THE WASHINGTON CONSTITUTION'S PROHIBITION
ON SPECIAL PRIVILEGES AND IMMUNITIES:
REAL BITE FOR "EQUAL PROTECTION" REVIEW OF
REGULATORY LEGISLATION?

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INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment\(^1\) allows lawmakers great leeway to discriminate among—and against—different groups so long as they stay clear of some well-marked pitfalls. Provided that lawmakers do not classify people in a "suspect" way, such as on the basis of their race, and they do not impose unequal burdens on the exercise of certain "fundamental interests," such as voting, judges are not to second guess the "fairness" of classifications adopted by legislative bodies. This is true even where the classifications cause transfers of substantial wealth to particular interest groups.

The Washington Constitution's prohibition on special privileges and immunities\(^2\) has a very different history from that of the Fourteenth Amendment's Equal Protection Clause. Furthermore, article 1, section 12 of the Washington Constitution demands closer judicial review of legislative classifications that affect direct transfers of wealth to particular interest groups. The historical and textual basis for this stricter "equal protection" review is particularly strong in the context of regulatory legislation.

The Washington Supreme Court has often stated that the state constitution's prohibition on special privileges and immunities provides protection "substantially identical" to that of the Equal Protection Clause.\(^3\) With that somewhat qualified assertion, the court has on occasion declined to under-

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2. WASH. CONST. art. 1, § 12.
3. See, e.g., In re Grove, 897 P.2d 1252, 1261-62 (Wash. 1995) (recognizing that rights protected by Equal Protection Clause and state privileges and immunities clause are substantially identical); American Network, Inc. v. Washington Utilis. & Transp. Comm'n., 776 P.2d 950, 960 (Wash. 1989) (consolidating state and federal constitutional claims because of substantial similarity between state and federal clauses); Equitable Shipyards, Inc. v. State, 611 P.2d 396, 403 (Wash. 1980) (allowing equal protection argument despite reliance on state privileges and immunities clause at trial); Olsen v. Delmore, 295 P.2d 324, 327 (Wash. 1956) (stating that because of substantial similarity between state and federal clauses, statute violating latter provision necessarily violates former); Texas Co. v. Cohn, 112 P.2d 522, 529 (Wash. 1941) (equating Washington's privileges and immunities provision to Equal Protection Clause of Fourteenth Amendment).
take independent analysis of claims brought under article 1, section 12 and has instead relied on the United States Supreme Court’s equal protection decisions to dispose of state claims.\textsuperscript{4} Recently, however, the Washington court has shown a willingness to consider state constitutional claims based on the independent language and history of Washington’s Declaration of Rights.\textsuperscript{5} More specifically, the court has hinted that it would consider adequately briefed\textsuperscript{6} arguments for broader state constitutional protection against discrimination under article 1, section 12.\textsuperscript{7}

\textsuperscript{4} See \textit{supra} note 3 for examples of the Washington Supreme Court’s reliance on federal equal protection jurisprudence.


\textsuperscript{6} The Washington Supreme Court indicated that parties should address their arguments to six “nonexclusive” criteria when arguing the scope of protection provided by state declaration of rights provisions. \textit{Gunwall}, 720 P.2d at 811. The factors include: (1) the language of the state constitution; (2) significant differences in language between parallel provisions of the federal and state constitutions; (3) constitutional history; (4) preexisting state law; (5) structural differences between the federal and state constitutions; and (6) whether the subject matter is of particular state or local concern. \textit{Id.}

\textsuperscript{7} See, e.g., Griffin v. Eller, 922 P.2d 788, 790 (Wash. 1996) (stating that extent to which scope of protection under state privileges and immunities clause exceeds Equal Protection Clause remains open question); \textit{In re Grove}, 897 P.2d at 1262 n.12 (recognizing petitioner’s failure to argue that state constitution provides for broader protection than federal); Foley v. Department of Fisheries, 837 P.2d 14, 16 (Wash. 1992) (acknowledging that art. 1, § 12 of Washington Constitution has been found to provide broader protection than federal Equal Protection Clause); Ford Motor Co. v. Barrett, 800 P.2d 367, 374 (Wash. 1990) (implying that independent analysis of Washington clause was not considered because such analysis had not been urged by litigants); Sofie v. Fibreboard Corp., 771 P.2d 711, 714 (Wash. 1989) (pointing out that adherence to federal equal protection framework is result of litigants’ failure to urge independent analysis of state constitution); \textit{In re Marriage of Gillespie}, 890 P.2d 1085, 1087 n.2 (Wash. Ct. App. 1993) (declaring that the marriage is a constitutional issue because of petitioner’s failure to brief it); Campos v. Department of Labor & Indus., 880 P.2d 543, 547 (Wash. Ct. App. 1994) (relying on federal equal protection analysis because petitioner failed to set forth requisite \textit{Gunwall} factors), \textit{review denied}, 891 P.2d 38 (Wash. 1995). \textit{But see In re Runyan}, 853 P.2d 424, 433 (Wash. 1993) (rejecting petitioner’s argument that state clause affords greater protection than Equal Protection Clause); State v. Smith, 814 P.2d 652, 660-61 (Wash. 1991) (refusing independent review of petitioner’s state privileges and immunities argument because Washington courts do not distinguish between state and federal clauses); State v. Clark, 833 P.2d 333, 335 (Wash. Ct. App. 1994) (dismissing contention that state clause should be interpreted independently of Equal Protection Clause), \textit{aff’d}, 916 P.2d 384 (Wash. 1996).
I. The "Rediscovery" of State Bills of Rights

Throughout the nineteenth century and the first quarter of the twentieth, state courts decided questions of constitutional rights principally under their own constitutions. By the 1970s, though, state courts and the lawyers practicing before them began to look almost exclusively to interpretations of the federal Bill of Rights for the meaning of their state constitutions. This phenomenon began with the partial incorporation of the guarantees provided by the first eight amendments of the United States Constitution, applied to the states by way of the Due Process Clause of the Fourteenth Amendment over the first half of the century, and intensified with the "explosion" of criminal procedure, civil rights, and equal protection doctrine under the Warren Court.

Since the 1970s, however, many commentators have urged, and some state courts have at least partially undertaken, a return to independent state constitutional analysis. State courts, after all, have an institutional right to interpret the provisions contained in their own bills of rights to provide broader protection for individual rights than that provided by the federal Constitution.

Former Oregon Justice Hans Linde has argued that by focusing unduly on federal constitutional law in the area of individual rights, judges, lawyers, and law schools have impoverished constitutional discourse and allowed no alternative to federal theory. There is little doubt that where some state constitutional provisions are concerned, the focus on federal constitutional

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9. Id. at 382-83.
12. In the 1970s, some commentators feared that the Warren Court's development of the law of individual rights would be undone. For example, Justice Brennan reminded states of their freedom to develop principled, independent state constitutional law. William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977). See also Vern Countryman, Why a State Bill of Rights?, 45 Wash. L. Rev. 453, 455-56 (1970) (proposing that state courts recapture some of power lost to U.S. Supreme Court by relying on state constitutions to determine rights rather than incorporated federal provisions). This movement has had its detractors. See George Deukmejian & Clifford K. Thompson, Jr., All Sail and No Anchor—Judicial Review Under the California Constitution, 6 Hastings Const. L.Q. 975, 1009-10 (1979) (arguing that dual reliance on federal and state constitutional grounds insulates state courts from Supreme Court review while infringing on legislature's role in lawmaking process).
14. Linde, supra note 8, at 382-83.
analysis crowded out the development of state constitutional doctrine reflecting the independent language and history of state constitutions.\textsuperscript{15} In fact, a strong tradition of independent analysis under the Washington Constitution’s prohibition on special privileges and immunities has been all but forgotten in recent years, and obscured by analyses developed by the United States Supreme Court in interpreting the Fourteenth Amendment’s Equal Protection Clause.

In its 1986 decision in State v. Gunwall,\textsuperscript{16} the Washington court set forth six “nonexclusive” criteria for independent analysis of provisions of the state declaration of rights.\textsuperscript{17} As indicated above, the court has recently suggested that article 1, section 12 might be a candidate for independent state analysis, given appropriate briefing under the factors set out in Gunwall.

\section*{II. The Language of the Special Privileges and Immunities Prohibition Compared with the Equal Protection Clause}

The wording of article 1, section 12 has remained unchanged since its adoption as part of the original Washington Constitution in 1889:

Special privileges and immunities prohibited.\textsuperscript{18} 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.\textsuperscript{19}

The language of the special privileges and immunities prohibition is strikingly different from the federal provision to which it has frequently been compared. The Equal Protection Clause of the Fourteenth Amendment states, in pertinent part: "No state . . . shall . . . deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{20} While the Washington provi-

\textsuperscript{15} See Ronald K.L. Collins & Peter J. Galie, Models of Post Incorporation Judicial Review: 1983 Survey of State Constitutional Individual Rights Decisions, PUBLIUS, Winter 1986, at 111, 112 (stating that recent expansion on individual rights under state law has been reaction to Supreme Court’s retraction of such rights); Robert F. Utter, Swimming in the Laws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 Tex. L. Rev. 1025, 1025 (1985) (asserting that as lawyers and judges become more familiar with state constitutions, they may tend to rely less on federal grounds); Robert F. Williams, Methodology Problems in Enforcing State Constitutional Rights, 3 Ga. St. U. L. Rev. 143, 148 (1987) (acknowledging that Georgia court decisions consistently follow those of U.S. Supreme Court in area of individual rights).

\textsuperscript{16} 720 P.2d 808 (Wash. 1986).

\textsuperscript{17} Id. at 811. See supra note 5 for cases discussing the independent analysis of states’ bills of rights.

\textsuperscript{18} The titles of the various provisions of the Washington Constitution were adopted along with the bodies of the various provisions. Thus, unlike statutory titles, which are provided by the code revisor after legislative adoption of the relevant section, constitutional titles are relevant to their interpretation.

\textsuperscript{19} Wash. Const. art. 1, § 12.

