1909) (reversing a conviction for unlicensed peddling because peddlers of other goods did not require licenses); City of Klamath Falls v. Winters, 289 Or 757, 765-767, 619 P2d 217 (1980) (collecting cases).
[225] *In re* Williams, 294 Or. 33, 41, 653 P.2d 970 (1982).
[226] Id.
[227] 276 Or. 9, 554 P.2d 139 (1976).
[228] Id. at 19.
[229] *See, e.g.,* San Antonio School District v. Rodriguez, 411 U.S. 1, *reh'g denied* 411 U.S. 959 (1973).
[230] Collins, 644 N.E.2d 72.
[231] Olsen, 276 Or at 19-20.

1. Fundamental Rights

The Oregon court had "no difficulty following that part of the analysis which asks whether the classification is made on the basis of a suspect class such as race or sex and, if so, holding that such a classification is subject to a strict scrutiny."[233] Instead it objected to that part of the rule that subjects fundamental interests to strict scrutiny.[234] *Olsen* found the federal "approach of categorizing an interest as a fundamental or nonfundamental interest and deciding this issue upon the basis of whether the interest is explicitly or implicitly guaranteed by the Constitution" to be an unhelpful method of analysis.[235] Instead, it set out a balancing test, by which the court weighs "the nature of the restraint or the denial against the apparent public justification."[236]

Olsen involved a constitutional challenge to Oregon's system of financing its public schools.[237] Under the Oregon system, education was largely funded by property tax; the amount of money available for education depended upon the value of the property in the individual school districts.[238] The plaintiffs arued that this resulted in unequal educational opportunities for the children of the state and as such violated both the Equal Protection Clause and Article I, § 20.[239]

The court noted that although it had "repeatedly and explicitly held or unequivocally inferred that the scope of the equal protection clause of the Oregon Constitution and the Fourteenth Amendment [was] the same," it was nevertheless not

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[232] State v. Clark, 291 Or 231 (requiring that the claimant prove that the affect class is a true class, not one created by the challenged law).
[233] Olsen, 276 Or at 19.
[234] Id.
[235] Id.
[236] Id. at 20, citing Robinson v. Cahill, 62 NJ 473, 492, 303 A2d 273 (1975).
[237] Id. at 11.
[238] Id.
[239] Id.

prevented from finding "that the equal protection clause of the Oregon Constitution [was] broader than that of the Federal Constitution."[240] In reaching that decision, the court examined *San Antonio School District v. Rodriguez*,[241] the leading Supreme Court decision on school financing.[242] In *Rodriguez*, the Court held that the Texas public school financing scheme, also based on property taxes, did not violate the Equal Protection Clause of the Fourteenth Amendment because it did not involve a suspect class or fundamental rights and was rationally related to the legitimate state objective of granting local control to the schools.[243]

In *Rodriguez*, the Court followed standard equal protection analysis.[244] First, it determined whether the classification was made either on the basis of a "suspect" class or whether it impinged upon a "fundamental interest."[245] If either were found, the legislation would be subject to "strict scrutiny," and the state would have a heavy burden to justify the legislation.[246] If neither was found, the legislation would survive the challenge if it rationally related to "some legitimate, articulated state purpose."[247] The defendant state of Texas had virtually conceded that its "system of financing education could not" withstand strict scrutiny.[248] The issue before the Court was whether the Texas system involved a suspect class or a fundamental interest.[249]

The Court rejected the plaintiffs' contention that the Texas scheme involved a suspect class, finding that there was "none of the traditional indicia of suspectness: the

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[240] Id. at 15-16.
[241] Rodriguez, 411 U.S. 1, *reh'g denied* 411 U.S. 959 (1973).
[242] Olsen, 276 Or at 16-17.
[243] Rodriguez, 411 U.S. at 24-35.
[244] Olsen, 276 Or at 17.
[245] Rodriguez, 411 U.S. at 17.
[246] Id.
[247] Id.
[248] Id. at 16 (footnote omitted).

class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[250] It also rejected the claim that the plaintiffs' fundamental rights were violated because there is no explicit or implied right to education guaranteed by the Constitution.[251]

