THE RIGHT TO "EQUAL PRIVILEGES AND IMMUNITIES": A STATE'S VERSION OF "EQUAL PROTECTION"

David Schuman*

INTRODUCTION

State supreme courts have recently interpreted states' constitutions to confer more rights than their federal counterpart in well over 400 cases.[1] As the "New Federalism"[2] loses its novelty and moves into the mainstream of American jurisprudence,[3] some of its subtle benefits may begin to emerge. States' charters, which already provide courts with the basis to grant more or different rights, may begin to provide the opportunity to explore different theories of judicial review and different methods of constitutional adjudication.[4] Surely the several states can find different animals to set beside the various Two-Tiered Scrutinies, Three-Pronged Tests, Four-Factored Analyses, Sensitive Balances and sundry exotica currently occupying the United States Supreme Court's menagerie. As the states' independent constitutional decisions proliferate, they will demonstrate some theories and methods that deserve to be adopted elsewhere, and others that do not; such is the Darwinian dynamic of cross-fertilization and experimentation known as "horizontal federalism," or the tendency of one state to look to the decisions of sister states instead of to Washington, D.C.

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* B.A., 1966, Stanford University; Ph.D., 1974, University of Chicago; J.D., 1984, University of Oregon; Visiting Assistant Professor, University of Oregon Law School, 1987-88.

1. Collins and Galie reported over 300 cases in 1986. Collins & Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 317 (1986). Professor Collins reports in conversation that the total has now passed 400.

2. This term refers to state supreme courts' practice of developing interpretations of their own states' constitutions independent of United States Supreme Court interpretations of the federal Constitution. As this symposium issue indicates, the movement has progressed beyond the stage where each new contribution to the scholarship must justify itself with a footnote to the standard works in the field. An exhaustive list of cases and commentary as of 1986 appears in Collins & Galie, *The Methodology (State Constitutional Law)*, 9 NAT'L L.J., Sept. 29, 1986, at S-8, col. 2.

3. *Compare* State v. Owens, 302 Or. 196, 208, 729 P.2d 524, 531 (1986) (Gillette, J., concurring: "I should like to think that the Oregon Constitutional Revolution has been accomplished. The primacy of our state's constitution, so long neglected, is now accepted by all.") *with* State v. Kennedy, 295 Or. 260, 262-66, 666 P.2d 1316, 1318-19 (1983) (explaining and justifying independent state analysis).

4. Linde, *E Pluribus: Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

In this article, I will describe one court's attempt to formulate a novel and perhaps better analysis of problems in the law of anti-discrimination, particularly as they arise under states' guarantees of "equal privileges and immunities"[5] as opposed to the more common "equal protection" clauses. This description serves two purposes. First, it provides a specific model, to be adopted or adapted by those states with similar provisions. Second, it provides a generic example of how a court examines the text and history of its own constitution to derive a principled interpretation of it that does not march lock-step with whatever happens to be the latest formulation from the United States Supreme Court.

I. "PRIVILEGES AND IMMUNITIES": HISTORY AND SOURCES

The present-day guarantees of "equal privileges and immunities" articulate an urge as old as Cain and Abel: the desire to eliminate the injustice of unmerited favoritism and special treatment.[6] This urge found particularly fertile soil in the United States. Alexis de Tocqueville, observing the young democracy in 1831, noted that anti-aristocratic sentiment was the nation's "ruling passion," running even deeper and stronger than our love of freedom.[7] America's legalistic desire for equality was evident as early as 1641, when a colonial Massachusetts statute called the Body of Liberties provided: "Every person within this Jurisdiction, whether Inhabitant or Forreiner shall enjoy the same justice and law, that is general for the plantation, which we constitute and execute one towards another without partialitie or delay."[8] At approximately the same time, English reformation and anti-royalist sentiment inspired the radical sect known as the Levellers to demand in language foreshadowing "equal privileges and immunities" clauses "that all privileges and protections above the law, whereby some persons are exempted from the force and power thereof, to the insufferable vexation and ruine of miltitudes of distressed people, may be forthwith abrogated."[9]

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5. *See infra* notes 6-27 and accompanying text.

6. The word "privilege" itself stems from the Latin for "private law" (*priv-us legem*). OXFORD ENGLISH DICTIONARY 1391 (1978).

7. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 190 (R. Heffner ed. 1956).

8. B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 72 (1971) (quoting WHITMORE, THE COLONIAL LAWS OF MASSACHUSETTS, 1672 (1890)).

9. *The Case of the Army Truly Stated* (1647) in D. WOLFE, LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 216 (1944). The same document demanded "[t]hat all Monopolyes be forthwith removed, and no persons whatsoever may be permitted to restraine others from

Although egalitarianism germinated during the next century in the colonies, legal expressions of it did not. The first constitutional "equal privileges" guarantee appears in the Virginia Declaration of Rights of 1776, where it is included in section 4, written by George Mason: "That no man, or set of men, are entitled to exclusive or separate emoluments and privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of Magistrate, Legislator, or Judge be hereditary."[10] Several of the other original colonies' Bills of Rights incorporated identical or similar guarantees,[11] transplanting a generalized version of old-world anti-royalism and imbuing it with the force of natural law.[12] Today, as a result of state[13] constitutional conventions' practice of basing their own provisions on existing models,[14] an "equal privileges and immunities" clause appears in the constitutions of fifteen states.[15] Variations within

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free trade." *Id.* at 215. This document was circulated as a pamphlet, and served as a precursor to "An Agreement of the People" (1647), which contained the more muted demand "[t]hat in all Laws made, or to be made, every person may be bound alike, and that no Tenure, Estate, Charter, Degree, Birth, or place, do confer any exemption from the ordinary Courts of Legal proceedings, whereunto others are subjected." *Id.* at 227-28. *See generally* H. BRAILSFORD, THE LEVELLERS AND THE ENGLISH REVOLUTION 255-66 (1961).

10. B. SCHWARTZ, *supra* note 8, at 234. A. HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 77 (1964).

11. B. SCHWARTZ, *supra* note 8, at 231-382.

12. *See* Holden v. James, 11 Mass. 396, 405 (1814); Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1200-03 (1985).

13. The Articles of Confederation contained a declaration that "the free inhabitants of each of [the] states . . . shall be entitled to all privileges and immunities of free citizens in the several states . . . ." ARTICLES OF CONFEDERATION art. IV. A similar provision was included in the United States Constitution, article IV, section 2, clause 1, and has been interpreted to prohibit one state from granting preferential treatment to its own citizens in respect to fundamental rights, without adequate reason. United Bldg. & Constr. Trades v. Camden, 465 U.S. 208 (1984). Another "privileges and immunities" clause in the United States Constitution, amendment XIV, section 1, clause 2, prohibits a state from denying to its citizens those rights which are inherent in national citizenship. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

14. The Oregon Constitution's Bill of Rights, for example, was taken almost verbatim from Indiana's. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926); C. CAREY, THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (1926).