\textsuperscript{20} U.S. Const. amend. XIV, § 1.
sion prohibits laws "granting . . . [unequal] privileges and immunities,"\textsuperscript{21} the U.S. Constitution prohibits "deny[ing] . . . equal protection of the laws."\textsuperscript{22}

A comparison of the verbs in the two provisions shows that they are aimed at different mischiefs. The Washington provision is aimed at the mischief of positive favoritism. It prohibits grants of special privileges and immunities that give some individual or few citizens elevated status before the law. The federal provision, on the other hand, is aimed at the mischief of negative discrimination. It prohibits states from denying any person the benefits that are generally available to others under the law.

In one sense the provisions are the same: they both prohibit unequal treatment under the law. Considered in this way, a prohibition against favoritism is just the other side of the coin of a prohibition against discrimination.\textsuperscript{23} In any given case of unequal treatment, there is both discrimination and favoritism. Thus, both provisions may be used by persons who allege that they have received lesser treatment at the hands of the government than others similarly situated.

Despite the fact that the language of both provisions states that unequal treatment is wrong, their different wording suggests that they reach this conclusion for opposite reasons. As noted above, the Equal Protection Clause focuses on the evil of discrimination while the prohibition on special privileges and immunities is more concerned with the evil of favoritism. Thus, one might expect that the state provision would have a harder "bite" where a small class is given a special benefit, with the burden spread among the majority. On the other hand, the Equal Protection Clause would bite harder where majority interests are advanced at the expense of minority interests. The different historical impulses that led to the adoption of each provision both explain and strengthen the significance of their differences.\textsuperscript{24}

\textsuperscript{21} WASH. CONST. art. 1, § 12 (emphasis added).
\textsuperscript{22} U.S. CONST. amend. XIV, § 1 (emphasis added).
\textsuperscript{23} A Massachusetts decision from 1814 contains a passage which illustrates how the equal protection/equal privileges and immunities dichotomy represents two sides—or two ends of a spectrum—of "equality" jurisprudence:

It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances; or that any one should be subjected to losses, damages, suits, or actions, from which all others, under the circumstances, are exempted.

Holden v. James, 11 Mass. 396, 404-05 (1814) (emphasis added). Under the Massachusetts "free and equal" clause, the Massachusetts court invalidated a legislative act that suspended the statute of limitations to authorize an action by a specific plaintiff against the administrator of an estate. \textit{Id.} at 405.

\textsuperscript{24} There unfortunately remains little official "legislative history" on Washington's constitutional prohibition of special privileges and immunities. Neither are the many contemporaneous newspaper articles especially helpful in shedding light on the drafters' intentions regarding this provision. In any case, because a constitution is an expression of the people's will, its words must be interpreted with the meaning they would have had to ordinary voters rather than lawyers and legislators. \textit{See State ex rel. O'Connell v. Slavin,} 452 P.2d 943, 945 (Wash. 1969) (stating that words in constitution must be given common ordinary meaning).
The Reconstruction Amendments to the United States Constitution were enacted because of the post-Civil War concern that former slaves would experience discriminatory treatment by the states and would have their interests trampled by a hostile majority. Thus, the general intent of the Reconstruction Amendments, like the federal Bill of Rights, was to protect individual or minority interests against the tyranny of the majority. The Supreme Court recognized the purpose of the Reconstruction Amendments as early as 1873, when it decided the Slaughter-House Cases, and stated that:

[In the light of . . . events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested: we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. . . .

We do not say that no one else but the negro can share in this protection. But what we do say, and what we wish understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all.

Thus, the court embarked on a course of equal protection jurisprudence that would have serious bite only where one seeking to invoke the provision could analogize her situation to that of blacks in the post-Civil War South.

Prohibitions on special privileges and immunities appear in the constitutions of at least fifteen states. The provisions have quite different historical


27. ALA. Const. art. I, § 22; ARIZ. Const. art. II, § 13; ARK. Const. art. II, § 18; CAL. Const. art. I, § 9(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. See also David Schuman, The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection", 13 VT. L. REV. 221, 223 n.15 (1988) (listing various constitutional provisions). Schuman argues that in addition to those noted, many state constitutions contain "functionally comparable" provisions, such as those prohibiting "special laws," or providing that "[a]ll laws of a general nature shall have uniform operation." He also notes that other states use
roots than the Equal Protection Clause. Washington borrowed the language of its provision from article 1, section 20 of Oregon’s 1857 Constitution. Oregon’s constitutional framers in turn borrowed the language from the 1851 Indiana Constitution. The Oregon language came to Washington’s convention in a draft constitution placed on each delegate’s desk at the commencement of the Olympia convention. The convention’s Committee on the Declaration of Rights altered the Oregon model only by adding the reference to corporations, which reflected the contemporary populist suspicion of the political influence accompanying large concentrations of wealth. It is important to note that the formulation of special privilege and immunity prohibitions considerably preceded the 1868 adoption of the Fourteenth Amendment to the United States Constitution.

State special privileges and immunities prohibitions represent a response to perceived manipulation of lawmaking processes by corporate and other powerful minority interests seeking to advance their interests at the expense of the public. More than they feared majority oppression, Western populists feared the ability of small groups of wealthy and influential persons to obtain the passage of laws that appeared pernicious to the relatively under-

the phrase “privileges and immunities” to prohibit hereditary benefits, or grants of “irrevocable” privileges and immunities. Washington’s constitution contains all such language. Id. at 223-24 n.15.


30. One of the fears behind the passage of the Sherman Antitrust Act in 1890—one year after the adoption of the Washington Constitution—was that private attainment of disproportionate economic power through cartelization could lead to the subversion of liberal republican institutions. This view meshed with late nineteenth century political theory that state favoritism would spark a battle for control of government itself. See James May, Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918, 50 Ohio St. L.J. 257, 288-98 (1989) (discussing belief held by many that economic inequality and state favoritism could both result in subversion of liberal republican institutions).


The persistent theme of the limitations written into state constitutions after the 1840’s was the desire to curb special privilege. The trend began with general or detailed prohibitions on the enactment of “special” and “local” legislation. The related fear, that special favors would be sought under cover, was expressed in requirements that every bill . . . deal with but one subject. The same fear was behind insistence upon many requirements, hopefully designed to insure full publicity and open deliberation of the merits of legislation, through three readings, reference to committee, recording of yeas and nays, and the like.

Real, if naïve, public protest spoke through such provisions; its stimulus was in revealed fraud and corruption in public-land dealings and in the getting and granting of franchises, subsidies, and rate privileges for turnpikes, canals, river improvements, toll bridges, and, of course, especially railroads and street railways.

Id.
represented majority.\textsuperscript{32} Thus, it is not surprising that many state bills of
rights not only protect against majoritarian threats to individual freedom and
security (like those contained in the federal Bill of Rights), but also protect
against laws that serve private interests to the detriment of the majority.\textsuperscript{33}

With reference to Oregon's almost identically worded privileges and
immunities clause,\textsuperscript{34} former Justice Betty Roberts of the Oregon Supreme
Court has noted that:

Article I, section 20, of the Oregon Constitution has been said to be
the "antithesis" of the equal protection clause of the fourteenth
amendment. . . . While the fourteenth amendment forbids curtail-
ment of rights belonging to a particular group or individual, article
I, section 20, prevents the enlargement of rights. . . . The Recon-
struction Congress, which adopted the fourteenth amendment in
1868, was concerned with discrimination against disfavored groups
or individuals, specifically, former slaves. . . . When article I, section
20, was adopted as a part of the Oregon Constitution nine years

\begin{footnotesize}
32. The Washington constitutional convention was noted for its distrust of legislative power
and of the influence of large corporations, primarily railroads. The convention's distrust of the
legislature may have resulted from the fact that the territorial legislature had been notorious for
spending "much of its time granting special acts and privileges."

Railroads were chartered and never built; the actions of inexperienced Territorial offi-
cials were legalized; private laws authorizing the building of bridges, the establishing of
ferries, or the incorporation of companies often with nearly monopolistic powers, were
regularly passed. . . . As this type of legislation predominated before 1867, it is not
surprising that Congress gradually curtailed the right of the Territorial legislatures to
grant private charters and special privileges. So great had these restrictions become by
1887 that Governor Semple reminded the legislature that their powers were confined to
passing only general laws on a long list of enumerated topics.

Wilfred Airey, A History of the Constitution and Government of Washington Territory 208

The practice of "logrolling" appears to have been the means of obtaining special acts and
privileges. \textit{Id.} Logrolling is the "legislative practice of embracing in one bill several distinct
matters, none of which . . . could singly obtain the assent of the legislature, and then procuring its
passage by a combination of the minorities in favor of each of the measures into a majority that
will adopt them all." \textsc{Black's Law Dictionary} 942 (6th ed. 1992).

Logrolling, or "bargain and sale," the policy of "bartering the interests of one section to
secure the adoption of a measure wanted by another," seems to have been a common
practice especially during the political turmoil of the 1860s. . . . By 1864 the abuse of
logrolling had grown steadily worse. It is reported that the legislature of 1862-1863
passed almost no general laws while it enacted 150 private Acts, the majority of them
"exclusive monopolies" for roads, bridges, trails, ferries, and the like, and that "the
whole Democratic strength of the House and Council inaugurated a perfect system of
logrolling for private interests against the general welfare."

Airey, \textit{supra}, at 209-10 (newspaper citations omitted).

33. See \textit{supra} note 27 for citations of state constitutions and bills of rights; see \textit{infra} notes
150-57 and accompanying text for a discussion of the Washington Constitution's protections
against private interests.

34. \textsc{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.").
\end{footnotesize}
earlier, in 1859, the concern of its drafters was with favoritism and the granting of special privileges for a select few.\textsuperscript{35}

In recent years, the Oregon high court has employed a wholly independent analysis of "equal protection" claims under its prohibition on special privileges and immunities.\textsuperscript{36}

The language used in article 1, section 12, as well as the sentiment it expresses, can be found in other original provisions of the Washington Constitution. Article 1, section 8 states that: "No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature."\textsuperscript{37} Article 1, section 28 states that: "No hereditary emoluments, privileges, or powers, shall be granted or conferred in this state."\textsuperscript{38} Article 2, section 28 states, in part: "The legislature is prohibited from enacting any private or special laws . . . [f]or granting corporate powers or privileges."\textsuperscript{39} These are but a few variations on a dominant theme of the Washington Constitution, and other state constitutions adopted around the same time: that laws should be general in application and special interests should not be permitted to obtain privileges or carve out unjustified immunities.\textsuperscript{40} All of these provisions re-

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\textsuperscript{35} \textit{In re Williams}, 653 P.2d 970, 975 (Or. 1982) (citations omitted).