In view of the fact that the Oregon Constitution guarantees a uniform education,[252] the *Olsen* plaintiffs would have appeared to have a stronger case before the Oregon Supreme Court under Article I, § 20. However, *Olsen* found the federal method of defining fundamental interests as those that are "explicitly or implicitly guaranteed by the Constitution . . . not a helpful method of analysis."[253] The court noted that in state constitutions like Oregon's " many laws which are usually considered legislation are inserted in the Constitution."[254] As an example, the court cited Article I, § 39, of the Oregon Constitution, which provides that it is a guaranteed constitutional right to sell and serve intoxicating liquor by the glass.[255] "According to the analysis of *Rodriguez*, this would make that right a 'fundamental interest.'"[256] Not wanting to require strict scrutiny for every mundane right guaranteed in the Oregon Constitution, the court embraced a two-part balancing test.[257] First, the court weighs "the nature of the restraint or the denial against the apparent public justification."[258] Then, if it appears the classification is

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[249] Id.
[250] Id. at 28.
[251] Id. at 35.
[252] Or Art § 3. Article VIII of the Oregon Constitution is devoted entirely to the state's public school system.
[253] Olsen, 276 Or at 19, citing Robinson v. Cahill, 62 NJ 473, 303 A2d 273 (1975).
[254] Olsen, 276 Or at 19.
[255] Id.
[256] Id. at 19-20, citing Rodriguez, 411 U.S. 1.
[257] Olsen, 276 Or at 20.
[258] Id., citing Robinson v. Cahill, 62 NJ at 492.

arbitrary, the State is required "to demonstrate the existence of a sufficient public need for the restraint or the denial."[259]

However, in reaching its decision, the Oregon Court looked to two provisions of the Oregon Constitution which provide evidence of Oregon's long term commitment to local control of schools,[260] all the while disregarding the whole of Article VIII, which relates to the establishment of public education. Neither of the provisions cited by the court in support of local rule pertains specifically to the funding of public schools. Nevertheless, the court cited them as evidence that the "tradition of local government providing services paid for by local taxes" is "constitutionally accentuated" and "continues to be a basic accepted principle of Oregon government."[261] By contrast, Article VIII, § 3 of the Oregon Constitution, which provides "for the establishment of a uniform, and general system of Common schools," played no part in the court's analysis under the Privileges or Immunities Clause.[262]

Oregon's rejection of the federal rule requiring strict scrutiny of classifications that threaten fundamental rights is troubling. Under the guise of expanding rights protected under Article I, § 20's Privileges or Immunities Clause,[263] the Oregon Court nonetheless tailored its analysis to conform to the outcome of the Supreme Court's decision in *Rodriguez*. The Oregon Court's reliance on the holding of *Rodriguez*, while rejecting its method of analysis is misplaced. In *Rodriguez*, noting that in previous

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[259] Id.
[260] Id. at 25, citing Or CONST. Art XI, § 2, and Article VI, § 10, both of which provide that the voters of the cities and counties may enact their own charters which shall govern on matters of city or county concern.
[261] Id.
[262] The Court regarded Or CONST. art. VIII § 8 as a separate challenge to the constitutionality of the state's system of public education. Id. at 26-27.

decisions the Court had rejected a constitutional claim to the assurance of adequate housing[264] or welfare benefits,[265] while upholding the right to travel,[266] the Court concluded that:

> the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[267]

In *Rodriguez*, the Supreme Court felt compelled, out of federalist concerns, to limit its exercise of federal equal protection to those rights that are fundamental.[268] In *Rodriguez*, the Supreme Court deferred to the Texas legislature on the matter of school financing because state laws are presumed valid under equal protection review unless they involve a fundamental right or a suspect class.[269] Finding that it involved neither, the Court upheld the Texas system because it was rationally related to a legitimate state objective.[270]

No such deference was required by the Oregon Court; on the contrary it was being asked to provide a check against the abuse of power by Oregon legislature.[271] The reasoning of *Olsen*, displays the court's fundamental confusion.

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[263] Id. at 16 (the fact that previous decisions had equated the scope of the Oregon provision with the Equal Protection Clause "does not mean that we cannot decide that the equal protection clause of the Oregon Constitution is broader than that of the Federal Constitution").
[264] Lindsey v. Normet, 405 U.S. 56, 74 (1972).
[265] Goldberg v. Kelly, 397 U.S. 254, 264 (1970).
[266] United States v. Guest, 383 U. S. 745, 757 (1966).
[267] Rodriguez, 411 U.S. at 33.
[268] Rodriguez, 411 U.S. at 44 ("Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.").
[269] Rodriguez, 411 U.S. at 40.
[270] Id.
[271] *See* Olsen, 276 Or at 15-6 (acknowledging that state constitutional provisions may provide greater protection than their federal counterparts).

