A RATIONAL BASIS FOR RATIONAL BASIS REVIEW UNDER ARTICLE I, SECTION 20 OF THE OREGON CONSTITUTION?

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I. INTRODUCTION

Recent Oregon Supreme Court opinions have emphasized originalism in interpreting Oregon state constitutional provisions. They demand that judges, counsel, and presumably officials interpret and apply constitutional provisions by attempting to discover what the framers believed that clause to mean. The Oregon Supreme Court, in its 1992 decision *Priest v. Pearce*, set forth an originalist method for interpreting original provisions of the Oregon Constitution.[1] The *Priest* court declared that a constitutional provision must be interpreted in light of (1) its specific wording, "text and context,"(2) prior case law, and (3) the historical circumstances of its creation.[2] This signaled to many practitioners an attempt by the Oregon courts to fashion a coherent approach to constitutional construction, focusing on discovering the framers' intent in drafting the particular clause in question as evidence of that clause's meaning.[3] Subsequent application of the *Priest* formulation was sporadic.[4] However, in *Stranahan v. Fred Meyer*, the court expressly noted that "it long has been the practice of this court 'to ascertain and give effect to the intent of the framers of the provision at issue and of the people who adopted it.'"[5] *Stranahan* referenced the three-part inquiry in *Priest v. Pearce* as the appropriate methodology to ascertain the framers' intent.[6] Moreover, the court invited arguments in favor of new understandings of constitutional provisions.

> [W]e remain willing to reconsider a previous ruling under the Oregon Constitution whenever a party presents to us a principled argument suggesting that, in an earlier decision, this court wrongly considered or wrongly decided an issue in question. We will give particular attention to arguments that either present new information as to the meaning of the constitutional provision at issue or that demonstrate some failure on the part of this court at the time of the earlier decision to follow its usual paradigm for considering and construing the meaning of the provision in question.[7]

Despite *Stranahan's* invitation, article I, section 20 of the Oregon Constitution has never been interpreted utilizing the *Priest v. Pearce* originalist approach. Article I, section 20 provides: "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."[8] For decades, Oregon courts have struggled to give this clause meaning and fashion an appropriate legal analysis. In early decisions addressing the clause, Oregon courts interpreted article I, section 20 as providing the same protections as the Federal Equal Protection Clause.[9]

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1. 840 P.2d 65, 67-69 (Or. 1992).

2. *Id.* at 67.

3. Jack L. Landau, *The Unfinished Revolution: Interpreting the Oregon Constitution*, 62 OR. STATE BAR BULL. 9, 12 (2001).

4. *Id.*

5. 11 P.3d 228, 237 (Or. 1999) (citing Jones v. Hoss, 285 P. 205 (1930); Oregonian Publ'g Co. v. O'Leary, 736 P.2d 173 (1987)).

6. *Id.*

7. *Id.*

8. OR. CONST. art. I, § 20.

9. *See, e.g.*, Sch. Dist. No. 12 v. Wasco County, 529 P.2d 386, 389 (Or. 1974); Plummer v. Donald M. Drake Co., 320 P.2d 245, 248 (Or. 1958); David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 227-28 (1986).

However, beginning in 1981 with *State v. Clark*[10] and *State v. Edmonson*,[11] Oregon courts recognized the independent nature of the various clauses provided in the Oregon Constitution and commenced independently interpreting and applying those provisions. Commentators, as well as the Oregon Supreme Court itself, dubbed this event a "revolution" in state constitutional law.[12] Instead of relying on federal constitutional provisions, the courts recognized new rights granted by state constitutions. This recognition resulted in reexaminations of several Oregon constitutional clauses, including article I, section 20. Subsequent cases fleshed out the elements and analysis of a claim under article I, section 20, setting forth a somewhat unique analysis for this clause.[13] While still looking for "suspect" classifications and nonsuspect classifications like Federal Equal Protection tests, the court refused to engage in balancing. Rather, the court seemed to strike down all suspect classifications as per se violations of the clause, while uniformly upholding nonsuspect statutory classifications. These cases predated *Priest v. Pearce*, so none of these revolutionary state constitutional law decisions employed this originalist methodology to interpret the meaning of article I, section 20.

Recent Oregon appellate decisions, however, have returned to a pre-*Clark* understanding of article I, section 20, importing the two-tiered strict scrutiny and rational basis review from Federal Equal Protection jurisprudence. While not employing a balancing analysis of suspect classifications like strict scrutiny under Federal Equal Protection analysis, the Oregon Supreme Court now employs a rational basis balancing test for nonsuspect classifications. More troubling is the fact that the Oregon courts have not provided a rationale for their newfound reliance on Federal Equal Protection tests or their apparent departure from the notion that Oregon constitutional provisions have meanings independent of similar federal provisions. Again, the court has failed to employ its self-proclaimed originalist method of constitutional interpretation in any of these decisions interpreting article I, section 20.

In 2002, *Jensen v. Whitlow* presented the Court's most recent formulation of the analysis of a claim brought under article I, section 20.[14] In *Jensen*, the plaintiff brought suit in federal district court claiming that employees of the Children Services Division of the State of Oregon (CSD) were negligent in placing her minor daughter in a foster home where she was sexually abused.[15] CSD moved to dismiss the claim under ORS 30.265(1), which provided tort immunity to government employees acting within the scope of their employment.[16] The plaintiff argued that, among other things, ORS 30.265(1) violated article I, section 20 of the Oregon Constitution by giving a benefit to government employees that is not available to other citizens on equal terms.[17] The federal district court certified that question to the Oregon Supreme Court.[18]

In answering the article I, section 20 question, the *Jensen* court first determined whether ORS 30.265(1) distinguished between citizens on the basis of a suspect or immutable characteristic such as "race, religion, or alienage" and concluded that the statute distinguished

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10. 630 P.2d 810, 817-18 (Or. 1981).