\textsuperscript{36} See Schuman, supra note 27, at 226-27. Under the analysis developed by the Oregon court, the first inquiry is whether the challenged state action implicates something that might be called a "privilege or immunity." See, e.g., City of Salem v. Bruner, 702 P.2d 70, 74 (Or. 1985) (finding privileges and immunities clause triggered whenever person is denied advantage to which she would be entitled but for government interference). A further inquiry is whether the alleged discrimination is against (1) a "true class" (one that existed prior to the passage of the law, such as gender, race, nationality, or residence); (2) a "de jure" class (one created by the law itself, such as opticians, income tax payers, or those disfavored by the prosecutor); or (3) an individual. Schuman, supra note 27, at 230-33. Where a true class is involved the court asks whether the classification is suspect in that it distinguishes on the basis of immutable personal characteristics. \textit{Id.} at 233-37. If the classification is suspect, the court asks whether it is invidious, \textit{i.e.}, reflecting stereotyping or prejudice and not based on a reasonable determination of competence to participate in society. See, e.g., State v. Freeland, 667 P.2d 509, 515 (Or. 1983) (finding individual may challenge unsystematic use of procedure). If the challenge is to a \textit{de jure} classification, the court asks whether the classification works a deliberate and unfair limitation on access to a privilege or immunity. Schuman, supra note 27, at 237-41. The inquiry turns on whether the class is "closed" or "open to anyone to bring himself or herself within the favored class on equal terms." State v. Clark, 630 P.2d 810, 816 (Or.), cert. denied, 454 U.S. 1084 (1981). Where discrimination against an individual is alleged, the inquiry is whether the state action constitutes an ad hoc, haphazard distribution or one governed by consistently applied criteria with some "satisfactory explanation." State v. Edmonson, 630 P.2d 822, 823 (Or. 1981).

\textsuperscript{37} \textsc{Wash. Const.} art. 1, § 8.

\textsuperscript{38} \textit{Id.} art. 1, § 28.

\textsuperscript{39} \textit{Id.} art. 2, § 28, cl. 6.

\textsuperscript{40} See Hurst, supra note 31, at 241-42; Lyman H. Cloe & Sumner Marcus, \textit{Special and Local Legislation}, 24 Ky. L.J. 351, 354-55 (1936) (citing provisions in some state constitutions that require uniformity in legislation and that prevent special legislation). Examples of similar provisions are contained in \textsc{Wash. Const.} art. 7, § 1 ("public purpose" requirements of tax uniformity provision); \textit{id.} art. 8, §§ 5, 7 (prohibition on lending of public credit to private interests); \textit{id.} art. 1, § 16 (eminent domain provisions).
\end{quotation}
reflect a concern about the ability of powerful minorities to obtain benefits at the expense of underrepresented majority interests.41

III. THE FOURTEENTH AMENDMENT EQUAL PROTECTION CLAUSE AND THE RATIONAL BASIS TEST

The federal Equal Protection Clause does not require equal treatment under the law for all persons. Laws necessarily classify persons, and the task of classification is generally the province of the political branches.42 Separation of powers demands that courts be very selective about the types of legislative classifications they rule unconstitutional.43 Certain substantive values about the proper objects of public policy inform the courts' limited interventions under the banner of equal protection.44 In other words, the Supreme Court has interpreted the Equal Protection Clause to place certain kinds of

41. One contemporary school of political thought holds that accommodation among interest groups making deals among themselves to trade off benefits is justified by its facilitation of stability, moderation, and broad satisfaction with the political system. See ROBERT A. DAHL, DILEMMA OF PLURALIST DEMOCRACY: AUTONOMY VERSUS CONTROL 40-53 (1982) (citing four problems of pluralist democracy: stabilizing injustices, deforming civic consciousness, distorting public agenda, and alienating final control over agenda). This is decidedly not the guiding faith of the Washington Constitution. The constitution in many places evinces a philosophy that every provision of law passed by a legislative body should reflect majority preferences.

42. See New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979) (finding classification was rational and related to safety and efficiency); Marshall v. United States, 414 U.S. 417, 428 (1974) (stating congressional classifications may be policy choices that legislature has power to make). See also JOHN H. ELY, DEMOCRACY AND DISTRUST 135-36 (1980) (arguing that those with most votes can maneuver for most advantages for themselves).


44. Without a limitation on permissible legislative goals, the reasonable classification requirement would be meaningless. If any goal were legitimate, then every statute would have to be upheld because its classification would be the most reasonable way to accomplish whatever goal the statute actually accomplishes. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-2 to 16-4, at 1439 (2d ed. 1988) (discussing equal protection requirement that classifications be reasonable in light of legislation's purpose).

Regardless of whether it is uniformly applicable to all persons, a law which has the avowed purpose of "preserving racial integrity" will not survive Fourteenth Amendment equal protection review. See Loving v. Virginia, 388 U.S. 1, 4, 7-11 (1967) (striking down Virginia statute making it felonious for "any white person [to] intermarry with a colored person, or any colored person [to] intermarry with a white person"). The Court found the racial classifications in such statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity of all races." Id. at 8. Likewise, laws passed for the purpose of promoting "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" have also been held to violate equal protection. Craig v. Boren, 429 U.S. 190, 198-99 (1976) (invalidating Oklahoma statute prohibiting sale of 3.2% beer to males under 21 and to females under 18). A bare congressional desire to harm a politically unpopular group is not a sufficient justification for a law denying members of that group otherwise available benefits. See, e.g., United States Dept. of Agric. v. Moreno, 413 U.S. 528, 533-38 (1973) (striking down law excluding from food stamp program households containing one individual unrelated to any other member of household, and in apparent attempt to exclude hippies and hippie communes from the program). Similarly, state action adversely affecting a group cannot be based on the fact that the public holds an irrational fear of the affected class. See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (holding unconstitut-
discriminatory purposes out-of-bounds and it has invalidated laws that employ "means" (i.e., modes of classification) that are not sufficiently connected to constitutionally permissible "ends." 45

The Court has defined the scope of permissible state goals under the Equal Protection Clause with a view toward the purpose and historical context of that amendment. 46 Recognizing the amendment's original purpose of protecting former slaves in the post-Civil War South from discrimination, the Court has analogized and extended the clause's protections to other "discrete and insular minorities" who were the object of irrational discrimination. 47 The theory that it is the courts' duty to apply the Equal Protection Clause to protect groups who cannot protect themselves in the majoritarian decision-making process mirrors the view that it is the courts' role to protect minority interests under the Bill of Rights.

Where there is neither a "suspect classification" implicating discrimination against a "discrete and insular minority" nor an unequal burden on a fundamental interest, the courts' means/ends analysis tends to become an empty repetition of stock phrases on the way to upholding the challenged classification. In the area of economic legislation, virtually no discriminatory purpose is unconstitutional. "Economic legislation"—a blanket term the Court applies to any law implicating neither a suspect classification nor a fundamental right—is reviewed under a highly deferential "rational basis" test. 48 Under the test, a statutory classification that bears a rational relation to a permissible state objective does not violate equal protection. The neces-

45. Tribe, supra note 44, § 16-2, at 1439.
46. See United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (suggesting guidelines for equal protection scrutiny). This footnote is the source of the much-quoted phrase "discrete and insular minorities," which the Court has since used in deciding when "heightened scrutiny" may be appropriate. Id.
47. Id. To guide this analysis, the Supreme Court has developed three levels of "scrutiny" or willingness to intervene in the legislature's choice of classifications—strict, intermediate, and rational basis.

48. See, e.g., Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (finding statute constitutional where there is "an evil at hand for correction" and legislation was rational measure to correct it); Carolene Prods., 304 U.S. at 152 (stating regulatory legislation is not unconstitutional if it is based on any rational basis of legislators).
sary relationship is presumed to exist, unless the plaintiff can prove that the statute could under no conceivable state of facts serve any legitimate state goal identified by the statute itself, the state's attorneys, or the court. Because it is nearly impossible to prove that a statute is not at least "rationally" related to some hypothetical purpose under some conceivable state of facts, in ninety-nine out of one hundred cases judicial review under this test amounts to no review at all.

As if the "any conceivable state of facts" standard of review did not render economic equal protection review toothless enough, the "one step at a time" doctrine adopted by the Supreme Court renders it even more so in the regulatory context. Based on the theory that the political branches are best suited to the task of measuring the different dimensions of evils in a given field of economic activity, and that legislatures should be free to address one phase of a problem at a time, the "one step at a time" doctrine holds that:

The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . . The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Thus, a claim of regulatory underinclusion will fall on deaf ears under federal equal protection analysis.

Challenging a regulatory classification with evidence that a powerful economic group has manipulated the political process to obtain a 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 under federal equal protection analysis. The Supreme Court's willingness to uphold such classifications on any conceivable state of facts, coupled with its unwillingness to question even the most glaring underinclusiveness, prevents litigants from using federal equal protection analysis to challenge almost any classification that is neither "suspect" nor burdensome on a fundamental interest.


50. Only once has the Court struck down economic legislation under this formulation, in a case which was later expressly overruled. Morey v. Doud, 354 U.S. 457, 457 (1957) (striking down Illinois statute excepting money orders of American Express Co. from requirement that any firm selling or issuing money orders in state must secure license and submit to state regulation), overruled by City of New Orleans v. Dukes, 427 U.S. 297, 306 (1976) (per curiam).

51. Williamson, 348 U.S. at 489 (citation omitted).

IV. POLITICAL THEORY UNDERPINNINGS OF EQUAL PROTECTION RATIONAL BASIS REVIEW—AND A BETTER MODEL

The tremendous deference to legislative classification under the rational basis test is illuminated by noting what the United States Supreme Court has not required of legislative classifications under that standard of review. The Court does not require the challenged classification to bear a substantial or even a reasonable relation to the legislation’s purpose—a merely “rational” relationship is enough.53 Moreover, in its search for the necessary rational nexus between the challenged classification and a legitimate state purpose, the Court normally provides itself with the largest possible toolbox of conceivable purposes. The Court does not limit itself even to those purposes suggested by government attorneys in defense of the challenged classification, let alone to those purposes discernible from the statute’s own statement of purpose or legislative history. The Court will often go so far as to hypothesize its own “conceivable state of facts” to enable it to find the constitutionally required nexus between the classification chosen and some permissible state purpose.