Olsen rejected the federal rule of identifying fundamental interests with those recognized by the constitution because it found that the state and federal constitutions were not comparable.[272] It arrived at this conclusion because the Oregon Constitution included certain trivial rights, such as the right to sell alcoholic beverages by the glass.[273]

Although few would disagree that the right to sell alcohol by the glass is a minor right, this fact should not have been grounds for rejecting the federal method of subjecting constitutionally protected rights to strict scrutiny. First, even under strict scrutiny, a law will be upheld if there is a compelling governmental interest.[274] If, for example, there were compelling health reasons barring certain institutions from serving by the glass, such a law would likely survive strict scrutiny. Second, and more importantly, the *Olsen* decision is wrong because it cavalierly disposes of strict scrutiny for all constitutionally recognized rights without regard to their importance. Reduced vigilance is inconsistent with the state court's role as defender of the state constitution and contrary to Olsen's asserted intention of expanding rights protected under Article I, § 20.[275]

For these reasons, the balancing test, as articulated in *Olsen*, should be rejected. Indeed, while not explicitly rejecting the *Olsen* test, the Oregon Court has not applied it to an Article I, § 20 challenge in recent years.[276]

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[272] Id. at 19.
[273] Id., citing Or CONST. art. I § 39.
[274] *See, e.g.*, Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U. S. 37, 45 (1983) (providing that, under strict scrutiny, a restriction on speech is constitutional only if it is narrowly tailored to serve a compelling governmental interest).
[275] Olsen, 276 Or at 19.

2. Suspect Class

Although it retained the federal equal protection analytical framework as it applies to suspect classes,[277] the Oregon Court refined the federal method of analysis for application to Oregon's Article I, § 20.[278] In *State v. Clark*,[279] the Oregon Court held that Article I, § 20 applies only to classifications that "exist as categories or as classes with distinguishing characteristics before and apart from" the challenged law or policy.[280] Examples of protected classes are gender, ethnic background, legitimacy, past or present residency, and military service.[281] By contrast classes that are created by the challenged law are not protected by Article I, § 20.[282]

In *Clark*, the defendant challenged a criminal statute that gave the prosecutor discretion to charge a person with a felony either by grand jury indictment or by a district attorney's information.[283] If charged by an information, Article I, § 5 of the Oregon Constitution granted each defendant the right to a preliminary hearing to determine probable cause,[284] whereas no such right existed for defendants indicted by a grand jury.[285] The defendant challenged the law as a violation of both the Fourteenth Amendment and Article I, § 20 of the Oregon Constitution.[286]

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[276] Jungen v. State, 94 Or.App. 101, 104, 764 P.2d 938 (1988), citing Schuman, *supra* note 138 at 221, 228 n.43.
[277] Olsen, 276 Or at 19.
[278] State v. Clark, 291 Or. 231, 240-43, 630 P.2d 810 (1981).
[279] Clark, 291 Or. 231.
[280] Id. at 243.
[281] Id. at 240.
[282] Id. at 243.
[283] Id. at 233.
[284] Id. at 233-34, citing Article I, § 5 (amended).
[285] Id. at 234.
[286] Id. at 235

The defendant relied on *Hawkins v. Superior Court*,[287] in which the California Court held that indicted defendants must be afforded preliminary hearings equally with defendants charged by an information in order to meet the equality guarantee of California's constitution.[288] *Clark* declined to follow *Hawkins*, explaining that both criminal procedures were authorized by the Oregon Constitution and—if properly administered—each satisfied the Fourteenth Amendment.[289] The court rejected the reasoning of *Hawkins* as circular because the affected classes were first created by the challenged law.[290] *Clark* denied the defendant's constitutional challenge, holding that "the mere coexistence of the two procedures so as to limit preliminary hearings to one of them does not constitute forbidden class legislation."[291]

In reaching its decision *Clark* relied on earlier decisions by the Oregon Court, which rejected Article I, § 20 challenges "whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms."[292] As an example, Clark cites Oregon's Rule of Appellate Procedure 10.05 , which requires that petitions for review be filed within 30 days.[293] The rule "'classifies' persons by offering the 'privilege' of review to those who file within 30 days and denying it to those who file later."[294] Because a party need only comply with the criteria of the rule, to bring himself or herself within the favored class, a challenge of such a classification would be improper.

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[287] 22 Cal3d 584, 586 P2d 916 (1978).
[288] Id. at 593.
[289] Clark, 291 Or at 243, citing Hurtado v. California, 110 U.S. 516 (1884); Beck v. Washington, 369 U.S. 541, 82 S Ct 955 (1962); Cassell v. Texas, 339 U.S. 282, 70 S Ct 629 (1950).
[290] Clark, 291 Or at 240-41.
[291] Id. at 243.
[292] Id. at 240-41, citing Jarvill v. City of Eugene, 289 Or 157, 184-185, 613 P2d 1 (1980) (sustaining limitations on privilege to use public parking facilities).
[293] Id. at 240.