15. *See* ALA. CONST. art. I, § 22; ARIZ. CONST. art. II, § 13; ARK. CONST. art. II, § 18; CAL. CONST. art. I, § 7(b); CONN. CONST. art. I, § 1; IND. CONST. art. I, § 23; IOWA CONST. art. I, § 6; KY. CONST. BILL OF RIGHTS § 3; N.C. CONST. art. I, § 32; N.D. CONST. art. I, § 21; OR. CONST. art. I, § 20; S.D. CONST. art. VI, § 18; TEX. CONST. art. I, § 3; VA. CONST. art. I, § 4; WASH. CONST. art. I, § 12. Some states have functionally comparable provisions prohibiting "special laws," *e.g.*, ILL. CONST. art. IV, § 13; other states provide that "[a]ll laws of a general nature shall have uniform operation,"; UTAH CONST. art. I, § 24. *See also* WYO. CONST. art. I, § 34. Other states use the phrase "privileges and immunities" to prohibit only hereditary benefits,

the clauses themselves reveal their inspiration and heritage. Like the original Virginia version and the English precursors, they are frequently coupled with proscriptions against hereditary offices and privileges.[16] The clauses disclose anti-royalist or anti-aristocratic roots, and often contain an exception for privileges granted as payment for public service.[17] Other provisions, particularly those dating from the populist era, explicitly include "corporations" among the entities which may not receive special treatment, thus revealing a distrust of economic favoritism which is anti-aristocracy in its modern manifestation.[18]

In some states the "equal privileges and immunities" clause is the only equality guarantee.[19] In others it supplements "equal protection" clauses,[20] with both provisions sometimes appearing in the same section.[21] The two types of anti-discrimination guarantee have an obvious kinship. Both seek to prevent the state from distributing benefits and burdens unequally; prohibiting special benefits for some people is functionally equivalent to guaranteeing to others that they will not be burdened by being denied those benefits.[22] Yet there are significant differences. An "equal protection" guarantee typically emanates from the privileged as a self-limiting gesture of largess toward the burdened: "*we* hereby grant equal treatment to *you*." It is a *promise* to adhere to the equality princi-

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e.g., KAN. CONST. BILL OF RIGHTS, § 19; ME. CONST. art. I, § 23, or grants of *irrevocable* privileges and immunities, *e.g.*, HAW. CONST. art. I, § 21; NEB. CONST. art. I, § 16.

16. *E.g.*, VA. CONST. art. I, § 4.

17. *E.g.*, N.C. CONST. art. I, § 32; KY. CONST. BILL OF RIGHTS, § 3; TEX. CONST. art. I § 3.

18. *E.g.*, ARIZ. CONST. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges . . . ."; *see also* WASH. CONST. art. I, § 12. As Willard Hurst notes regarding state constitutions like Indiana's and Oregon's dating from the era of populism, "[t]he persistent theme of the limitations written into state constitutions after the 1840's was the desire to curb special privilege." J.W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 241 (1950). *See also* Williams, *supra* note 12, at 1207 ("many states amended their constitutions during the populist era to curb the granting of 'special' or 'exclusive' privileges, after a series of abuses by the relatively unfettered state legislatures responding to powerful economic interests.").

19. *E.g.*, OR. CONST. art. I, § 20.

20. *E.g.*, N.C. CONST. art. I, § 19 (equal protection) and § 32 (privileges and emoluments).

21. CONN. CONST. art. I, § 1 ("All men when they form a social compact, are equal in rights; and no man or set of men are [*sic*] entitled to exclusive public emoluments or privileges from the community.").

22. State v. Savage, 96 Or. 53, 59, 184 P. 567, 569 (1919) ("[I]f legislation . . . imposes a burden on one class which is not imposed on others in like circumstances . . . it is a denial of equal protection of the laws to those subject to the burden and a grant of immunity to those not subject to it."); Note, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 120 (1984).

ple. Its historical object was to eliminate the effects of slavery or oppression.[23]

Conversely, state "equal privileges and immunities" provisions typically emanate from the non-privileged as a gesture of warning to those who have or seek special benefits; they are an implied *threat* to adhere to the equality principle.[24] That "equal privileges and immunities" clauses were not inspired by an altruistic desire to elevate the oppressed is demonstrated by the case of Oregon, where the provision was silently adopted by the same constitutional convention that ferociously debated slavery and ultimately decided to refer the issue to the people, who voted to ban slavery only under the proviso that immigration of blacks be prohibited.[25]

Despite these textual and historical differences, states' equal privileges and immunities clauses have not received treatment that differs in any significant way from the United States Supreme Court's equal protection analysis. As one commentator noted, the Warren Court's equal protection jurisprudence "has mesmerized a generation of lawyers and judges."[26] No court except Oregon's has rejected the basic federal methodology, under which state action discriminating against a "suspect class" or implicating a "fundamental right" receives "strict judicial scrutiny," while state action discriminating against a "quasi-suspect" class receives "heightened judicial scrutiny" and state action discriminating against a non-suspect class or implicating a non-fundamental right receives "rationality review."[27] Some courts have expanded equality guarantees by defining more classes as "suspect" or more rights as "fun-

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23. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

24. *Compare* A. DE TOCQUEVILLE, *supra* note 7, at 54-55: "There is, in fact, a manly and lawful passion for equality which incites men to wish all to be powerful and honored. This passion tends to elevate the humble to the rank of the great; but there exists also in the human heart a depraved taste for equality, which impels the weak to attempt to lower the powerful to their own level, and reduces men to prefer equality in slavery to inequality with freedom."

25. Palmer, *supra* note 14, at 202, 215; *see* OR. CONST. art. XVIII, § 4; art. I, § 34; art. I, § 35 (repealed Nov. 2, 1926).

26. Williams, *supra* note 12, at 1196.

27. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). This brutally reductive description of federal equal protection jurisprudence will not mean anything to anybody who is not already familiar with that body of law. On the other hand, nothing I could put into this article without having it take over could satisfactorily explain "the new equal protection." *See also* G. GUNTHER, CONSTITUTIONAL LAW 586-854 (11th ed. 1985); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 991-1136 (1978).

damental,"[28] but the basic analysis remains the same, except in Oregon, where a different approach has evolved.

II. Equal Privileges and Immunities: One State's Jurisprudence

A. Constitutional Adjudication in the Oregon Supreme Court

The Oregon Supreme Court subscribes to three principles of adjudication that bear on its interpretation of the state guarantee of equal privileges and immunities.[29] First, the court will not address whether the state has acted unconstitutionally until it is satisfied that it has acted lawfully under proper legislative authorization. Thus, when presented with a challenge to a welfare agency's policy of providing reimbursement for abortions, only if the operation was necessary to protect the life of the mother, the court never reached the constitutional issue. Instead, it struck down the reimbursement criteria under the state Administrative Procedures Act, which requires invalidation of rules which "exceed the statutory authority of the agency."[30] In deciding that the state police acted unlawfully in administering drunk driving roadblocks, the court based its decision on the lack of explicit legislative authorization for such procedures, and did not address the issue under state or federal constitutional protections against unreasonable searches and seizures.[31]

Second, the court will not decide whether a properly authorized action is unconstitutional under the federal Constitution until it has evaluated the action under the state constitution. As the court has explained, the federal Constitution, operating on the states through the fourteenth amendment, prohibits a state's law, including its constitutional law, from falling below a minimum

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28. *E.g.*, Crawford v. Board of Educ., 17 Cal. 3d 280, 551 P.2d 28, 130 Cal. Rptr. 724 (1976).