The extreme deference to legislative classifications under rational basis review is typically explained by the important and real concern that federal judges are unelected and that they are not the appropriate bodies to determine public policy. While these considerations counsel against unconfined judicial intervention into a legislature’s choice of means, a better answer to why the Supreme Court has so completely retreated from meaningful rational basis review of economic legislation lies in the pluralist view of politics that appears between the lines of the Court’s two deferential tenets of rational basis review discussed above. This optimistic pluralist view from the 1950s, when rational basis review emerged, saw the legislative process as a free marketplace in which representative groups compete for victory, in which good public policy typically wins out, and in which tyranny typically is avoided.54

This pluralist view holds that legislation is nothing more—nor should we hope for it to be more—than the product of compromises among various interest groups.55 Thus, the court recognizes that highly general goal statements are at times necessary in order to obtain compromise between interest

53. See supra notes 50-52 and accompanying text for a discussion of the lack of scrutiny under rational basis review.

54. Wilfred E. Binkley & Malcolm C. Moos, A Grammar of American Politics 7-8 (1950). See also Dahl, supra note 41, at 40-43 (finding pluralist democracy desirable because of mutual control, and suitable to democracy on large scale). An early pluralist theorist argued that groups have a degree of power proportionate to their numbers, and that the larger, more general interest would therefore prevail over the smaller special interest. Arthur F. Bentley, The Process of Government 453-59 (Harvard Univ. Press ed. 1967) (1908).

The legislative product will likely not be “rational” in the sense that every aspect of the law is related to an overriding theme, purpose, or goal, or that the means are the fairest or most efficient available. Sometimes it will be necessary to grant a powerful group an exemption from an otherwise generally applicable regulation in order to go forward with the regulation at all. Judicial intervention would upset the important process of political compromise.

Further, federal courts have taken their constitutional task to be that of protecting the rights of disfavored minorities. Claims that a particular law is nothing more than a naked interest-group transfer, which carries an implication of harm to majority interests, have not proven particularly availing under equal protection analysis. The Supreme Court seems to feel that the Constitution assumes that the political process adequately protects majority preferences. The state constitutional concept of “public purpose” review in the interest of underrepresented majority interests is foreign to federal constitutional dialogue.

More recent pluralist theory, however, is not so optimistic about the decisions produced in the interest group marketplace. “Public choice theory” holds that demand for legislative action is distorted by certain patterns of interest group organization. One result, in the view of public choice theorists, is a surplus of special interest legislation.

56. See Clover Leaf Creamery, 449 U.S. at 469. In Clover Leaf, Justice Brennan wrote that: The [contrary evidence] is easily understood, in context, as economic defense of an Act genuinely proposed for environmental reasons. We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry. Id. at 463 n.7.

57. See Frank H. Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 552 (1983) (arguing judicial construction should be used when statute clearly applies or judges are required to give their own solutions); Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 290 (1982) (arguing that economic theory of statutory and constitutional interpretation assumes courts are agents of enacting legislature). Easterbrook and Posner both argue that rather than insisting on legislative deliberation, courts should uphold legislative bargains. Their arguments focus on the U.S. Constitution.

58. Professor Cass Sunstein contends that there is a “fundamental constitutional norm against naked interest-group transfers. That norm proscribes legislative efforts to transfer resources from one group to another simply because of political power.” Cass R. Sunstein, After the Rights Revolution 139 (1990). Sunstein admits, however, that this norm is seldom applied, since courts are “almost always finding a public-regarding justification for legislation.” Id. Indeed, if such a norm did not exist, Justice Douglas would not have felt compelled in the classic Williamson case to hypothesize a public health objective that might have been served by the classification contained in the challenged law. Williamson v. Lee Optical, 348 U.S. 483, 487 (1955). If no such norm existed, he could simply have recognized that a private transfer had taken place and upheld the statute nonetheless.

The public choice view starts from the premise that organized groups provide useful information for the political system and tend to frame issues more clearly and precisely for legislators, thus helping effectuate legislative reform. These organized groups almost invariably dominate at the expense of unorganized groups.

According to public choice theory, the problem is that more widely shared interests are less likely to obtain organized representation than narrowly concentrated interests. A "free-rider" problem causes interest group representation to disintegrate as interest group constituency grows larger and the harms to be avoided or benefits to be sought grow more diffuse. One commentator, Murray Edelman, illustrates the impact of this phenomenon by dividing interest groups into two categories: Pattern A is highly organized, relatively small in membership, and interested in tangible resources; Pattern B is disorganized, possessing inadequate information, having large membership, and susceptible to symbolic reassurances. Pattern A groups will monopolize the available tangible benefits through the manipulation of the distribution of symbolic reassurances to Pattern B groups.

Another problem endemic to republican lawmaking is that while a legislature will tend to move toward restraint where the costs and benefits of a particular legislative initiative are widely distributed, it will tend to grant subsidies and power, i.e., privileges and immunities, to organized beneficiaries where benefits are concentrated and costs are widely dispersed. Unorgan-


60. See generally HAYES, supra note 59; see also MURRAY J. EDELMAN, THE SYMBOLIC USES OF POLITICS 22-43 (1985) (discussing benefits that organized groups receive in contrast to large, unorganized groups' lack of bargaining power).

61. EDELMAN, supra note 60, at 22-43.

62. Id. at 35-41.

63. Id.

ized interest groups such as taxpayers, consumers, or potential beneficiaries of protective regulations, bear the costs of these special privileges and immunities. Thus, under some very identifiable conditions, interests may prevail that would not have if majority preferences were given full accounting.

The result of this "political market imperfection," according to public choice theorists, is that

[t]he public sector will tend to spend too much money on statutes that concentrate benefits on special interests while distributing their costs to the general, often unsuspecting, public. There is an obvious tendency to logroll in a specific benefit-general taxation scheme such as ours, because legislators can please important groups with subsidies, without seeming responsible for the overspending that results from too many subsidies.65

The view that there is a tendency among lawmakers to produce legislation effecting a transfer from inherently unorganized to organized interests underlies state constitutional prohibitions on special privileges and immunities and many other provisions of state constitutions. Many of these views are not reflected in contemporary equal protection review.

V. WASHINGTON CASES ON ARTICLE 1, SECTION 12 AND THE FEDERAL EQUAL PROTECTION CLAUSE

A. Early Tendency to Combine Article 1, Section 12 and Equal Protection Analysis

The Washington Supreme Court early recognized the similarity between the state prohibition on special privileges and immunities and the Equal Protection Clause of the Fourteenth Amendment.66 Indeed, the fact that both provisions are invoked by persons who challenge laws that place them in a worse position than someone similarly situated67 led the court to analyze the two provisions together where litigants cited both as the grounds for constitutional challenge of a particular classification.68

While recognizing the similarity of the provisions, the court also recognized their differences. The anti-favoritism thrust of the state provision put an arrow in the quiver of those challenging statutory classifications that federal equal protection analysis, with its focus on invidious discrimination, did

65. WILLIAM N. ESKERIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 57 (1995). "Logrolling" refers to the practice of incorporating into one piece of legislation several distinct matters—which probably could not pass in the legislature on their own—and then arranging for their passage by combining support in favor of each of the measures separately into a majority consensus that adopts them all. See supra note 32 for further discussion of logrolling practices.
66. State v. Hart, 217 P. 45, 47 (Wash. 1923) (stating for the first time that Fourteenth Amendment's Equal Protection Clause and Washington Constitution's article 1, § 12, are substantially identical).
67. See Griffiths v. State, 183 P.2d 821, 825 (Wash. 1947) (holding that challenger of statute must be member of injured class to have standing).
68. Hart, 217 P. at 47.
not alone provide. While the court did not bother to sort out the subtleties of where federal equal protection left off and the prohibition on special privileges and immunities took over, its verbal formulae and some of the decisions it reached reveal that for many decades it applied a “double-barreled” analysis with broader reach than pure federal equal protection analysis.

Some early decisions involving challenges to legislative classifications based on both the equal protection and special privileges and immunities clauses analyzed the provisions separately. In several other cases, the court examined the constitutionality of ordinances and statutes under article 1, section 12, and often invalidated them without so much as a mention of the possible applicability of the Equal Protection Clause of the Fourteenth Amendment.

One area of analysis under article 1, section 12 that had nothing to do with federal equal protection analysis emerged in challenges to municipal franchise agreements with public utilities. In a number of early cases, the court held that article 1, section 12 voided any contract between a local government and a public utility company purporting to prevent the city from providing the same service as the utility company or hiring another company to provide the same service. To do so would be to grant a special “privilege” in the nature of a monopoly or, alternatively, an “immunity” from competition.

69. See infra notes 74-78 and accompanying text for a discussion of the combined state and federal constitutional analysis adopted by the Washington Supreme Court.

70. State v. Carey, 30 P. 729 (Wash. 1892). Carey upheld a statute providing that no person may be licensed to practice medicine except after examination by the state medical examining board appointed by the governor. Id. at 731. The court applied a separate, though brief, analysis of article 1, § 12 of the Washington Constitution and of the Equal Protection Clause of the Fourteenth Amendment. Id. at 729-31. The court made no suggestion that the state and federal provisions were equivalent.

71. See, e.g., Alton V. Phillips Co. v. State, 396 P.2d 537, 539-40 (Wash. 1964) (citing combined § 12 and equal protection formulation, but ultimately deciding on § 12 alone); Cotten v. Wilson, 178 P.2d 287, 290 (Wash. 1947) (deciding legislation’s constitutionality under § 12); City of Seattle v. Rogers, 106 P.2d 598, 600-01 (Wash. 1940) (holding charity campaign ordinance which exempted one charity from license fees discriminatory and unconstitutional); Pearson v. City of Seattle, 90 P.2d 1020, 1024 (Wash. 1939) (declaring revenue tax ordinance invalid as discriminatory under § 12); Verino v. Hickey, 237 P. 5, 6-7 (Wash. 1925) (holding statute unconstitutional under § 12); State v. W.W. Robinson Co., 146 P. 628, 629 (Wash. 1915) (holding city ordinance invalid under § 12); Ex parte Camp, 80 P. 547, 549 (Wash. 1905); Nathan v. Spokane County, 76 P. 521, 523, 525 (Wash. 1904) (holding statute violates numerous articles of Washington Constitution).