The rule on which *Clark* relied is useful. Where a law provides criteria by which a party may attain the proffered benefit and fails to comply with the criteria set by law, he or she should not be allowed to challenge the resulting classification. But, unlike the cases on which *Clark* relied, there was nothing the *Clark* defendant could have done to bring himself "within the favored class on equal terms."[295] Thus the holding of *Clark*, that no law may be challenged on the basis of the classifications that it creates, represents an unwarranted expansion of previous decisions. Hence, it should be rejected, even as the rule on which it relies should be embraced.

The *Clark* decision is notable for one other reason. It found that while "the original concern of Article I, section 20, with special privileges or 'monopolies' was the basis of early decisions," it was soon held to protect "rights against adverse discrimination as well as against favoritism."[296]

Equal protection guarantees that disfavored groups will not be unjustly targeted by the government; hence it has developed the doctrine of suspect classes. By contrast, claims of unfair favoritism aim at evening out the playing field. In spite of the oft repeated phrase that Oregon's Privileges or Immunities Clause is the antithesis of federal equal protection,[297] the Oregon Court has yet to articulate a corresponding rule for evaluating claims that a given law results in undue favoritism. Unless state courts intend to point fingers at the traditionally privileged, the suspect category has no place in reviewing such claims.

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[294] Id. at 240.
[295] Id. at 240-41.
[296] Id. at 236-37, citing White v. Holman, 44 Or 180, 74 P 933 (1904) (licensing of sailors' boarding houses); Monroe v. Withycombe, 84 Or 328, 165 P 227 (1917) (fishing rights); and State v. Wright, 53 Or 344, 100 P 296 (1909) (reversing a conviction for unlicensed peddling because peddlers of other goods did not require licenses).

The failure by the Oregon Court to address this disparity has resulted in confusion by the lower courts. For example, in *Gunn v. Lane County*,[298] the plaintiff argued that a statute providing immunity to public employees from claims that are covered by the workers' compensation statutes violates Article I, § 20, because it provides immunity to a favored class—government employees—that is not available to other citizens.[299] First, the court rejected the plaintiff's claim on the grounds that the case did not involve a "true class" because the class did not exist separate from the law that affects it.[300] As indicated, Oregon's true class distinction is misguided. This case provides another illustration of how misguided it is. Under this principle, any law that creates a favored class would be exempt from scrutiny because the class did not exist prior to the enactment of the law. Under *Clark*, this is the case even if entry into the favored class was not open to all, e.g. a law favoring persons with a minimum annual income, simply because the favored class would not have been identified prior to the enactment of the law.

Second, *Gunn* held that even if government employees were a true class, they do not form not a suspect class and therefore the challenged law was not subject to strict scrutiny.[301]

> A statute that distinguishes on the basis of government employment is not suspect. It does not define an immutable or "distinct, socially recognized group of citizens," nor have people, to any significant extent, been "the subject of adverse social and political stereotyping" on the basis of whether they are or are not employed by the government.[302]

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[297] *See, e.g.* State ex rel Reed v. Schwab, 287 Or 411, 417, 600 P2d 387 (1979), *cert. denied* 444 U.S. 1088, *rev' denied* 445 U.S. 955 (1980).
[298] 173 Or.App. 97, 20 P.3d 247 (2001).
[299] Id. at 250.
[300] Id. at 250-51.
[301] Id. at 251.
[302] Id., citing Tanner v. OHSU, 157 Or.App. 502, 524, 971 P.2d 435 (1998).

The problem with the application of the suspect class rule to a favoritism claim is that it is completely irrelevant. There is no reason to presume that members of the favored class "have been the subject of adverse social and political stereotyping,"[303] nor is it reasonable to presume that people who fall outside the favored class must be members of a socially distinct and traditionally disfavored group. That *Gunn* could so glibly require the plaintiff to provide evidence to that effect proves how incoherent the current state of the law on Oregon's Privileges or Immunities Clause is.

D. Recommendations for an Independent Analysis under Washington's Article I § 12

Washington's Article I § 12's Privileges or Immunities Clause 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.

The language of the Clause is nearly identical[304] to the Privileges or Immunities Clause of the Indiana and Oregon Constitutions from which it derives.[305] As indicated, both Indiana and Oregon have adopted an independent state constitutional analysis for claims brought under their respective Privileges or Immunities Clause.

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[303] Tanner, 157 Or.App at 524.