29. Or. Const. art. I, § 20: "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."

30. Planned Parenthood Ass'n v. Department of Human Resources, 297 Or. 562, 687 P.2d 785 (1984) (striking down *former* Or. Admin. Reg. 461-14-152 under Or. Rev. Stat. § 183.400(4)(b) (1987)). The court held that the agency's organic statute, Or. Rev. Stat. § 414.042(1) (1983), authorized the agency to promulgate criteria related only to financial need. *Id.*

31. Nelson v. Lane County, 304 Or. 97, 743 P.2d 692 (1987). *See also* State v. Atkinson, 298 Or. 1, 688 P.2d 832 (1984) ("inventory search" must proceed under legislative and administrative authority).

standard.[32] A state should have the opportunity to pass judgment on, and correct, its own law, under its own constitutional limitations, before deciding whether that law fails to meet the federal minimum. As Hans Linde noted: "A holding that a state constitutional provision protects the asserted claim in fact destroys the premise for a holding that the state is denying what the federal Constitution would assure."[33] Thus, by deciding issues under the state constitution before the federal Constitution, the court avoids deciding "that the state's government has fallen below a nationwide constitutional standard, when in fact the state's law, [including its constitutional law,] *when properly invoked*, meets or exceeds that standard."[34]

Third, the Oregon court systematically eschews the judicial technique of "weighing" various "interests" in order to achieve "a . . . 'balance' of pragmatic considerations about which reasonable people may differ over time . . . ."[35] Therefore, in such diverse areas of constitutional law as free speech,[36] free exercise of religion,[37] open courts,[38] and criminal procedure,[39] the court has attempted to address difficult issues by fashioning rules that officers, agency officials, legislators, and lower courts can apply without having to make policy choices disguised as ad hoc evaluations based on comparison of incommensurables. All of these propensities manifest themselves in the Oregon court's equality cases.

B. Equal Treatment Under Oregon Law

Prior to 1976, Oregon courts recognized some textual and conceptual differences between state and federal Constitutional guarantees of equality.[40] However, in practice, Oregon courts treated

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32. Sterling v. Cupp, 290 Or. 611, 614, 625 P.2d 123, 126 (1981) ("[T]he state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.")

33. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 182 (1970); *see also* Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 648 (1983). Justices Linde and Carson are both current members of the Oregon Supreme Court.

34. State v. Kennedy, 295 Or. 260, 267, 666 P.2d 1316, 1320 (1983) (emphasis added).

35. *Id.*, 666 P.2d at 1321.

36. State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982).

37. Salem College & Academy v. Employment Div., 298 Or. 471, 695 P.2d 25 (1985).

38. State *ex rel.* Oregonian Publishing Co. v. Deiz, 289 Or. 277, 613 P.2d 23 (1980).

39. State v. Brown, 301 Or. 268, 721 P.2d 1357 (1986) (automobile search).

40. *See, e.g.*, State v. Savage, 96 Or. 53, 59, 184 P. 567, 569-70 (1919).

state and federal guarantees interchangeably.[41] Then, in *Olsen v. State ex rel. Johnson*,[42] a school financing case, the Supreme Court of Oregon asserted its independence from federal precedent under the so-called "fundamental rights" branch of equal protection law. The court adopted an approach similar to one used in a New Jersey school financing case.[43] The result in *Olsen* was no different from what it would have been under a federal analysis.[44] Only in a 1978 tax case, *Tharalson v. State Department of Revenue*,[45] did the court suggest that Oregon's equality protections might be more extensive than federal ones. Although the court stated that a statute which is constitutional under article I, section 20 will certainly be constitutional under the federal equal protection clause, "the opposite may well occur."[46]

The Oregon Supreme Court's prediction came true three years later in *State v. Clark*[47] and *State v. Edmonson*,[48] companion cases involving identical equal protection challenges to criminal charging procedures allegedly applied so as to deny defendants equal privileges and immunities. The court recognized a system under which some felony suspects are charged by information after a preliminary hearing with traditional constitutional safeguards, while others are charged by a less rigorous grand jury indictment.[49] The court in *Clark* set forth the basic rationale for an independent le-

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41. *See, e.g.*, School Dist. No. 12 v. Wasco County, 270 Or. 622, 529 P.2d 386, 389 (1974); Plummer v. Donald M. Drake Co., 212 Or. 430, 437, 320 P.2d 245, 248 (1958).

42. 276 Or. 9, 554 P.2d 139 (1976).

43. *Id.* at 20, 554 P.2d at 144-45 (citing Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), *modified*, 67 N.J. 333, 339 A.2d 193 (1975)). Instead of a two-step process determining first if the state action implicated a "fundamental right," then, if so, whether the statute passed "strict scrutiny," the Oregon court collapsed the two steps into a single balancing test, weighing the damage to the alleged right against the state's interest in its statutory scheme. *Id.* at 20, 554 P.2d at 145. The *Olsen* court held that the state's traditional strong interest in local control of school financing outweighed any detriments to children whose education suffered because of poorly funded schools. *Id.* at 24-25, 554 P.2d at 147-48. *Olsen* pre-dated the court's rejection of judicial balancing, and has not been followed. In Hunter v. State, 84 Or. App. 698, 735 P.2d 1225 (1987), the Oregon Court of Appeals decided a criminal procedure case using the *Olsen* balancing test. The Supreme Court of Oregon allowed review and requested counsel to brief the question of *Olsen*'s continuing validity. *See* 304 Or. 55, 742 P.2d 1186 (1987). That case is currently under advisement.

44. 276 Or. 9, 27, 554 P.2d 139, 149 (1976) (The Oregon school financing scheme survived constitutional scrutiny as did the Texas school financing system in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973)).

45. 281 Or. 9, 573 P.2d 298 (1978).

46. *Id.* at 15, 573 P.2d at 301.

47. 291 Or. 231, 630 P.2d 810 (1981), *cert. denied*, 454 U.S. 1084 (1981).

48. 291 Or. 251, 630 P.2d 822 (1981).

49. *Clark*, 291 Or. at 233-34, 630 P.2d at 812 (1981).

gal definition of equality under article I, section 20 of the Oregon Constitution and sketched the outlines of how that definition functions.

The analysis first presented in *Clark* and *Edmonson* has not developed into a well-defined set of rules. Yet, the contours of the analysis are clear. Claims of discrimination under article I, section 20 must pass through a series of inquiries: Does the challenged state action implicate something that might be called a "privilege or immunity"?[50] Was the action properly performed under lawful authority?[51] Does the action allegedly discriminate against a true "class," a "pseudo-class," or an individual?[52] If so, is that discrimination "impermissible"?[53]

1. What is a "Privilege or Immunity"?

In 1985, the Oregon Supreme Court set forth an abstract definition of "privilege or immunity": "Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority, article I, section 20 requires that the government decision to offer or deny the advantage be made 'by permissible criteria and consistently applied.' "[54] The situations in which the court has used this definition suggest that the term "entitled" should not be construed narrowly to mean only a right, privilege, or benefit that would be deemed an "entitlement" under, for example, federal due process law.[55] In three Oregon cases, the "privilege" at issue was the privilege of being charged by information instead of by grand jury indictment.[56] Other cases involve the "privilege" of *de novo* appeal as opposed to appeal on only constitutional issues,[57] of deferring gains on real-

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50. *See infra* text accompanying notes 54-62.