72. See, e.g., North Springs Water Co. v. City of Tacoma, 58 P. 773, 775 (Wash. 1899) (holding franchise agreement between water utility and city council did not prevent city from building its own water works).

73. See, e.g., State v. City of Spokane, 63 P. 1116, 1118 (Wash. 1901) (utility agreement granting an exclusive privilege would be void); North Springs, 58 P. at 779 (stating contract at issue was not intended to be exclusive and thus did not grant monopoly to water utility). An alternative basis for this conclusion might also be based on article 1, § 8 which provides that “[n]o law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature." Wash. Const. art. 1, § 8. However, it may have been thought the term “legislature” did not include a city council, or that a utility contract was not a “law." It is interesting to note
Beginning with *State ex rel. Bacich v. Huse*, the court began to draw on both federal equal protection and state special privileges and immunities clauses, without clearly distinguishing where the coverage of one left off and the other began. In a formulation reflecting the double-barreled reach of the court's analysis, the *Huse* court stated that:

The aim and purpose of the special privileges and immunities provision of article 1, section 12, of the State Constitution and of the equal protection clause of the Fourteenth Amendment of the Federal Constitution is to secure equality of treatment to all persons, *without undue favor on the one hand or hostile discrimination on the other.*

This combined application of the state and federal provisions prohibited both “undue favor,” drawing from article 1, section 12 and “hostile discrimination,” drawing from the Fourteenth Amendment.

It is noteworthy both that the *Huse* court did not cite to federal court precedent and that the court did use the phrase “special privilege” when it condemned the challenged classification. Moreover, a concurring opinion noted that the challenged law “undoubtedly contravenes article 1, § 12, of our State Constitution, which is the only question with which we should concern ourselves. I doubt whether relator is in any way denied any rights under the Fourteenth Amendment to the Federal Constitution.” Nonetheless, *Huse* initiated a practice of a combined equal protection and article 1, section 12 analysis that cast a demonstrably longer shadow than federal equal protection analysis, with its relatively narrow focus on “hostile discrimination.”

B. “Reasonable Ground” Means Review of Regulatory Classifications Conferring Special Privileges or Immunities

The *Huse* case is one decision in a long and well-elaborated line of authority in which the Washington Supreme Court has applied a cautiously interventionist, “reasonable ground” review to regulatory classifications challenged under article 1, section 12. This doctrine has never been overruled, but appears to have been largely overlooked since the late 1960s. It

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75. *Id.* at 1104 (emphasis added).

76. *Id.* (interpreting provisions to require legislation to apply equally to all within class and to have reasonable ground for distinguishing those within class from those not in class).

77. *Id.*

78. *Id.* at 1107 (Holcomb, J., concurring).

79. *See* *Lone Star Cement Corp. v. City of Seattle*, 429 P.2d 909, 912-14 (Wash. 1967) (applying *Huse* test to strike down ordinance on both equal protection and art. 1, § 12 grounds); *Alton V. Phillips Co. v. State*, 396 P.2d 537, 539-40 (Wash. 1964) (striking down waiver of statute
is important to note that, under the doctrine, the court generally deferred to the legislature's choice of regulatory "ends," heeding the rule that "every reasonable presumption is in favor of the constitutionality of a law or ordinance." 80 Nonetheless, the court has applied a relatively stringent "reasonable ground" analysis to challenged regulatory classifications. 81 "Reasonable ground" review assured that challenged regulatory classifications—especially exemptions from regulations—rested on some ground of difference germane to the apparent or asserted regulatory purpose of the legislation rather than merely on the political power of the class enjoying the alleged privilege or immunity under the regulation. 82

Although the court has generally deferred to the legislature's choice of legislative ends, article 1, section 12 clearly placed certain legislative ends out of bounds, in addition to those prohibited by federal equal protection. 83 Where the challenger was able to convince the court that a regulatory classification was nothing more than a naked special-interest transfer based only on political power (i.e., a grant of special privilege or immunity), the court struck down the statute or ordinance on the basis that it served an unconstitutional purpose. 84 Where the only plausible objective sought by the regulation was one specifically prohibited by article 1, section 12 reasonable ground "means" review was unnecessary since there was no permissible end upon which the classification could be reasonably grounded. 85

Judicial intervention under article 1, section 12 was confined by a number of considerations. Chief among them was that the court was more willing to accede to arguments that a classification served permissible ends where the classification challenged was part of a legislative regime embodying complex and ambiguous policy choices. Examples of such regulatory laws

of limitations to permit named plaintiff to sue state, based entirely on art. 1, § 12 grounds, using Huse "reasonable ground" test. The Huse "reasonable ground" formulation has never been overruled, and although it has not been utilized frequently since the 1960s, it was used as recently as 1984 in United Parcel Serv., Inc. v. State Dep't of Revenue, 687 P.2d 186, 194 (Wash. 1984) (stating that one requirement that legislative classifications must meet is that "there must be reasonable grounds for distinguishing those who fall within the class and those who do not"); see also Sonitrol Northwest, Inc. v. City of Seattle, 528 P.2d 474, 476 (Wash. 1974) (using federal equal protection standard of any conceivable facts, despite citation of Huse "reasonable ground" test). Sonitrol and United Parcel can be distinguished from the Huse line of cases by the fact that both dealt with classifications for tax purposes.

80. City of Seattle v. Rogers, 106 P.2d 598, 600 (Wash. 1940).
81. See Huse, 59 P.2d at 1105 (reviewing classifications in ordinance for real and reasonable justification).
82. See id. (stating classification must relate to purpose of law and cannot be based on personal or fortuitous characteristics).
83. See infra notes 113, 150-57 and accompanying text for a discussion of the Washington Constitution's limitations on the legislature.
85. Ralph v. City of Wenatchee, 209 P.2d 270, 272-73 (Wash. 1949) (stating constitution prohibits exercise of police power which prohibits particular class from engaging in lawful business).
include unemployment compensation and a comprehensive state unfair business practices act. In short, the court was properly deferential where its factfinding ability was no match for that of a legislative body. On the other hand, the court did not hide from its duty under article 1, section 12 where it was at least as able as the legislative body to perceive the import of the competing interests involved in a given regulation.

Another limit on the court's cautious intervention under article 1, section 12 is that the judiciary often deferred to taxation and appropriation legislation, but not to regulatory legislation. The court has consistently given greater deference to legislative classifications contained in tax laws than to classifications contained in regulatory laws.

86. State v. Kitsap County Bank, 117 P.2d 228 (Wash. 1941).
88. Consider the difference in scrutiny applied in two cases decided in the same year. Compare id. (stating legislature has wide discretion in determining public interest when adopting economic policies) with City of Seattle v. Rogers, 106 P.2d 598, 600-01 (Wash. 1940) (stating that court must give charity campaign ordinance "every reasonable presumption" in favor of constitutionality).

Another justification for deference, based on public choice theory, is that such laws distribute costs and benefits widely and therefore do not fit the model of "interest group" or "client" politics in which majority interests are likely to be underrepresented. See Wilson, supra note 59, at 366-70 (stating that "interest group" and "client" politics occur when costs and benefits are narrowly concentrated).
89. Gerald Gunther has advocated such an approach to rational relation review under the Equal Protection Clause. Gunther argues that:

[When the Court cannot confidently assess whether the means contribute to the end because data are exceedingly technical and complex; or when a "myriad" of claimants upon the legislature permits a wide range of responses, with any one as "reasonable" an allocation decision as any other. But the rationality of means used in solving many "economic and social" problems is a judicially manageable question; and the model would have the Court "apply a modest but real version of the rational-basis standard in economic fields that are not intrinsically inaccessible to the judicial power."


90. See, e.g., McKnight v. Hodge, 104 P. 504, 507 (Wash. 1909) (deferring to legislature in holding that statute requiring peddlers who sell non-agricultural products to obtain business license is not violation of privileges and immunities clause of Washington Constitution). The distinction in the degree of deference to tax, as opposed to regulatory, classifications was noted at length in Hemphill v. Washington State Tax Comm'n, 400 P.2d 297 (Wash. 1965), appeal dismissed, 383 U.S. 103 (1966). In Hemphill, the court stated that in matters of taxation, there is a strong presumption that a challenged statute is constitutional, and that the legislature needs only a reasonable basis for classifications set forth in tax statutes. Id. at 298-300. The distinction is best elaborated in Texas Co. v. Cohn, 112 P.2d 522, 529 (Wash. 1941), in which the court surveyed several cases that gave deference to the legislature in holding several tax statutes constitutional.

The court in Texas Co. explained the basis for the distinction as follows:

The familiar rule that legislative classification, in order to come within constitutional limitations, must bear some reasonable relation to the object of the law in which it appears, originated in cases construing regulatory laws, where it has a natural and logical application. A statute prescribing a regulation in the exercise of the police power has a definite object which concerns the public health, safety, morals, or the like.
Likewise, the court recognized that redistributive social legislation was not an appropriate candidate for the brand of intervention applied to regulations. The reason may have been the recognition that it was the influence of powerful minorities (rather than disfavored “discrete and insular minorities”) that was the concern of article 1, section 12. On this theory, social legislation does not raise “private transfer” concerns in the way that regulatory classifications among economic competitors do, because social legislation arguably results in gains in aggregate social welfare by serving a public purpose rather than merely effecting a private transfer. If nothing else, the complexity of such issues counsels against intervention under article 1, section 12.

The cases in which the court has been willing to intervene can usually be placed in either the “privilege” or the “immunity” categories suggested by the language of article 1, section 12. In application, the line between “privilege” cases and “immunity” cases is blurred, but the distinction helps illuminate patterns in the court’s decisions.