[304] Washington adds the municipal corporation exception, not found in either the Indiana or Oregon provisions. Compare Wa CONST. art I § 12; Ind CONST. art I § 23; and Or CONST. art I § 20. Additionally, both Washington and Oregon adopt the passive voice, "No law shall be passed" as opposed to Indiana's active voice, "The general assembly shall not pass." Id.

[305] State v. Earls, 116 Wn.2d 364, 391-92, 805 P.2d 211 (1991) (Utter, J., dissenting); David Schuman, *Emerging Issues in State Constitutional Law: The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 (1992) (hereinafter "*Emerging Issues*") (Washington and Oregon adopted the Indiana Bill of Rights without any significant discussion or debate); Thompson, *supra* note 15 at 1253, citing W. Lair Hill, *Washington: A Constitution Adapted to the Coming State*, MORNING OREGONIAN (Portland), July 4, 1889, at 9 ("A draft constitution based on the Oregon constitution was placed on each delegate's desk at the commencement of the Washington constitutional convention.").

In his concurring opinion in *State v. Smith*,[306] Justice Utter urged the Washington Court to overrule its previous decisions that substantially equated the protections guaranteed under Article I, § 12 with rights granted under the federal Equal Protection Clause of the Fourteenth Amendment.[307] Justice Utter argued that the majority had failed to "address the possibility that the difference in language might require a different interpretation."[308] Furthermore, he argued that differences in the history of the two provisions should give rise to differences in interpretation:

> The Fourteenth Amendment was enacted after the Civil War and its purpose was to eliminate the effects of slavery. It was intended to guarantee that certain classes of people (blacks) were not denied the benefits bestowed on other classes (whites), thereby granting equal treatment to all persons. Enacted after the Fourteenth Amendment, state Privileges and Immunities Clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.[309]

Additionally, Utter noted that because the Washington constitutional provision was modeled after provisions in the pre-Civil War constitutions of Oregon and Indiana, and not the Fourteenth Amendment, it should be interpreted independently.[310]

Washington has yet to adopt an independent standard of review,[311] but it has repeatedly declared itself willing to provide an independent analysis under the right set of facts.[312]

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[306] State v. Smith, 117 Wn.2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring).
[307] Id. at 282.
[308] Id.
[309] Id. at 283.
[310] *See* State v. Earls, 116 Wn.2d 364, 391-92, 805 P.2d 211 (1991) (Utter, J., dissenting).
[311] *See* Thompson, *supra* note 15 at 1248 n.7 (collecting cases).
[312] Lakeview Boulevard Condominium Association v. Apartment Sales Corp., 144 Wn.2d 570, 577, 29 P.3d 1249 (2001) ("Since the Association has not asserted that the court should conduct an independent state constitutional analysis, we will scrutinize the statute in accordance with the rules for equal protection analysis."); Ford Motor Co. v. Barrett, 115 Wn.2d 556, 569, 800 P.2d 367 (1990) ("Under the facts of this

1. Gunwall

In *State v. Gunwall*,[313] the Washington Court provided a general interpretive framework for evaluating claims on an independent state constitutional basis.[314] The issue before the court was whether the "police can, without legal process, obtain the records of a telephone subscriber's long distance telephone calls (toll records) and by the use of a pen register also obtain the local telephone numbers the subscriber dials."[315] In view of the fact that the Supreme Court had found no Fourth Amendment violation under similar facts,[316] the defendant urged the court to conduct an independent state constitutional analysis under Article I, § 7, Washington's constitutional right to privacy. The court granted the defendant's request, holding that Article I, § 7 protects against "the defendant's long distance home telephone records . . . being obtained from the phone company, or a pen register . . . being installed on her telephone connections, without a search warrant or other appropriate legal process first being obtained."[317]

In order to provide a framework for asserting state constitutional claims, *Gunwall* set forth a list of six nonexclusive criteria for determining when the Washington Constitution extends broader rights to citizens than the U.S. Constitution:

> 1. The textual language of the state constitution. The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may have no precise federal counterpart at all.
> 2. Significant differences in the texts of parallel provisions of the federal and state constitutions. Such differences may also warrant reliance on the

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case, there is insufficient basis for concluding that greater protection is afforded under our state constitution than under the federal constitution."); and Sofie v. Fibreboard Corp., 112 Wn.2d 636, 640, 771 P.2d 711, 714 (1989) ("We have followed [the federal] approach because a separate analysis focusing on the language and history of our state constitution has not been urged.").

[313] 106 Wn.2d 54, 720 P.2d 808 (1986).

[314] Id. at 58.

[315] Id. at 55.