51. *See infra* text accompanying note 63.

52. The term "pseudo-class" is mine, not the court's. *See infra* text accompanying notes 64-79.

53. *See infra* text accompanying notes 80-134.

54. City of Salem v. Bruner, 299 Or. 262, 268-69, 702 P.2d 70, 74 (1985) (quoting State v. Freeland, 295 Or. 367, 377, 667 P.2d 509, 516 (1983)).

55. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564, 576 (1972) (fourteenth amendment protects "the security of interests that a person has already acquired in specific benefits").

56. State v. Edmondson, 291 Or. 251, 630 P.2d 822; State v. Clark, 291 Or. 231, 630 P.2d 810 (1981), *cert. denied*, 454 U.S. 1084 (1981). State v. Freeland, 295 Or. 367, 667 P.2d 509 (1983) (Oregon Constitution gives district attorneys the discretion to proceed either by information or grand jury indictment).

57. *Bruner*, 299 Or. 262, 702 P.2d 70.

estate transactions,[58] of having a particular kind of tort claim,[59] of being able to use the workers' compensation laws to provide survivors' benefits,[60] and of gaining "immunity" from a statute of limitations.[61] The significant words in the court's definition, then, are not "entitle," but "whenever" and "some advantage." The definition is expansive enough to implicate article I, section 20 whenever the state might unequally deprive a citizen of something potentially desirable. Claimants need not establish actual desirability or undesirability in the particular case. "Potential" advantages, "whether or not they are advantageous in a particular instance," are sufficient. For example, a particular claimant need not establish that in his case he would benefit from a preliminary hearing. Instead, he may establish that such a procedure could possibly, in some case, provide advantages over charge by information, and that this potential advantage is unequally distributed.[62]

2. *Does the Challenged Action Proceed Under Lawful Authority?*

Before deciding whether the state has acted unconstitutionally, the court determines if the challenged action is properly authorized. Thus, in *State v. Clark*, the Supreme Court of Oregon proceeded to an analysis under article I, section 20 after deciding that both of the procedures used to charge criminal suspects—indictment and information—were explicitly approved by state law.[63] Only after determining that the challenge involves a privilege or immunity, denial of which cannot be rectified under "sub-constitutional" law, will the court apply article I, section 20.

3. *Does the State Allegedly Discriminate Against an Individual, a "True Class," or a "Pseudo-class"?*

In *State v. Clark*, the Oregon Supreme Court distinguished three possible objects of unconstitutional discrimination, each of

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58. Wilson v. Department of Revenue, 302 Or. 128, 727 P.2d 614 (1986).

59. Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 652 P.2d 318 (1982).

60. Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 653 P.2d 970 (1982).

61. State *ex rel.* Adult and Family Serv. Div. v. Bradley, 295 Or. 216, 666 P.2d 249 (1983) (six year statute of limitations for paternity actions by illegitimate children violated state equal protection clause).

62. *Cf.* State v. Clark, 291 Or. 231, 235, 630 P.2d 810, 813, *cert. denied*, 454 U.S. 1084 (1981).

63. *Id.* at 233-34, 630 P.2d at 812.

which requires a different analysis under article I, section 20.[64] Drawing on the text of that provision, which includes the language "citizen or class of citizens," and its roots in the progressive era's anti-"special legislation" sentiment, the court stated:

> The clause forbids inequality of privileges or immunities not available "upon the same terms," first, to any citizen, and second, to any class of citizens. In other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs. Because constitutional attacks under article I, section 20 mostly have been directed at laws prescribing general rules for one or another class of subjects, these attacks, as well as most judicial opinions, have been phrased in the rhetoric of forbidden "classification," but that is only one of two distinct grounds of attack.[65]

In guaranteeing that privileges will be available to all "citizens . . . upon the same terms . . . equally,"[66] the constitution not only prohibits impermissible class legislation, it also empowers an individual to demand the same treatment as those with whom he or she is similarly situated, regardless of classifications. "A person therefore need not complain of being the victim of an invidiously discriminatory classification in order to invoke" article I, section 20.[67] A black claimant might attack a statute requiring blacks to sit only in the back of the bus, or attend separate schools. Such a statute holds out a privilege to a "class of citizens"; its vulnerability stems from the fact that the statutory classes themselves are impermissible. On the other hand, a white middle-aged Anglo-Saxon male may successfully challenge state action if it denies him a privilege while offering that privilege to other white middle-aged Anglo-Saxon males, if he can prove that the privilege is not available "equally" to all white middle-aged Anglo-Saxon males—for example, if a prosecutor distributes the privilege of a preliminary hearing by whim, caprice, or unbridled discretion. Such state action holds out a privilege to a "citizen" but not "upon the same terms . . . equally" to other citizens similarly situated. The action would be vulnerable, not because it uses an impermissible classification,

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64. *Id.* at 231, 630 P.2d at 810.
65. *Id.* at 237, 630 P.2d at 814-15.
66. *Id.*
67. State v. Freeland, 295 Or. 367, 370, 667 P.2d 509, 512 (1983).

but because it has granted the privilege or immunity arbitrarily, ad hoc, and haphazardly.[68] Thus if the challenger alleges that the state has used an unfair or otherwise impermissible *system* of distributing privileges, this is an attack on a classification scheme, and the attack finds constitutional support in the language requiring the state to treat all "*class[es] of citizens* . . . upon the same terms . . . equally."[69] If the challenger alleges that the state is distributing privileges without any system at all, this is an attack on arbitrary ad hoc state action, and the attack finds constitutional support in the language requiring the state to treat all "*citizen[s]* . . . upon the same terms . . . equally."[70]

The court unambiguously distinguishes between individual-based and class-based discrimination.[71] The further distinction between what might be called "true" classes and "pseudo-classes" is more subtle. Indeed, litigants and judges frequently use the term "class" imprecisely. For example, one Oregon judge has commented:

> The terms "class" and "classification" are invoked sometimes to mean whatever distinction is created by the challenged law itself and sometimes to refer to a law's disparate treatment of persons or groups by virtue of characteristics which they have apart from the law in question. Familiar examples of the latter kind of "class" are personal characteristics such as sex, ethnic background, legitimacy, past or present residency or military service. On the other hand, every law itself can be said to "classify" what it covers from what it excludes.[72]

Gender, race, nationality, geographical residence, and other classifications which exist prior to and independent of the statutory scheme at issue, and which are widely recognized as providing a basis for legal, political, social or ethnic groupings, are "true" classes. On the other hand, a "pseudo-class" consists of a group of individuals who are united only by the fact that they are subject to the law or other state action being challenged. Examples include persons who fail to file a petition for review of a court of appeals

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68. *Clark*, 291 Or. at 239, 630 P.2d at 816.

69. OR. CONST. art. I, § 20.

70. *Id.*

71. *See, e.g., Freeland*, 295 Or. at 374, 667 P.2d at 512 (referring to two distinct analyses under article I, section 20).