If such a statute is not universal in its application, but applies only to a particular class, then, in order to satisfy constitutional requirements, the regulation of those within the class, as distinguished from those excluded therefrom, must tend to accomplish the object of the statute. When the rule is applied to a tax law, however, it should be done with due appreciation of the fact that usually the principal object, and very often the sole object of such a law, is to raise revenue for the support of the taxing government. Thus, the state may constitutionally tax one class and exempt other classes if the classification reasonably tends, in some lawful way, to facilitate the raising of revenue.

By way of illustration, let us suppose that a state enacts a law solely as a regulatory health measure, prohibiting, or substantially restricting, the sale of a butter substitute. The classification inherent in such a law would be invalid if it did not bear some reasonable relation to the preservation or advancement of the public health, the object of the law; in other words, it must appear that the butter substitute is, in some way, unwholesome or deleterious to health. On the other hand, if the state, as a revenue measure, should place a tax upon a butter substitute without laying a corresponding tax on butter, such a classification may be sustained as constitutional on the sole ground that there is a substantial difference between the two commodities . . . even though it be conceded . . . that the particular butter substitute is a pure, nutritious, and wholesome food.

Id. at 529-30.


92. Larson v. City of Shelton, 224 P.2d 1067 (Wash. 1950). In Larson, the court struck down an ordinance exempting veterans from a very sizable peddler’s license fee as conferring a privilege or immunity in contravention of article 1, § 12. Id. at 1072. The court suggested that such an exemption might have been permissible if it had been qualified further by criteria of disability or indigence. Id. at 1071. That this is consistent with the intent of the framers and with the political philosophy underlying the Washington Constitution is buttressed by the exemption for the “necessary support of the poor and infirm” from the general prohibition of gifts of public funds. Wash. Const. art. 8, § 7.

93. See Dandridge v. Williams, 397 U.S. 471 (1970), in which the Court stated that: [Т]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this court. . . . [T]he Constitution does not empower this court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

Id. at 487.
The privilege category of cases condemns exemptions from regulatory laws to the extent that the exemptions have the effect of benefitting, or granting a “privilege” to the recipient vis-à-vis its economic competitors. In the “privilege” cases the court is motivated by a concern with the practical, anti-competitive consequences of a regulatory classification, and with the impact that the classification will have on consumer welfare as well as the interests of those in competition with the benefitted class. The concern in this line of cases is with statutes and ordinances that foster monopolies. This is consistent with the way in which state “equal protection” doctrine is used in other states to invalidate classifications affecting a private transfer by raising entry barriers, or working a severe deprivation on one of two market competitors and thus tending to create monopolies.

The second group of cases condemns laws granting immunity from otherwise generally applicable burdens, regardless of whether the exemption has any consequential anti-competitive effects. Challenges of this description seem to have been most successful where the recipient of the immunity was designated in the challenged law with relative specificity, thus raising the inference of powerful minority influence not necessarily justifiable under majoritarian preferences. The doctrine under these cases bears a resemblance to the state constitutional provisions prohibiting special and local legislation.

1. “Privilege” Cases

In 1905, the Washington Supreme Court, in Ex parte Camp, struck down a Spokane ordinance that prohibited the peddling of fruits, vegetables, butter, eggs, and other produce within the “fire limits” of Spokane because it conflicted with article 1, section 12. A peddler convicted under the ordinance challenged its exemption of farmers who disposed of their own produce.

94. For a forceful articulation of this doctrine, see City of Seattle v. Dencker, 108 P. 1086, 1088 (Wash. 1910), in which the court invalidated a city ordinance providing for considerable license taxation of vending machines, but not on shops selling the same items. The city argued that the basis for the distinction was that a cigar vending machine could be operated for less money than a retail cigar store could be equipped and operated, and implied that the machines represented a competitive threat to the retail shops. Id. at 1090. Although the Dencker court never made reference to Washington’s anti-monopoly provision, it certainly could have done so to buttress its reasoning under these cases. “Monopolies and trusts shall never be allowed in this state.” Wash. Const. art. 12, § 22.

95. See, e.g., In re Certificate of Need for Aston Park Hosp., Inc., 193 S.E.2d 729, 735-36 (N.C. 1973) (taking into account constitutional provision prohibiting grants of “exclusive privileges” in invalidation of state statute on hospital certificates of need). Numerous such cases are collected in Developments in the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1463-93 (1982). The authors make the point that “[s]tate courts have protected consumers and potential entrants by invalidating price-fixing regulations, barriers to entry into professions and businesses, and statutes limiting the torts liability of professional groups.” Id. at 1488 n.157.

97. 80 P. 547 (Wash. 1905).
98. Id. at 548-49.
The court found that although the city was authorized by its charter to regulate or even to prohibit peddling as a nuisance, the distinction "between peddling by the farmer or nurseryman and peddling by the purchaser from the farmer or nurseryman" was arbitrary and not a proper basis for classification. The court noted that "[o]ne class is permitted to indulge in the nuisance and others are unconditionally prohibited." The court's analysis demonstrates that it recognized the requirement that a classification within a regulatory ordinance must be germane to the lawful purpose of that ordinance. The court quoted language from a similar Minnesota decision, stating that: "It cannot be held, on any sound principle, that peddling may not become a nuisance as well when the peddler or his employer has manufactured the wares . . . as when someone else has manufactured them." The Washington court concluded that "the classification made by the ordinance grants special privileges, in violation of section 12, art. 1, of the state constitution." The Fourteenth Amendment Equal Protection Clause was not mentioned, and the court cited only to cases decided in other states under similar constitutional provisions.

Presumably, the court left open the possibility of an ordinance that would require a license for any peddling, and set criteria for obtaining that license that were more germane to whether or not the peddler would present a community nuisance. Camp showed a heightened degree of "scrutiny" of a classification under article 1, section 12 where it appeared to the court that a private transfer was effected by a regulatory classification. Specifically, the court was skeptical of the relevance of the classification to the ordinance's nuisance abatement purpose, because it looked as though farmers had obtained for themselves, through the political process, the privilege of peddling their produce without any competition from retail peddlers.

The principles implicit in Camp became more explicit in the Huse case mentioned previously. The court in Huse considered a challenge to a successful 1934 initiative prohibiting fishing in certain waters except by hook and line. The initiative contained an exception for licensed operators of gill nets. The problem, from a constitutional standpoint, was that the licenses were available only to persons, corporations, or firms who held a gill net license in either 1932 or 1933. The classification was challenged under ar-

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99. Id. at 549.
100. Id.
101. Id. at 548.
102. Id. at 549.
104. Id. at 1102.
106. Id.
article 1, section 12 and the Equal Protection Clause of the Fourteenth Amendment.107

The court first deduced the objective of the statute under the article 1, section 12 “reasonable ground,” means/ends test for which Huse is frequently cited.108 The court determined, apparently by examining its language, that the statute’s objective was to conserve fish.109 The state argued that a secondary purpose of the law was to avoid depriving people of their livelihood if their “sole means of livelihood was gill netting.”110

After noting that “the state holds title to the fish within its waters in trust for all its people,”111 the court rejected the state’s purported secondary purpose. Apparently concluding that such a private transfer under the aegis of a regulatory statute would be unconstitutional as a special privilege, the court stated that the statute “makes a gratuitous selection of individuals who shall enjoy the use of common property to the exclusion of all others.”112 Thus, the court was unwilling to ascribe to the initiative a purpose of transferring public largesse to private individuals and corporations by way of a regulatory statute.

The court cast a more doubting eye upon whether voters had such an intention in passing the initiative, because the law caused an allocation of a type of wealth which was otherwise held in trust for the public. The court’s skepticism seems justified on the argument that voters who wanted to achieve the conservation objective may have felt bound to accept, or may simply have been unaware of, the ancillary private transfer effectuated by the challenged classification. Given the choice, a majority of voters might have preferred a conservation measure without the private transfer.113

Having deduced the permissible objective of the statute, the Huse court next analyzed whether the challenged classification was germane to, or reasonably grounded in, those recognized objectives. While “the Legislature has a wide measure of discretion,”114 classifications “must rest on real and sub-

108. Id. at 1104.
109. Id.
110. Id.
111. Id.
112. Id.
113. The Washington Supreme Court has defined logrolling as the practice of incorporating several distinct issues in one bill in hopes of legislative assent where the issues would not pass if contained in separate bills. Robison v. Dwyer, 364 P.2d 521, 523-24 (Wash. 1961). Concerns about logrolling are at the root of many of the constitutional controls on legislative procedure, including the single subject, scope-of-the-title provision: “Bill to Contain One Subject. No bill shall embrace more than one subject, and that shall be expressed in the title.” WASH. CONST. art. 2, § 19. See Flanders v. Morris, 558 P.2d 769, 772 (Wash. 1977) (purposes of provision are twofold: (1) to prevent legislation from being furthered by incorporating it with other, more necessary, legislation; (2) to assure that legislature and public are aware of content of proposed laws); State ex rel. Cole v. New Whatcom, 27 P. 1020, 1022 (Wash. 1891) (stating that objective of provision is to prevent surreptitious legislation in matters not relevant to declared object of act as expressed in its title).
stational differences bearing a natural, reasonable, and just relation to the subject-matter of the act in respect to which the classification is made. The distinctions giving rise to the classification must be germane to the purposes contemplated by the particular law." In other words, there must be a reasonable fit between the non-private-transfer end chosen by the legislature and the means, or classification, chosen to reach that end.

Applying the reasonable ground test, the court found the distinction between the 1932 and 1933 license holders and others who wished to obtain the privilege of a gill net license to be without "natural, reasonable, or just relation to the subject matter of the act"—i.e., the conservation of fish.

If conservation be the end sought, it is not promoted by selecting a particular class of persons on an arbitrary basis and conferring special privileges on them and denying the same privileges to all others. Concededly, regulations might be prescribed which would tend to accomplish the desired result. But such regulations should not only apply to all persons equally, but should be of such nature as that all persons would at least have an equal chance to conform thereto. The provisions of the present act draw a line and erect a barrier which prevent all persons, except a chosen few, from ever crossing them, or from ever qualifying themselves for the privilege within the dispensation of the state.