[316] Smith v. Maryland, 442 U.S. 735 (1979).

[317] Gunwall, 106 Wn.2d at 63.

> state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.
> 3. State constitutional and common law history. This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.
> 4. Preexisting state law. Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.
> 5. Differences in structure between the federal and state constitutions. The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.
> 6. Matters of particular state interest or local concern. Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.[318]

While Factor (6) concerns subject matter and cannot be discussed independently of the specific matter before the court, factors (1)-(5) provide general support for the development of an independent analytical framework.[319]

With respect to these factors, the structure of the two clauses is similar, as both pertain to a bill of rights,[320] but while the federal courts are required to presume the

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[318] Id. at 61-62 (footnote omitted).

[319] In addition, factors (3) and (4) help to determine the type of framework Washington. *See infra* Section III D. b. (reviewing case law supporting the adoption a reasonableness standard) and c. (devising a category analogous to the suspect class category for claims asserting favoritism).

[320] The Supreme Court has held that the following rights apply to the states through the Fourteenth Amendment: Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment); Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897) (Fifth Amendment); *accord* Malloy v. Hogan, 378 U.S. 1 (1964); and Benton v. Maryland, 395 U.S. 784 (1969); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment); *accord* Pointer v. Texas, 380 U.S. 400

validity of state legislation under the principles of federalism, no such restriction applies to state courts.[321] Also both Washington's Article I, § 12 and the Fourteenth Amendment's Equal Protection Clause prohibit unequal treatment under the law and both provide a remedy for those who have received "lesser treatment at the hands of the government than others similarly situated."[322] However, only Article I, § 12 provides a remedy where the state or local government has selectively granted privileges or immunities, not available to all. As to the history of the provision, at the 1889 constitutional convention,[323] Washington adopted Article I, § 12 from the Oregon and Indiana constitutions with little discussion,[324] but it is clear that Indiana adopted the provision with the express purpose of eliminating the power to grant monopolies.[325] With respect to preexisting state law, while the original concern of Article I, § 20, was with special privileges, its protective effect was soon held to extend to rights against adverse discrimination as well as against favoritism.[326]

Thus, as Justice Utter stated: "We cannot[no longer afford to] ignore the plain difference in the language and history that exists between the federal equal protection clause and the privileges and immunities language of our own constitution."[327]

(1965); Klopfer v. North Carolina, 386 U.S. 213 (1967); and Duncan v. Louisiana, 391 U.S. 145 (1968); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment).

[321] *See supra* Section III. C. a. (comparing State v. Olsen, 276 Or. 9, 554 P.2d 139 (1976) with San Antonio School District v. Rodriguez, 411 U.S. 1, *reh'g denied* 411 U.S. 959 (1973)).

[322] Thompson, *supra* note 15 at 1251.

[323] Gerberding v. Munro, 134 Wn.2d 188, 202, 949 P.2d 1366 (1998).

[324] *Emerging Issues*, *supra* note 305 at 1201; Thompson, *supra* note 15 at 1253.

[325] *See supra* Section III. B. (describing the political and economic circumstances surrounding the adoption of Ind. CONST. art. I § 23.)

[326] *See, e.g.*, State v. Hart, 125 Wash. 520, 217 P. 45 (1923) (treating the plaintiff's equal protection claim and Article I § 12 claim as substantially identical).

2. Reviving the Reasonableness Standard

As indicated, Indiana has adopted a reasonableness standard for evaluating claims under its Privileges or Immunities Clause.[328] The Indiana Court requires a two-step analysis: first, it must determine whether the classification reasonably related to its subject matter, and if so, whether the privilege or immunity is equally available to all similarly situated persons.[329] Facially, this is a useful standard because it avoids the problem of classifying interests according to their relative importance, but the Indiana Court has coupled its reasonableness standard with a presumption of reasonableness.[330] Indiana currently allows challenges only where the classification is arbitrary or manifestly unreasonable.[331] As a result the distinction between the rational basis standard and the reasonableness standard collapses.[332]

In *State ex rel. Bacich v. Huse*,[333] Washington also applied a two-step reasonableness standard,[334] and it granted the legislature "a wide measure of discretion," such that legislation could not "be successfully attacked unless it [was] manifestly arbitrary, unreasonable, inequitable, and unjust."[335] This standard provides less