72. *Clark*, 291 Or. at 240, 630 P.2d at 816.

judgment within 30 days;[73] persons who sue for fatal injuries to parents;[74] persons charged by indictment as opposed to information;[75] income tax payers;[76] opticians;[77] and those favored by the prosecutor.[78] A "pseudo-class," in other words, is any group of people who would never have conceived of themselves as a "class," and would not have been treated as a class, if the statute or policy allegedly disadvantaging them did not exist.

Governmental action, therefore, might discriminate against a true class of citizens like blacks or women by consistently denying its members privileges or immunities equal to those offered members of other classes; it might discriminate against a "pseudo-class," like late filers, by denying them the privileges offered to timely filers; or it might discriminate against an individual by denying her privileges offered to other individuals similarly situated, based on no criteria. Each type of discrimination receives a different type of analysis under article I, section 20.[79]

4. True Class Discrimination

The Oregon court's treatment of true class discrimination bears a close resemblance to standard federal "suspect class" adjudication under the equal protection clause,[80] a "mode of analysis [that] has notorious difficulties."[81] For example, it is difficult to "rise beyond tautology" when determining that "like shall be treated alike," without also establishing "what is alike for constitutional purposes, *i.e.*, what are distinctions without a constitutionally permissible difference or what known forms of inequality the

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73. *See id.* at 240, 630 P.2d at 816.

74. Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 567-68, 652 P.2d 318, 331-32 (1982).

75. *Freeland*, 295 Or. at 374, 667 P.2d at 511.

76. Cole v. Oregon Dep't of Revenue, 294 Or. 188, 192-94, 655 P.2d 171, 173-74 (1982).

77. *Clark*, 291 Or. at 240, 630 P.2d at 816 (referring to Williamson v. Lee Optical, 348 U.S. 483 (1955)).

78. *Freeland*, 295 Or. at 376, 667 P.2d at 515.

79. Some generic article I, section 20 claims present overlapping allegations. The claimant may attack the governmental action without specifying whether the true object of attack is the classification scheme itself, its standardless application in his case, or its application along some impermissible class lines. *See, e.g.*, *Freeland*, 295 Or. at 375 n.7, 667 P.2d at 515 n.7 ("The issue in this case is not one of impermissible classification of citizens but whether the prosecutor follows adequately consistent practices that justify granting or denying the privilege of a preliminary hearing to defendant and others as individuals.").

80. *See supra* note 27 and accompanying text.

81. *Clark*, 291 Or. at 240, 630 P.2d at 816.

particular clause was meant to end."[82] Both Oregon and federal law distinguish "invidious" classifications, and treat them more harshly. Oregon cases, however, reveal a slightly different method, resulting in a larger group of impermissible classifications. Further, once a class is typed as either invidious or not, the Oregon court does not proceed to a balancing test considering the "compellingness" or "importance" of the state's interest. Invidious classification is *per se* unlawful.

The *Clark* court described true classes as those defined by personal characteristics widely regarded as forming the basis for meaningful social or ethnic categories, giving as examples race, legitimacy, gender, geographical residence, and military service.[83] Because *Clark* did not deal with such a classification system, the court did not develop any distinction between permissible and impermissible "true" classes, although it suggested cryptically that distinctions "are tested by the usual criteria of equal privileges and immunities or equal protection."[84] This language echoing the federal Constitution indicated that the court might adopt something similar to the federal "suspect class" definition. In *Hewitt v. State Accident Insurance Fund Corp.*,[85] which struck down a gender-based workers' compensation regulation, that is what the court did:

> Like other state and federal courts, we agree that a classification is "suspect" when it focuses on "immutable" personal characteristics. It can be suspected of reflecting "invidious" social or political premises, that is to say, prejudice or stereotyped prejudgments. . . . [Gender] bears no relation to ability to contribute to or participate in society. . . . Accordingly, we hold that when classifications are made on the basis of gender, they are . . . inherently suspect. The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women. It is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason.[86]

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82. *Id.* at 240 n.11, 630 P.2d at 816 n.11 (quoting Tharalson v. State Dep't of Revenue, 281 Or. 9, 15 n.10, 573 P.2d 298, 301 n.10 (1978). *See also* Linde, *Constitutional Law - 1959 Oregon Survey*, 39 OR. L. REV. 138, 156-58 (1960) (discussing the need for careful use of words such as "class" and "equally").

83. *Clark*, 291 Or. at 240, 630 P.2d at 816.

84. *Id.* at 241, 630 P.2d at 817.

85. 294 Or. 33, 653 P.2d 970 (1982).

86. *Id.* at 45-46, 653 P.2d at 977-78.

This definition appears to incorporate two components: "suspectness" and "invidiousness." A classification is "suspect" if it distinguishes on the basis of immutable personal characteristics. Such classification schemes should provoke suspicion in the state actors who are considering using them, as well as in courts evaluating the classification schemes on judicial review. Classes based on traits such as long hair or style of dress, which can be adopted or abandoned at will, are not suspect. But not all "suspect" classification schemes violate the constitution. In order to be unconstitutional, the suspect classification must also be "invidious," reflecting stereotyping, prejudice, or other methods of evaluation not based on a reasoned determination of general competence or ability to participate in society. Examples of suspect classifications include those based on race,[87] gender,[88] ethnic background,[89] immigrant status,[90] religion,[91] age,[92] and "illegitimacy."[93] "Other types . . . stand or fall by analogy to these more obvious examples."[94]

Whether these "suspect" classifications are "invidious" in any case depends on whether the government's system of classification in that case reflects prejudiced or stereotypical thinking. Thus, a statute requiring women to undergo mammograms, or one requiring annual prostate examinations for men, while involving suspicious classification, would not be invidious, because it is based on "specific biological differences," and not irrational notions about gender *per se*.[95] Likewise, if the state could establish that biological and not social differences account for predictably different levels of industrial injuries, it could adjust workers' compensation insurance premium rates accordingly.

In *State ex rel. Adult and Family Services Division v. Bradley*,[96] the court struck down a six year statute of limitations on filiation proceedings brought on behalf of children born out of

87. *Id.* at 46, 653 P.2d at 977 (citing Loving v. Virginia, 388 U.S. 1, 11 (1967); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

88. *Id.* at 46, 653 P.2d at 977-78.

89. *Id.* at 46, 653 P.2d at 978 (citing Oyama v. California, 332 U.S. 633, 644-46 (1948)).

90. *Id.* (citing Graham v. Richardson, 403 U.S. 365, 372 (1971)).

91. State v. Freeland, 295 Or. 367, 375, 667 P.2d 509, 515 (1983).

92. Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 568, 652 P.2d 318, 332 (1982).

93. State *ex rel.* Adult and Family Serv. Div. v. Bradley, 295 Or. 216, 223, 666 P.2d 249, 253 (1983).

94. *Freeland*, 295 Or. at 376, 667 P.2d at 516.

95. Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 46, 653 P.2d 970, 978 (1982).