11. 630 P.2d 822, 823 (Or. 1981).

12. *See, e.g.*, Jack L. Landau, *Hurrah for the Revolution: A Critical Assessment of State Constitutional Interpretation*, 79 OR. L. REV. 793, 864 (2000); State v. Owens, 729 P.2d 524, 531 (Or. 1986) (Gillette, J., concurring).

13. *See* Schuman, *supra* note 9, at 227-28 (explaining the elements and inquiries for claims brought under article I, section 20 as understood at the time the article was written).

14. 51 P.3d 599 (Or. 2002).

15. *Id.* at 600-01.

16. *Id.* at 601; *see also* OR. REV. STAT. § 30.265(1) (2001).

17. *Jensen*, 51 P.3d at 604.

18. *Id.* at 600.

on the basis of public employment, which is not a suspect or immutable characteristic.[19] The court reasoned that the statute would be upheld if any rational basis was found for distinguishing between public employees and other citizens.[20] The *Jensen* court found that ORS 30.265(1) satisfied rational basis review because "[t]he legislature reasonably may conclude that providing public workers with personal immunity from liability will assist in recruiting qualified persons to work in public service."[21] This analysis is identical to rational basis review under the Federal Equal Protection Clause.[22]

While the ultimate conclusion of *Jensen* is not surprising, the utter lack of critical analysis by the court, and its mechanical application of a two-tiered Equal Protection-like test, is shocking. The *Jensen* court relied on precedent in reaching its conclusion, but failed to investigate the shaky basis upon which the precedent rested. In finding rational basis review applicable to statutory classifications not based on "immutable characteristics," the *Jensen* court cited its previous decision in *In re Marriage of Crocker*.[23] The *Crocker* court also employed rational basis review for nonsuspect statutory classifications, relying on *Seto v. Tri-County Metropolitan Transportation District*[24] as authority for rational basis review.[25] In *Seto*, one finds the root of the recent departure from an independent analysis under article I, section 20.[26] The *Seto* court cited *State v. Clark* for the proposition that rational basis review applied to article I, section 20 claims challenging statutes that do not distinguish between persons based on immutable or suspect characteristics.[27] The citation to *State v. Clark* as precedent for rational basis review under article I, section 20 is ironic because the *Clark* court stressed that article I, section 20 had its own meaning, independent of the Federal Equal Protection Clause.[28] Again, in *Seto*, like *Crocker* and *Jensen*, the court did not provide an interpretive rationale for its adoption of rational basis review for nonsuspect statutory classifications.

As is apparent from the *Jensen*, *Crocker*, and *Seto* cases, the Oregon Supreme Court has never followed its "usual paradigm" of originalist analysis in interpreting article I, section 20 despite its own command in *Stranahan*. Nor has the court offered any other rationale for applying Equal Protection two-tiered scrutiny to statutory classes challenged under article I, section 20. This Comment attempts to apply the *Priest v. Pearce* analysis to interpret the meaning of article I, section 20 as applied to challenged statutory classifications.[29] In so doing, this Comment shows the weak under-pinnings of the current legal analysis of the provision, which is based largely upon concepts underlying Federal Equal Protection jurisprudence. In addition, an application of originalist methodology to article I, section 20 reveals weaknesses in the methodology. Rejecting the ultimate fruits of originalist analysis of the clause, this Comment proposes a new analysis for claims under article I, section 20,

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19. *Id.* at 605.

20. *Id.*

21. *Id*.

22. United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175-76 (1981). Both the current Oregon rational basis review and federal equal protection rational basis review look for any rational reason for the classification, whether those reasons are real or *ad hoc*. *Id.*

23. *Jensen*, 51 P.3d at 605; *see also In re* Marriage of Crocker, 22 P.3d 759 (Or. 2001).

24. 814 P.2d 1060 (Or. 1991).

25. *Crocker*, 22 P.3d at 766.

26. *See Seto*, 814 P.2d at 1066.

27. *Id.* at 1066.

28. State v. Clark, 630 P.2d 810, 816-17 (Or. 1981).

29. Article I, section 20 may be used by an individual citizen to challenge a grant of special privileges or immunities to other citizens, or by a class of citizens to challenge the grant of special privileges or immunities to another class of citizens. *Id.* This Comment focuses on the application of article I, section 20 to statutory classifications challenged by other "classes" of citizens, not individual challenges to preferential governmental actions, as was the case in *State v. Clark*.

based on the clause's text and the earliest Oregon decision interpreting the clause.

Part II of this Comment addresses current understandings of article I, section 20 based on existing Oregon case law, examining the constituent parts of the provision. Part III considers Oregon Supreme Court cases applying the *Priest v. Pearce* method of constitutional interpretation to other provisions, and attempts to utilize this method in interpreting article I, section 20. Finally, Part IV of this Comment argues that there is no rational basis for rational basis review of statutory classifications and suggests a new paradigm for interpreting article I, section 20.