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[327] State v. Smith, 117 Wn.2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring).
[328] *See supra* Section III. B. (Indiana's adoption of a single standard of review).
[329] Collins, 644 N.E.2d at 78.
[330] Id.
[331] Id. at 80.
[332] *See* Levinson, *supra* note 219 at 558-59 (citing the court's extreme deference as an obstacle to claims under Ind. CONST. art. I § 23).
[333] 187 Wash. 75, 59 P.2d 1101 (1936), *overruled on other grounds by* Puget Sound Gillnetters Ass'n v. Moos, 92 Wn.2d 939, 949, 603 P.2d 819 (1979).
[334] "To comply with these constitutional provisions, legislation involving classifications must meet and satisfy two requirements: (1) The legislation must apply alike to all persons within the designated class; and (2) reasonable ground must exist for making a distinction between those who fall within the class and those who do not." Id. at 80.
[335] Id.

protection than what is currently available under the federal Equal Protection Clause because it eliminates strict scrutiny and intermediate review.[336]

If Washington were to return to its reasonableness standard, at a minimum it must abolish the presumption of reasonableness. Better still, it should retain strict scrutiny for fundamental rights, i.e. rights recognized by the state constitution,[337] and adopt a reasonableness standard for all others.

Oregon has officially abandoned the three-tiered scheme of federal equal protection review and replaced it with a balancing test.[338] Because it, too, applies a deferential standard, the balancing test provides a narrower scope of protection than that found under the federal Equal Protection Clause.[339] Although the balancing test is inadequate in itself, it would be beneficial as a third step in the reasonable basis test. If a claimant met his or her burden with respect to the first steps of the reasonable basis test,[340] the burden could then shift to the state to prove that the nature of the restraint or the denial is outweighed by the apparent public justification.[341] The result would be similar to intermediate scrutiny under federal equal protection review.[342]

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[336] A statute that classifies by race, alienage, or national origin is subjected to strict scrutiny. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440 (1985). Legislative classifications based on gender or legitimacy call for an intermediate standard of review. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (gender); Mathews v. Lucas, 427 U.S. 495, 505 (1976) (legitimacy).

[337] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[338] State v. Olsen, 276 Or. 9, 19, 554 P.2d 139 (1976).

[339] See *supra* Section III. C. a. (analyzing Olsen, 276 Or 9).

[340] Under Huse, (1) the legislation must apply equally to all persons within the designated class; and (2) there must be reasonable ground for making a distinction between those who fall within the class and those who do not. Huse, 187 Wash. at 80.

[341] Id.

3. Eliminating Purely Circular Claims

Oregon has adopted an additional procedural hurdle not found in federal equal protection review in order to eliminate claims based on purely circular arguments.[343] To bring a claim under Oregon's Privileges or Immunities Clause, a claimant must first prove that the classification is not a creation of the challenged legislation.[344]

Early decisions show that Washington had a similar requirement.[345] The problem with this requirement is that it is too restrictive.[346] The better rule is the one the Oregon Court previously followed, whereby it rejected Article I, § 20 challenges only when "the [challenged] law leaves it open to anyone to bring himself or herself within the favored class on equal terms."[347] This is another way of ensuring that the privileges or immunities are available equally to all.

4. Finding a Complement to the Suspect Class Category for Claims Asserting Undue Favoritism

The balancing test has rarely been applied in Oregon.[348] Instead, the focus of recent decisions on Oregon's Article I, § 20 has been on the suspect class.[349] Both Washington and Oregon have expanded the scope of classes subject to strict scrutiny.[350]

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[342] Where an intermediate standard applies, the legislation will be upheld if the classification is substantially related to an important government objective. Cleburne, 473 U.S. at 440.
[343] State v. Clark, 291 Or. 231, 243, 630 P.2d 810 (1981).
[344] Id.
[345] State v. Carey, 4 Wash. 424, 30 P. 729 (1892) ("From the very necessities of the case, the test of the qualifications of the examining board in the first instance must arbitrarily rest somewhere. . . and to deny the right of the legally appointed tribunal to thus arbitrarily exercise this discretion, is practically to deny the right of the state to enact and enforce the law.").
[346] *See supra* III. C. b. (criticizing Oregon's additional requirement as too deferential).
[347] Jarvill v. City of Eugene, 289 Or 157, 184-185, 613 P2d 1 (1980) (sustaining limitations on privilege to use public parking facilities).
[348] Jungen v. State, 94 Or.App. 101, 104, 764 P.2d 938 (1988), citing Schuman, *supra* note 138 at 221, 228 n.43.
[349] *See supra* Section III. C. (describing Oregon's departure from federal equal protection review).
[350] *See, e.g.*, Griffin v. Eller, 130 Wn.2d 58, 64- 65, 922 P.2d 788 (1996) (gender); Tanner v. OHSU, 157 Or.App. 502, 971 P.2d 435 (1998) (sexual orientation).