96. 295 Or. 216, 666 P.2d 249 (1983).

wedlock.[97] Distinguishing between permissible and impermissible statutory treatment of illegitimacy, the court noted that "[d]ifficulties of proof are a valid and important consideration in the regulation of paternity proceedings."[98] However, "restraints on the ability of illegitimate children to ascertain paternity must be imposed only for reasons relating specifically to the proof problems encountered in paternity determinations. Restrictions not so justified cannot be upheld."[99] The statute of limitations failed, then, because it did not reflect a sufficient degree of freedom from stereotyped or prejudicial thinking. The court determined that the legislators had focused too much on illegitimacy and not enough on pure problems of proof. It was an "arbitrary" and "heavy-handed substitute for particularized requirements of proof" that would have addressed the problem without imposing restraints on illegitimates as illegitimates.[100] In such situations, suspicion of invidious motive ripens into certainty, and the classification fails. Therefore, the court recognized that a suspicious classification could, in some circumstances, survive; as yet, however, no such circumstances have arisen.[101]

This scheme, like its federal counterpart, is not without its "notorious difficulties."[102] For example, how would an affirmative action program fare under it? If the constitution prohibits classifi-

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97. *Former* OR. REV. STAT. § 109.135(3).

98. State *ex rel.* Adult and Family Serv. Div. v. Bradley, 295 Or. at 216, 666 P.2d at 252 (1983).

99. *Id.* at 224, 666 P.2d at 253.

100. *Id.* at 225, 666 P.2d at 254.

101. In *Norwest v. Presbyterian Intercommunity Hospital*, the court examined an article I, section 20 challenge to distinctions between spouse and child. Norwest v. Presbyterian Intercommunity Hosp., 293 Or. 543, 567-68, 652 P.2d 318, 331-32 (1982). State tort law allowed a spouse to recover damages for loss of consortium of a disabled spouse, but denied such recovery for children. First expressing doubt that "children" and "spouses" were "classes" for constitutional purposes, the court ultimately stated that the distinction between the two "could be so described if the law purported to deny otherwise identical claims to a child merely by reason of age or relationship." *Id.* at 568, 652 P.2d at 332. The distinction in question apparently did not; the court sustained it, noting that "[t]he age of majority . . . is a criterion for many legal privileges or immunities." *Id.* Although cryptic, this holding seems based on the conclusion that discrimination against minors in the context of tort recovery for loss of consortium is not based on stereotyped or prejudicial notions about youth, but on logical conclusions about young people's "ability to contribute to or participate in society." Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 46, 653 P.2d 970, 977 (1982) (stating that gender classifications are inherently suspect but may be constitutional if based upon biological differences).

102. State v. Clark, 291 Or. 231, 240, 630 P.2d 810, 816, *cert. denied*, 454 U.S. 1084 (1981).

cations based on invidious discriminations, can so-called reverse discrimination be justified? May the law *offer* a privilege or immunity to a class that is otherwise victimized by invidious classifications, and *deny* one to a class that has *benefited* from stereotyping and prejudice? Because the Oregon equality provision was not designed to remedy historical deprivations, can remedial discrimination enjoy any special dispensation? Or again, if this analysis avoids the pitfalls of ad hoc balancing, does it not entangle itself instead in the equally murky task of discerning legislative or executive motivation? Or is a constitutional interpretation that focuses on such motivation, instead of levels of judicial scrutiny, justified by the fact that article I, section 20 addresses in the first instance, not judges who review law after application, but legislators and executives who make and apply it?

In any event, we know at present a "true" classification that is both suspect and invidious, one based on immutable social or physical characteristics and founded in prejudice or stereotype instead of reason, will not survive a challenge under article I, section 20. Classifications that are not suspect are permissible, as are non-invidious suspect classifications. The cases indicate no willingness to justify an invidious classification on the basis of a state interest, "compelling," "important" or otherwise.

5. *Pseudo-class Discrimination*

A pseudo-class is a group of people whose existence *as a class* derives from the statute or policy being challenged. Thus, blacks, women, Portland residents and (perhaps) veterans constitute true classes because they share relevant traits, which are widely regarded as significant personal, ethnic or social characteristics, prior to and independent of any law that might discriminate against them.[103] Citizens who fail to meet a statute of limitations, who are cited into municipal court, or who are charged by information, are members of pseudo-classes because the traits they share derive from the challenged statute itself. Without the challenged classifications, these groups of citizens would not exist as self-conscious or recognized groups. Opticians,[104] income tax payers,[105] those favored

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103. *See supra* notes 72-78 and accompanying text (distinguishing "true-classes" from "pseudo-classes").

104. *See Clark*, 291 Or. at 240, 630 P.2d at 816 (referring to Williamson v. Lee Optical, 348 U.S. 483 (1955)).

by the prosecutor, are examples of pseudo-classes. Although they share traits that were not brought into existence *per se* by the challenged law or policy, the traits are not generally recognized by society as class-forming ones; they exist for class-defining purposes *with respect to the challenged state action.*

Typically, when claimants allege that a law such as a tax classification or a dual charging scheme "discriminates" against them, they do not argue that the law creates a class that is somehow unjust or invidious in itself. Rather, such claimants usually argue either that the state has not followed consistent practices in granting or denying a privilege (the tax law is arbitrary), or has granted or denied a privilege on the basis of invidious pre-existing classes (the tax law is applied so as to disadvantage blacks). These are really claims based on individual[106] or true class[107] discriminations. Yet occasionally an attack on a pseudo-class *per se* will surface. An optician may argue that discriminating between opticians and optometrists is arbitrary and unlawful; a person in a 20 percent tax bracket may argue that her rate should be the same as her poorer neighbor who is in a 15 percent bracket. In adjudicating such a claim, the court will not use the analysis based on "invidiousness" which it uses with respect to true classes.

True class discrimination is prohibited when it perpetuates irrational stereotypes or prejudgments. Pseudo-class discriminations require a different standard because, by definition, they never perpetuate a widely recognized pre-existing classification; they could not possibly derive from a history of social prejudice or stereotype. Thus, because such a history is the only reason the court examines true class distinctions for their invidiousness, this inquiry is neither necessary nor possible for pseudo-classes. The legislature could not decide to enact a law providing the privilege of an appeal to those who file within thirty days because it shares an irrational social prejudice in favor of timely filers; the statute itself creates timely filers and defines what they are. The prosecutor does not allow those he favors preliminary hearings because of a widely held social stereotype or prejudice; he does so because they share the trait of being favored by him.[108] With pseudo-classes, the crucial

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105. Cole v. Oregon Dep't of Revenue, 294 Or. 188, 191-92, 655 P.2d 171, 173 (1982).

106. State v. Freeland, 295 Or. 367, 375 n.7, 667 P.2d 509, 515 n.7 (1983); *see infra* text accompanying notes 115-34 for analysis of such claims.

107. *See supra* text accompanying notes 80-101 for a discussion of such claims.

108. If he chooses his friends on the basis of a true class feature—their race or gen-

question is not whether state action reflects irrational prejudgment, but rather whether it reflects deliberate and unfair limitation of access.