Allowing only those persons who already held licenses in the two designated years to obtain later licenses arguably may have been an effective way to carry out conservation, and one which a court almost certainly would accept under current "conceivable rational basis" review. However, since the initiative undeniably worked a private transfer from potential market entrants to established market participants, the court increased its scrutiny and found the classification irrelevant to the state's legitimate conservation purpose.

The general principle to be drawn from Huse is that the court will assume only those purposes of a regulation which do not effect a private transfer, i.e., grant a special privilege or immunity. Assuming only the non-private transfer purposes, the court will uphold challenged classifications only if they are germane to the lawful regulatory purpose.

The state might have achieved its objectives without contravening article 1, section 12 by imposing fishing restrictions in a neutral manner without favoritism, and simultaneously providing financial relief to displaced gill netters. The court has recognized on occasion that "the legislature, as the keeper of the public conscience, may grant relief to specific individuals with-

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115. Id. at 1105.
116. Id.
117. Id.
118. See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 176-77 (1980) (upholding statute remarkably analogous to that struck down in Huse). In an effort to save money by retroactively revoking accrual of railroad retirement system benefits, the statute in Fritz mandated that workers who were not yet retired, but had already qualified for railroad and Social Security benefits, could only receive such benefits if they had performed railroad work in 1974. Id. at 171.
out violating the special privileges and immunities provision of our state constitution." The reason seems to be that a grant of money for relief is neither a privilege nor an immunity under law. Moreover, the possibility of anti-majoritarian logrolling is lessened where the transfer is achieved overtly through a separate appropriation bill rather than under the aegis of a regulatory law.

_Ralph v. City of Wenatchee_, 120 decided in 1949, is an example of the court's analysis where the only end asserted in defense of an ordinance was one that is impermissible under article 1, section 12—that is, where the legislature had no intention other than granting a special privilege. The _Ralph_ court struck down sections of an ordinance that (1) required photographer license fees only of those photographers who were non-residents of Wenatchee, and (2) prohibited sales of photographic services in public places or door-to-door without prohibiting other forms of itinerant sales. 121 The court in _Ralph_ struck down the discriminatory license fee provision of the ordinance with little discussion, stating simply that "by requiring license fees of those photographers who are non-residents of Wenatchee only, [the ordinance] discriminates unreasonably against them" in violation of article 1, section 12 and the Equal Protection Clause. 122

As to the second portion of the ordinance, prohibiting itinerant sales of photographic services, the court focused more on the legitimacy of the ends chosen by the city than on the germaneness of the classification to any purported regulatory purpose. The court identified from "the testimony in this case and from a study of the ordinance itself" that the challenged portions were "passed with the primary purpose of protecting local photographers from lawful competition, and [were] thereby designed to serve private interests in contravention of common rights." 123 The court adopted the proposition that "[o]rdinances operating to restrain competition and tending to create monopolies or confer exclusive privileges are generally condemned." 124

The court applied a type of reverse means/ends review to show that no permissible end was sought, rather than testing whether the classification served a given permissible end.

There seems no reason to believe that the householder or business man would be more annoyed . . . by the appearance of an itinerant photographer than by that of any other salesman. Therefore, the reasoning fortifying the conclusion that all peddling is a nuisance.

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119. Alton V. Phillips Co. v. State, 396 P.2d 537, 540 (Wash. 1964). See State ex rel. Govan v. Clausen, 183 P. 115, 119 (Wash. 1919) (holding that appropriations act which granted payments to petitioners for services done on behalf of state was constitutional); see also State ex rel. Lister v. Clausen, 183 P. 120, 120 (Wash. 1919) (affirming reasoning of Govan in reference to constitutionality of appropriations laws).
120. 209 P.2d 270 (Wash. 1949).
121. Id. at 272-73.
122. Id. at 272.
123. Id. at 273.
124. Id. at 272-73.
which a municipality may forbid, seems inapplicable to a case where an attempt has been made to prohibit the activities of but one class of itinerants, leaving others to ply their trade without restriction.\textsuperscript{125} Because the only objective plausibly served by the ordinance was one specifically prohibited under a regulatory law by article 1, section 12, the court never reached the question of whether the classification was "reasonably grounded" on any purported reasonable purpose.\textsuperscript{126}

Instead of proceeding from the point that the classification was not suited to any purpose other than a private transfer, the court could have proceeded in the same way as the \textit{Huse} court and presumed instead a non-private transfer purpose such as that of abating the nuisance of itinerant sales. The court might then have concluded that the classification between photographers and other types of itinerant salesmen was not germane to the purpose of abating the nuisance of itinerant sales, and that it therefore failed the "reasonable ground" test.\textsuperscript{127}

2. "Immunity" Cases

The immunity cases are the clearest evidence of article 1, section 12's special repugnance toward positive favoritism. They demonstrate that sparing an individual or a class from a generally applicable regulatory burden is offensive to state constitutional values even where no private competitive benefits necessarily flow from that exemption. These cases clearly contrast with the "one step at a time" doctrine of federal equal protection which permits the court to ignore evidence of naked interest group transfers by stating

\textsuperscript{125} \textit{Id.} at 273.

\textsuperscript{126} The court reached a similar result in City of Seattle v. Dencker, 108 P. 1086 (Wash. 1910). The \textit{Dencker} court struck down, under article 1, § 12, a Seattle licensing fee for vending machines on the ground that "there is no claim that the business discriminated against here affects in any way the public morals or the business interests of the community, except as it affects the interest of others engaged in the same business, but purely in the way of competition." \textit{Id.} at 1088. The court noted that "the purpose, if it had any, was to benefit the regular retail cigar merchants by suppressing a business of the same kind, but differing simply in the mode of delivery of the cigars; or, in other words, to prevent honest competition in the cigar trade." \textit{Id.} Apparently no non-private transfer purpose was urged on the court and the court refused to hypothetically one against which it might test the germaneness of the classification.

Thus, as commentators have suggested with regard to equal protection analysis, if there is a close connection between the classification and the public end, the court may be persuaded that the legitimate end is at work. If, as in these cases, there is no such connection, there is reason to suspect that the asserted legitimate end is a fraud. See Ely, \textit{supra} note 42, at 145-48 (reviewing strict scrutiny suspect classification in light of legislative goals and functions of particular statutes); Cass R. Sunstein, \textit{Naked Preferences and the Constitution}, 84 COLUM. L. REV. 1689, 1713 (1984) (stating that classification under "rational review" serves as enforcement of weak prohibition against favoring groups which have gained significant political power, by basing goals of legislation on plausible public values).

\textsuperscript{127} This seems to have been the court's approach in Larson v. City of Shelton, 224 P.2d 1067 (Wash. 1950). In \textit{Larson}, the court invalidated an ordinance exempting veterans from licensing and bonding requirements for peddling, on the ground that the distinction between veterans and others was wholly arbitrary in relation to the object of protecting the public from fraudulent dealings with peddlers. \textit{Id.} at 1070-72.
that the legislature may "select one phase of one field and apply a remedy there, neglecting the others."\(^{128}\)

The facts of City of Seattle v. Rogers\(^ {129}\) present this principle with particular clarity. In Rogers, the court considered a challenge to an ordinance that required any business or individual being compensated for soliciting contributions for charities to obtain a costly license. However, a proviso in the final sentence of the ordinance stated: "The provisions of this ordinance shall not apply to the annual campaign of the Seattle Community Fund."\(^ {130}\) An individual under contract with the Elks organization to solicit funds for a charity event challenged the ordinance on the ground that the Seattle Community Fund exemption rendered the ordinance void under article 1, section 12.

In considering the challenge, the Rogers court first noted that ordinances of the same sort, but which had been uniform in their application, were upheld under prior constitutional challenge.\(^ {131}\) The court further recognized that "solicitation of funds for alleged charitable purposes constitutes a plan or scheme which is susceptible of great abuse by unscrupulous persons seeking their own selfish profit."\(^ {132}\) Ultimately, however, the court found the exemption of the Seattle Community Fund to be a constitutional flaw. As the court stated:

Apparently the ordinance provides for an arbitrary exemption of one particular activity, doubtless because the city council was convinced that the exempted campaign was worthy and honestly conducted, and resulted in benefit to the public, while many others should be classified as no better than frauds. It should be noted, however, that a perfectly worthy campaign, whose operation could be subject to no adverse criticism, would be practically barred by the ordinance, as well as less righteous campaigns and those which are fraudulent and entirely unworthy of consideration.\(^ {133}\)

Concerns about the political process appear between the lines of the court's holding. The court in Rogers certainly did not downplay the evils in this field of economic activity, recognizing it as an area of commerce indisputably worthy of strict regulation.\(^ {134}\) Thus, the court's concern is not a Lochner era.\(^ {135}\)


\(^{129}\) 106 P.2d 598 (Wash. 1940).

\(^{130}\) Id. at 599 (citation omitted).

\(^{131}\) Id. at 601.

\(^{132}\) Id. at 600.

\(^{133}\) Id. at 600-01. A similar sentiment was expressed by the court in Larson v. City of Shelton, 224 P.2d 1067 (Wash. 1950), in which the court invalidated a veterans' exemption from the peddler's licensing and bonding requirements. The Larson court stated that "[t]here is a legitimate and proper feeling of gratitude toward [veterans], but the legislature has no authority to express that gratitude in enactments which suspend the operation of criminal laws or regulations enacted under the police power for the protection of the public..." Id. at 1072.

\(^{134}\) Rogers, 106 P.2d at 600.

\(^{135}\) The period was characterized by Lochner v. New York, 198 U.S. 45 (1905), in which the Supreme Court held that a state statute fixing minimum working hours for bakers violated the Fourteenth Amendment's Due Process Clause. Courts of the Lochner era were criticized for
laissez-faire hostility toward economic regulation per se. Rather, the court’s reasoning discloses a concern about a particular species of political dealmaking apparent on the face of the city’s regulatory response. Specifically, the court in Rogers was concerned with the way in which the legislative body proceeded in fashioning the challenged regulation. Rather than deliberating in order to refine a troublesome one-size-fits-all regulatory approach, the city council took the easy way out and simply exempted the group with whom it was most sympathetic—or the group who had the most political clout. By overturning this regulation, the court acted consistently with the special privileges and immunities provision’s disapproval of this method of compromise and held the city council to a loftier model of deliberation.