Oregon cases define suspect classes by common, class-defining characteristics, that are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.[351] "If a law or government action fails to offer privileges and immunities to members of such a class on equal terms, the law or action is inherently suspect and, . . . may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted."[352]

This state law practice of expanding the classes the state recognizes as suspect is effective in the context of unlawful discrimination claims and should be continued.[353] However, it is wholely out of place in the context of unlawful favoritism claims.[354] Federal equal protection was created to prevent the encroachment of the rights of a beleaguered class, i.e. African Americans.[355] The courts have gradually expanded the scope of the Equal Protection Clause to include other classes that traditionally have been the focus of unjust laws.[356] By contrast, Washington's Privileges or Immunities Clause was adopted to prevent the legislature from confering monopolies that were contrary to the public interest.[357] The proper focus of undue favoritism claims should, therefore, be

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[351] Tanner, 157 Or.App. at 523.
[352] Id.
[353] For example, Washington recognizes gender as a suspect class; Griffin, 130 Wn.2d at 64- 65; and an Oregon appellate court has recognized sexual orientation as a suspect class, Tanner, 157 Or.App. 502.
[354] *See supra* Section III. C. b. (criticizing Oregon's use of the suspect class in the context of undue favoritism claims).
[355] Afroyim v. Rusk, 387 U.S. 253 (1967) ("This undeniable purpose of the Fourteenth Amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the Government can rob a citizen of his citizenship without his consent by simply proceeding to act under an implied general power to regulate foreign affairs or some other power generally granted).
[356] Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Oyama v. California, 332 U.S. 633 (1948) (national origin).
[357] *See supra* III. B. and D. (describing the origin of the Indiana provision that was adopted by Washington).

the public interest. The validity of a law that provides benefits to one class not equally available to others can best be measured by a balancing test to determine whether the harm that is occasioned by a showing of partiality is outweighed by the public good that is attained.

IV. CONCLUSION

From the foregoing, it is clear that Washington's Privileges or Immunities Clause provides broader protections than the federal Equal Protection Clause. Washington has already demonstrated its willingness to expand the range of suspect classes under Article I, §12.[358] To ensure that a broad scope of rights will be protected under this Clause, it is critical that Washington adopt an independent standard of review. For the reasons discussed above, Washington should adopt the following analytical framework for review of claims under Article I, § 12:

As a preliminary matter, the court should determine whether the claimant challenges a valid classification. A classification will not be valid, if the challenged law leaves it open to the claimant to bring himself or herself within the favored class on equal terms.

Second, the court should determine what the challenge consists of, i.e whether it involves (1) a claim that the class, to which the claimant belongs, has been unfairly denied benefits available to others similiarly situated, or (2) a claim that a class, to which the claimant does not belong, has been unfairly singled out for benefits not equally available to others.

[358] Griffin v. Eller, 130 Wn.2d 58, 64- 65, 922 P.2d 788 (1996) (holding that gender is subject to strict scrutiny rather than the intermediate standard adopted by the federal courts under the Equal Protection Clause).

If the former, the court should determine whether the claim involves a fundamental right or a suspect class. Fundamental rights are those recognized by the state constitution.[359] Suspect classes are defined by common, class-defining characteristics, that have been historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.[360] If either are involved, the court should apply strict scrutiny.

For all other cases, whether the claimant claims that he or she has been unfairly discriminated against or that the state has provided another class with a benefit not available to others, the court should apply a three part reasonableness test to test the validity of the challenged law.

First, the law must ensure that the benefits are equally available to all within the designated class.[361] Second, there must be reasonable ground for making a distinction between those who fall within the class and those who do not.[362] If a law fails to meet either criteria, the law will be upheld only if the public interest in upholding it outweighs the harm to the affected classes.

The approach outlined in this paper has the advantage of clarity and consistency. It is consistent with the natural rights philosophy underlying state and federal constitutions, while mindful of the distinction between federal and state rights. Further, it avoids the deferential standard adopted by the Indiana and Oregon Courts that has jeopardized the scope of protection afforded by their respective Privileges or Immunities

[359] San Antonio School District v. Rodriguez, 411 U.S. at 35.
[360] Tanner, 157 Or.App. at 523.
[361] Huse, 187 Wash. at 80.
[362] Id.

Clauses. Finally, it helps to bring order to an emerging area of law. Indeed, "[w]hen the right point of view is discovered, the problem is more than half solved."[363]

[363] Ellison v. Georgia Railroad Company, 87 Ga. 691, 706-707, 13 S.E. 809 (1891) (Bleckley, C.J.).