For this reason, "[a]ttacks on such laws . . . have generally been rejected whenever the law leaves it open to anyone to bring himself or herself within the favored class on equal terms."[109] The crucial phrase in this formulation is "whenever *the law* leaves it open." Any pseudo-class that does not have *legal* impediments to entry is permissible. There is a subtle but important distinction between pseudo-classes which the law does not leave open, and pseudo-classes which are, for other reasons, not open. The pseudo-class of income tax payers[110] provides a good illustration. In order to join this pseudo-class, a citizen must have earnings above a certain minimum. To those people with earnings below this minimum—among them my eight-year-old son—the pseudo-class is closed. There may be people who will never be able to join: the infirm, the institutionalized, and members of structurally impoverished groups. But their disability does not stem from the tax law's legal criteria which are objective, consistent, and impersonal. In the relevant sense, "the law" does not close the class. Fate, history, economic exploitation, institutionalized racism, laziness, or bad luck closes out the class. A child might inherit a trust fund from some hitherto unknown relative and henceforth have to pay income taxes on the annual distributions. He will age and (one hopes) bring his income above the minimum. The infirm or poverty-stricken might win the lottery. In either event, they would find themselves in the class of income tax payers. It is therefore not the income tax law that closes the pseudo-class. That pseudo-class remains open to all who meet its objective, consistent, and impersonal criteria, and therefore does not violate the constitution.

On the other hand, a "special" law granting a monopoly to the ABC Corporation or a prosecutor's policy of granting preliminary hearings to the clients of those he favors—the precise type of laws article I, section 20 was designed to prohibit[111]—are different.

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der—then he simply passes that prejudice along when he affords his friends the privilege, and his action may be attacked as the functional equivalent of true class discrimination.

109. State v. Clark, 291 Or. 231, 240-41, 630 P.2d 810, 816, *cert. denied*, 454 U.S. 1084 (1981); *accord* Wilson v. Department of Revenue, 302 Or. 128, 132, 727 P.2d 614, 616-17 (1986); Cole v. Department of Revenue, 294 Or. 188, 191-92, 655 P.2d 171, 173 (1982).

110. *See generally Cole*, 294 Or. 188, 655 P.2d 171.

111. *Clark*, 291 Or. at 236, 630 P.2d at 814; *see supra* text accompanying notes 9-25.

"The law," regarded as a monolith which includes not only constitutions, statutes and regulations, but also the unwritten policy of governmental agents, does not leave entry into those classes open. Nothing the XYZ Corporation does can make it become the ABC Corporation. Nothing a hapless defendant does can make his attorney one of those who the prosecutor favors, *unless the prosecutor so chooses*. Theoretically, it is the law itself which controls admission to the privileged pseudo-class. Instead of creating a group into which any person meeting objective, consistent and impersonal criteria might gain admission, these laws or policies create special, closed groups defined not by criteria but by pre-existing, unchangeable *ad hominem* membership lists. Such laws are impermissible.

This analysis has some grey areas. Most obvious is the problem of facially neutral laws have the purpose or effect of closing classes. For example, the legislature could create a monopoly for the ABC Corporation by designing ostensibly neutral criteria that uniquely resemble the characteristics of ABC Corporation, and only ABC Corporation, such that all other corporations are *de facto* excluded. The court is faced with the difficulty of distinguishing between pseudo-classes the law leaves open to all "upon the same terms . . . equally"[112] and laws with terms so idiosyncratic that they effectively designate a particular individual or group of individuals as special beneficiaries of state largess.[113]

A more complex problem suggests itself in the following hypothetical situation. Suppose an overburdened prosecutor decides to lighten her docket by accepting plea bargains from all defendants who get "heads" when they flip a coin. This procedure creates pseudo-classes: head-flippers and tail-flippers. Is this a permissible

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112. OR. CONST. art. 1, § 20.

113. The court has already faced a similar problem with respect to "special" or "local" laws prohibited by article IV, section 23 of the Oregon Constitution. In *Tichner v. Portland*, the court confronted a challenge to a statute applying to any county in the state that " 'now has or shall hereafter attain a population of one hundred thousand or more inhabitants.' " Tichner v. Portland, 101 Or. 294, 295, 200 P. 466, 466 (1921). At the time there was only one county that qualified. Relying on an earlier case, *Ladd v. Holmes*, in which the court had sustained against an article I, section 20 challenge, a statute applying only to cities with 10,000 or more inhabitants, the court held that because the statute did not prohibit future entrants, it was not "special or local legislation" despite the fact that it applied to only one county in the state. *Id.* at 298, 200 P. at 467 (citing Ladd v. Holmes, 40 Or. 167, 66 P. 714 (1901)). The court contrasted *State ex rel. Gray v. Swigert*, on the grounds that the statute at issue there did not allow for future entrants. *Id.* at 299, 200 P. at 467 (citing State *ex rel.* Gray v. Swigert, 59 Or. 132, 116 P. 440 (1911)).

method of distributing a privilege? The court seems to have rejected the argument that the criteria must relate to the privilege.[114] Thus, the crucial issue is whether this consistent, objective and impersonal technique leaves the class "open." In one sense it does: all citizens have an equal chance of flipping heads. Yet in another sense it does not: once the coin has landed, the citizen is powerless to change "class." This dilemma raises the question: is a *consistently, systematically random* distribution method permissible? Because the purpose of article I, section 20 is not to make government rational but to prevent abuses of discretion, such distribution should be constitutionally unobjectionable.[115]

6. *Discrimination Against Individuals*

"[A]n individual who demands equality of treatment with other individuals" may invoke the guarantee of article I, section 20 regardless of class affiliation.[116] This type of challenge occurs when an individual alleges that in *applying* a neutral law, the government offers an advantage to some individuals without offering it to others "upon the same terms . . . equally." Article I, section 20 prevents the state from distributing privileges or immunities, "purely haphazardly,"[117] requiring instead that government use criteria "consistently applied"[118] so as to achieve a "coherent, systematic policy."[119] Although the Oregon government must act consistently with the state constitution, the equality guarantee does not preclude all exercise of discretion. State agents have "discretion to make policies for even application, not discretion to treat each case on an ad hoc [sic] basis."[120] Formal rulemaking, although not the exclusive way of achieving these policies, is the surest and safest method of defeating a claim of arbitrariness.[121]

Although individuals who claim discrimination bear the bur-

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114. City of Salem v. Bruner, 299 Or. 262, 270, 702 P.2d 70, 74 (1985).

115. One member of the court has long argued that the constitution does not require rational laws. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195 (1976); Linde, *supra* note 33.

116. *Clark*, 291 Or. 231, 237, 630 P.2d 810, 814.

117. State v. Edmonson, 291 Or. 251, 254, 630 P.2d 822, 823 (1981).

118. *Bruner*, 299 Or. at 269, 702 P.2d at 73 (1985).

119. State v. Freeland, 295 Or. 367, 375, 667 P.2d 509, 515 (1983).

120. *Id.* at 377, 667 P.2d at 516-17 (footnote omitted) (quoting Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n., 16 Or. App. 63, 72, 517 P.2d 289, 293 (1973)).