The impulse behind this application of article 1, section 12 is suggested by Justice Jackson’s observation that “nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.” The Washington Supreme Court in Rogers appears to concur with Justice Jackson’s view, suggesting further that the moderating and refining influence of deliberative process is cheated when the legislature grants such exemptions.

The rule applied in Rogers is not limited, as the facts might suggest, to cases in which an individual or entity is singled out for a special immunity. The rule applies, as with the cases described in the “privilege” context, to situations in which the subjects inside and outside a regulatory classification are essentially the same in terms of the activity they are engaged in, but can only be distinguished on the basis of factors that are not particularly germane to the apparent object of the regulation. Thus, an exemption of an entire industry segment composed of many individuals is enough to trigger scrutiny under article 1, section 12.

In 1958, the court in Adams v. Hinkle struck down legislation that would have required a pre-publication license for dealers in comic books. The Adams court reasoned that comics, defined in the regulations as “drawings depicting or telling a story of a real or fanciful event or series of events,” contributed to juvenile delinquency. Because the law explicitly exempted the “comic section of any regularly published daily or weekly newspaper,” the flaw under article 1, section 12 was that “the legislature may not exact from dealers in comic books a pre-publication license while immunizing

seeking to “enact Mr. Herbert Spencer’s Social Statics,” which promoted a conservative social and economic agenda. Id. at 75 (Holmes, J., dissenting). The federal courts of the period enforced limitations upon state legislatures through invalidation of minimum wage, maximum hour, pro-union, price fixing, and entry barrier laws. See Tribe, supra note 44, § 8–4.

137. 322 P.2d 844 (Wash. 1958).
138. Id. at 847.
139. Id.
newspapers from the same requirements in the publication and distribution of identical materials.\textsuperscript{140}

While basing its decision on both equal protection and special privileges and immunities grounds and citing the \textit{Huse} combined analysis, the court in \textit{Hinkle} cited to a large number of Washington cases, many of which were decided on article 1, section 12 alone, in support of its holding.\textsuperscript{141} Some of the cases cited in \textit{Hinkle} demonstrate equally well that the exemption of an industry segment from a regulation applicable to others in the industry raises article 1, section 12 scrutiny.\textsuperscript{142}

Another branch of immunity cases applies article 1, section 12 to prohibit suspension of laws governing rights of action between private individuals, as opposed to exemptions from public laws. In \textit{Alton V. Phillips Co. v. State},\textsuperscript{143} the court struck down a legislative act suspending a statute of limitations, enabling the plaintiff company to bring an action for breach of contract against the state's Department of Highways.\textsuperscript{144} Similarly, the court in \textit{Cotten v. Wilson}\textsuperscript{145} struck down a law requiring passengers to prove gross negligence, as opposed to "ordinary" negligence, to recover in tort against certain private bus companies employed to take passengers to and from jobs with shipbuilding companies and other defense contractors.\textsuperscript{146} In like fashion, a law lifting homestead protections to permit foreclosure by a particular class of creditors, those having a claim based on wages due, was invalidated in \textit{Verino v. Hickey}.\textsuperscript{147}

\section*{VI. A Proposal for Reinvigorated Economic Equal Protection Analysis under the Prohibition on Special Privileges and Immunities}

The concerns that accompany open-ended substantive due process review of regulations do not accompany reasonable ground means/end review. This point was made by Justice Jackson in urging the United States Supreme Court not to remove all the teeth from equal protection rationality review:

\begin{quote}
Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
\end{quote}

\textsuperscript{140} \textit{Id.} at 858.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{See}, e.g., Sherman Clay & Co. v. Brown, 231 P. 166, 168 (Wash. 1924) (striking down under art. 1, § 12 a Seattle ordinance prescribing licensing, record keeping, and other requirements of dealers in second-hand goods, but carving out an exemption for dealers in stoves, furniture, or total contents of any room or house); State v. W.W. Robinson Co., 146 P. 628, 629 (Wash. 1915) (striking down statute that required recording of sale of concentrated commercial foodstuffs, but exempted cereal and flour mills).
\textsuperscript{143} 396 P.2d 537 (Wash. 1964).
\textsuperscript{144} \textit{Id.} at 540.
\textsuperscript{145} 178 P.2d 287 (Wash. 1942).
\textsuperscript{146} \textit{Id.} at 290.
\textsuperscript{147} 237 P. 5, 7 (Wash. 1925).
Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.\textsuperscript{148}

It is important to note that renewed reasonable ground review need not necessarily prohibit particular legislative ends. Rather, the court could simply presume, in the absence of a statutory statement of purpose or persuasive legislative history to the contrary, that only arguably public-regarding purposes are sought. This presumption would at least have the effect of requiring the legislature to make explicit its private transfer purpose on remand. By increasing awareness of what is sought to be achieved in legislation, such an approach would enforce representational and deliberative processes without unduly risking a substitution of the policy judgment of the court for that of the legislature.\textsuperscript{149}

Unlike the federal Equal Protection Clause, the Washington Constitution’s article 1, section 12 provides a textual basis for intervention in some types of regulatory enactments. Public purpose review has a strong history in state constitutional law. The Washington Constitution, like many other state constitutions, contains provisions that seek to prevent the use of government power to effect private transfers. The Washington Constitution provides that taxation must be for public purposes only,\textsuperscript{150} that the credit of the state may not be given or loaned for private benefit,\textsuperscript{151} and that private property cannot be taken for other than a public purpose reviewable by the courts.\textsuperscript{152} It seems entirely appropriate for the state courts to use the principles underlying provisions such as these to give content to the prohibition on grants of special privileges and immunities. Federal equal protection analysis is inconsistent with the state constitution’s hostility to private transfers.

The Washington Constitution is also replete with provisions that seek to prevent the passage of laws without thorough majoritarian deliberation. Cases interpreting many of the legislative procedural requirements embrace the view that powerful minorities may achieve anti-majoritarian ends by means of stealth or overtly by means of logrolling. Specific provisions include the detailed prohibition on the enactment of “special” and “local” legislation\textsuperscript{153} as well as the requirement that every bill deal with only one subject\textsuperscript{154}—both of which have the object of preventing anti-majoritarian

\begin{footnotes}
\footnotetext{148}{Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).}
\footnotetext{149}{Rose-Ackerman, supra note 59, at 56.}
\footnotetext{150}{Wash. Const. art. 7, § 1.}
\footnotetext{151}{Id. art. 8, § 7.}
\footnotetext{152}{Id. art. 1, § 16.}
\footnotetext{153}{Id. art. 2, § 28.}
\footnotetext{154}{Id. art. 2, § 19.}
\end{footnotes}
logrolling. Other provisions have the related purpose of insuring full publicity and open deliberation on the merits of legislation and the prevention of special favors being sought under cover. These provisions include forbidding the legislature from altering a bill to change its original purpose,\textsuperscript{155} requiring referral to committee,\textsuperscript{156} and requiring recording of yea and nays.\textsuperscript{157} While the success of these constraints is subject to debate,\textsuperscript{158} the model of open, public-spirited deliberation to which they seek to hold the legislature is clear.\textsuperscript{159} The court's view of its role in overseeing legislative line-drawing in \textit{Huse, Rogers} and similar cases is consistent with the representation and deliberation-reinforcing purposes of state constitutions like Washington's. The optimistic pluralist assumptions about the political process that underlie federal equal protection analysis are inconsistent with those of the state constitution.

"Rational basis" review under the Equal Protection Clause follows the same means/ends nexus as state "reasonable ground" review. Rational basis review, however, is usually nothing more than a tautology in which the court assumes that the legislature must have intended everything it did and that therefore the court must only conceive of some basis for the legislature to have acted as it did.\textsuperscript{160} The analysis under the article 1, section 12 cases discussed above differs from modern "rational basis" review in that the Washington court has been less deferential—at least where a private transfer is sought under the aegis of a regulatory law—in hypothesizing facts or in accepting government attorneys' rationalizations of exemptions from regulatory provisions on some basis other than the political strength of the exempted class. Notably absent from the court's analysis under many of these cases is the notion that the legislature may proceed incrementally in its

\begin{enumerate}
\item \textit{Id.} art. 2, § 38.
\item \textit{Id.} art. 2, § 12, cl. 3.
\item \textit{Id.} art. 2, § 21.
\item An objection might be that since controls such as the single subject rule of article 2, § 19 are in place, and may be resorted to by litigants, courts should assume that only majoritarian ends are served by legislation. This does not necessarily follow, however, since the single subject rule merely prevents logrolling by way of omnibus "Christmas tree" or "garbage can" bills. It does not reach those instances in which support is exchanged between interest groups to enable the passage of separate bills that would not otherwise command a majority.

\begin{quote}
[T]he court apparently assumes that Congress must have \textit{intended} that result. But by presuming purpose from result, the court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary and irrational, perfectly tailored to achieve its purpose.
\end{quote}

\textit{Id.} at 187 (Brennan, J., dissenting).
\end{enumerate}
development of a regulatory scheme, applying regulatory controls to some but not all potential subjects.

If the court is to renew application of article 1, section 12 under holdings of cases like those discussed above, it can no longer combine article 1, section 12 and Fourteenth Amendment equal protection analyses as it did under the Huse formulation. The United States Supreme Court indicated that where state courts combine analysis of state and federal constitutions, they risk reversal on federal constitutional grounds. This is based on the presumption that the state court viewed federal precedent as controlling, unless the state court indicated that its decision "is alternatively based on bona fide separate, adequate, and independent state grounds."\textsuperscript{161} Therefore, if presented with an argument based upon the separate language and history of article 1, section 12, the court should not neglect to undertake analysis separate from its Fourteenth Amendment equal protection analysis. As former Washington Justice Robert Utter has stated, to do otherwise would be "to rewrite our constitution without benefit of a constitutional convention and to deprive the people of this state of additional rights, which they adopted in our constitutional convention, without their consent."\textsuperscript{162}

\textsuperscript{161} In Michigan v. Long, 463 U.S. 1032 (1983), Justice O'Connor wrote: [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, we, of course, will not undertake to review the decision.

\textit{Id.} at 1041.