121. Trebesch v. Employment Div., 300 Or. 264, 267 n.3, 710 P.2d 136, 137-38 n.3 (1985).

den of proving a negative (that there is no consistent policy underlying government implementation of a particular law), if they carry that burden their claim of unlawful governmental action will succeed. For example, the defendant in *State v. Freeland* prevailed by convincing the court that the prosecution's decision to charge him without a probable cause hearing was based on no acceptably consistent criteria.[122]

If the state does avoid standardless distribution of privileges or immunities by using consistently applied criteria, those criteria themselves must have some "satisfactory explanation" under article I, section 20.[123] Although originally the court was not explicit about what type of explanation might qualify, it has become clear that one based on an invidious classification will not survive: a prosecutor may not lawfully limit his discretion by prosecuting only those defendants who are black, or female, or Catholic.[124] The prosecutor may not distribute privileges based on terms that employ impermissible pseudo-classifications either. For example, he may not base decisions on personal like or dislike of potential recipients or of their attorneys, or on their willingness to "accede to or cooperate with some extraneous demand . . . ."[125] Therefore, if a government official avoids ad hoc distribution of privilege by substituting distribution based on invidious classifications or impermissible, closed-entry "pseudo-classifications," the distribution is still unlawful.

Although the court has not defined other types of impermissible "terms," it has indicated at least one factor that tends to make them permissible: political authorization. In *State v. Freeland* the court noted that in choosing to implement a criminal charging policy the government could justify a broad range of criteria based on administrative efficiency because efficiency was the apparent goal of the referendum.[126] However, in *Planned Parenthood Association v. Department of Human Resources*,[127] the court struck down an agency's criteria for determining who could and could not receive reimbursement for abortions, because the statutory grant ex-

122. *Freeland*, 295 Or. 367, 667 P.2d 509.

123. State v. Edmonson, 291 Or. 251, 254, 630 P.2d 822, 823 (1981).

124. State v. Clark, 291 Or. 231, 239-40, 630 P.2d 810, 816, *cert. denied*, 454 U.S. 1084 (1981).

125. *Freeland*, 295 Or. at 376, 667 P.2d at 516 (1983). *See supra* text accompanying notes 102-11.

126. *Freeland*, 295 Or. 367, 667 P.2d 509.

127. 297 Or. 562, 687 P.2d 785 (1984).

plicitly limited the type of criteria the agency could employ.

Thus, if the government, through its agents, distributes a privilege or immunity according to a coherent policy, and that policy has legislative, popular, or direct constitutional authorization, the court will sustain it unless it implements an invidious discrimination, a closed-entry, a "special" law, or violates some other constitutional provision.[128] Criteria authorized by statute or regulation will not generally be subjected to "rationality review."[129] This practice reflects the Oregon court's pervasive distrust of governmental discretion and its concomitant respect for policy decisions in the statutes and rules of legislative and quasi-legislative bodies.[130]

The difficulty with this aspect of the court's article I, section 20 jurisprudence is its scope. When the court first announced that the constitution prohibited ad hoc government action unguided by coherent policy, the state bar anticipated significant change. For example, some attorneys interpreted the decision to mean that every highway patrol officer who ticketed a speeding motorist would have to justify the decision to stop that car and not others on the basis of an "acceptable coherent policy consistently applied." Many members of the law enforcement community were apprehensive also; some thought the decisions called for promulgation of formal rules to cover every action which could possibly affect a citizen. Both of these fears were unfounded to begin with. The court carefully noted that a claimant could not simply allege arbitrariness and sit back to await a favorable outcome. The claimant carries the burden of proving that the state acted with no real policy, either written or informal.[131] As yet, only one defendant has met this burden.[132] Meanwhile, the appellate courts routinely give disgruntled speeders the short shrift they deserve.

This does not mean, however, that the scope of the new privileges and immunities doctrine is clear. For example, it is unclear who can take advantage of the guarantee. The court has suggested

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128. *Freeland*, 295 Or. at 373, 667 P.2d at 515.

129. *See* Linde, *supra* note 115.

130. *E.g.*, Nelson v. Lane County, 304 Or. 97, 783 P.2d 692 (1987) (indicating willingness to approve administrative searches only if authorized by explicit legislation and implemented according to proper regulations); State v. Atkinson, 298 Or. 1, 688 P.2d 832 (1984) (requiring legislative authorization and police regulations for inventory searches).

131. State v. Edmonson, 291 Or. 251, 254, 630 P.2d 822, 823 (1981).

132. *Freeland*, 295 Or. 367, 667 P.2d 509.

that a public entity is not a "citizen" deserving equal privileges and immunities, but the opinion contains no reasoning and seems vulnerable.[133] It is uncertain to whom the guarantee imposes obligations. The text of article I, section 20 commands that "no law shall be made"[134] without specifying if this bears upon executive action, or only to quasi-legislative executive action. If the latter limitation holds, it is unclear why the court countenances challenges to the action of district attorneys in particular cases. Another unanswered question is whether article I, section 20 applies to the judicial branch. Does the supreme court itself, for example, have to allow or deny review according to systematic principles consistently applied? Do juries have to reach verdicts that meet those requirements? As yet, the court has not confronted these questions.

CONCLUSION

Guided by a predisposition to rules instead of balancing tests, a policy of treating issues as non-constitutional whenever possible, and a commitment to the primacy of the state constitution, the Oregon Supreme Court is developing a unique approach to the problems of equality as presented by the "equal privileges and immunities" clause of the state constitution. This approach presents a sequence of inquiries.

First, the court will determine whether the citizen challenging the government action has been deprived of a constitutionally recognizable privilege or immunity.[135] If so, the court proceeds to examine whether the challenged government action was properly authorized and executed under existing statutes or regulations.[136] Only if the case meets these prerequisites will the court examine the constitutional issue. The first step in that examination is to classify the challenged discrimination as implicating either a true class, a "pseudo-class," or an individual.[137] Each of these types of discrimination is governed by different principles and rules. The government may not discriminate against a true class if the class is based on some immutable social or personal characteristic, and the

133. State *ex rel.* Emerald People's Util. Dist. v. Joseph, 292 Or. 357, 362, 640 P.2d 1011, 1014 (1982).

134. OR. CONST. art. 1, § 20.

135. *See supra* text accompanying notes 54-62.

136. *See supra* text accompanying notes 63.

137. *See supra* text accompanying notes 64-79.

classification derives from an invidious prejudice or stereotype.[138] "Pseudo-class" discrimination is impermissible when the law does not leave entry into that class open on the same terms to all citizens.[139] Distribution of privileges or immunities to individuals must proceed according to systematic criteria consistently applied; ad hoc, haphazard treatment, or treatment based on other impermissible or unauthorized criteria will be unlawful.[140]

These simply-stated rules provide an efficient and just method for disposing of most article I, section 20 challenges. They are not flawless or comprehensive, but that fact should surprise none. Equal protection analysis under the federal Constitution has yet to evolve into a seamless, coherent system despite at least forty-seven years since the introduction of the modern "levels of scrutiny" tests in 1944.[141] Modern Oregon equal protection jurisprudence began only in 1981. Perhaps when it has had an opportunity to evolve through the process of resolving a variety of concrete cases, enriched, perhaps, by similar developments in other states, the end product will be an even more valuable alternative to prevailing federal law.

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138. *See supra* text accompanying notes 80-102.

139. *See supra* text accompanying notes 103-15.

140. *See supra* text accompanying notes 116-35.

141. Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied*, 324 U.S. 885 (1945).