

No. 78598-8

J.M. JOHNSON, J. (concurring)—The Washington Constitution provides that “[a]ll persons convicted of infamous crimes unless restored to their civil rights . . . are excluded from the elective franchise.” Const. art. VI, § 3. Respondents argue that requiring them to pay their legal financial obligations (LFOs), including restitution to victims, before such restoration of rights violates our constitution’s privileges and immunities clause.<sup>1</sup>

Despite prior case law establishing a sound, historical, and relatively simple approach to application of our constitution’s privileges and immunities clause, the majority errs in its analysis. However, the majority ultimately reaches the correct result. Thus, I concur in the majority’s conclusion that “Washington’s disenfranchisement scheme does not violate the privileges and immunities clause of the Washington Constitution.” Majority at 2. I write separately to articulate the proper application of article I, section 12 to the present case.

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<sup>1</sup> Const. art. I, § 12

The majority correctly notes that this court has previously held that article I, section 12 “requires an independent constitutional analysis.”<sup>2</sup> Majority at 10 (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 811, 83 P.3d 419 (2004) (*Grant County II*)). Thus, there is no need to conduct a *Gunwall*<sup>2</sup> analysis. Majority at 10 (citing *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998)). However, as noted by Justice Madsen in her separate concurrence, the majority errs in suggesting that an appropriate independent constitutional analysis involves a reiteration of the *Gunwall* factors as applied to the state constitutional provision at issue. Concurrence (Madsen, J.) at 2-3. Instead, an independent examination of article I, section 12 should be conducted in accordance with its plain language. The majority further errs in concluding that respondents’ article I, section 12 claim implicates the “privilege” of voting. Majority at 11. Because convicted felons are excluded from the elective franchise in Washington under our constitution, no “privilege or immunity” is granted or withheld by Washington’s re-enfranchisement scheme.<sup>3</sup> See Const. art. VI, §

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<sup>2</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

<sup>3</sup> The majority consistently refers to the statutory scheme at issue as Washington’s “disenfranchisement scheme.” Majority at 6. However, because this statutory scheme actually provides for the reinstatement of voting rights, which have been lost under the constitution as a result of a felony conviction, I believe “re-enfranchisement scheme” is a

3. Thus, respondents' claim must fail.

Article I, section 12 provides as follows: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." The plain language of this provision requires a two-part analysis: "(1) Does a law grant a citizen, class, or corporation 'privileges or immunities,' and if so, (2) Are those 'privileges or immunities' equally available to all?" *Andersen v. King County*, 158 Wn.2d 1, 59, 138 P.3d 963 (2006). "[I]f no 'privilege or immunity' is granted by the challenged law . . . , the clause has no application and the second question is never reached." *Id.*; see also *Grant County II*, 150 Wn.2d at 812 ("For a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens.").

Respondents contend that because Washington law prohibits voting by felons who have not paid their LFOs, it somehow confers a privilege upon wealthy felons, while withholding that privilege from poor felons. The fundamental flaw in respondents' argument is that the "privilege" to vote

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more appropriate appellation.

does not extend to felons under Washington law.

This court has defined “privileges and immunities” as ““those fundamental rights which belong to the citizens of the state by reason of such citizenship.”” *Grant County II*, 150 Wn.2d at 813 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). More specifically, the phrase “privileges and immunities” has historically been understood to encompass:

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; . . . an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . [and] *the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.*

*Corfield v. Coryell*, 4 Wash. C. C. 371, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (emphasis added); *see also Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 747, 42 P.3d 394 (2002) (Sanders, J., dissenting) (*Grant County I*); *Saenz v. Roe*, 526 U.S. 489, 521, 119 S. Ct. 1518, 143 L. Ed. 2d 689 (1999) (Thomas, J., dissenting).

Although the above definition was originally articulated with reference to the federal constitution, it is also relevant to this court's interpretation of article I, section 12. *See Vance*, 29 Wash. at 458 (indicating that state law concept of "privileges and immunities" should be defined and interpreted similarly to federal concept).

The majority asserts that "[t]his court has previously recognized that the right to vote is a fundamental right afforded to the citizens of Washington State." Majority at 11 (citing *Foster v. Sunnyside Valley Irrigation Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984)). This may be true, so far as it goes, but this statement does not address whether and to what extent voting is a "privilege" within the meaning of article I, section 12.<sup>4</sup> As indicated in *Corfield*, 6 F. Cas. at 552, the "privilege" of the elective franchise is inherently limited in scope according to the manner in which it is "regulated and established by the laws or constitution of the state." In Washington, the

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<sup>4</sup> While it appears the appellants in *Foster* challenged the irrigation district's election scheme under article I, section 12, as well as article I, section 19, the scheme was expressly held unconstitutional solely under article I, section 19. *Foster*, 102 Wn.2d at 411. In its analysis, the *Foster* court did cite to an earlier decision by this court, *Malim v. Benthien*, 114 Wash. 533, 196 P. 7 (1921), which suggests that voting may be a "privilege" within the meaning of article I, section 12. However, the *Malim* court does not discuss the scope of the voting privilege established by Washington law, the key to deciding the present case.

right to vote is regulated and established by multiple constitutional provisions. Even a cursory review of these provisions reveals that the “privilege” of voting does not extend to respondents.

As the majority correctly notes, “Article I, section 19 of the Washington Constitution prohibits interference with ‘the free exercise of the right of suffrage.’” Majority at 11. However, this is far from the entirety of our state constitution’s treatment of voting rights. All of article VI deals with this subject. Sections 1 and 3 of article VI are particularly relevant to the present case. Section 1 of article VI provides:

All persons of the age of eighteen years or over who are citizens of the United States and who have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote, *except those disqualified by Article VI, section 3 of this Constitution*, shall be entitled to vote at all elections.

(Emphasis added.) Section 3 of article VI provides, in relevant part:

“All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise.”

Read together, the above constitutional provisions clearly establish that under Washington law, citizens convicted of felonies<sup>5</sup> are

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<sup>5</sup> Under RCW 29A.04.079, an “infamous crime” is defined as “a crime punishable by death

excluded from the elective franchise unless and until they are restored to their civil rights. In other words, “the elective franchise, as regulated and established by the . . . constitution of [Washington]” does not extend to felons. *Corfield*, 6 F. Cas. at 552. Thus, in accordance with the historical understanding of “privileges and immunities,” I conclude no “privilege” is implicated by Washington’s re-enfranchisement scheme.

Because there is no constitutional privilege or immunity at stake, Washington’s re-enfranchisement scheme cannot be found to violate article I, section 12. *See Grant County II*, 150 Wn.2d at 814 (where “there is no privilege . . . at issue in [the] case . . . the claim of a violation of article I, section 12 fails for this reason.”). Respondents may constitutionally be required to pay their LFOs, including restitution to victims,<sup>6</sup> before they will be extended the franchise in Washington. Since the majority ultimately concludes that respondents’ challenge under the Washington privileges and immunities clause must fail and upholds Washington’s constitutional system,

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in the state penitentiary or imprisonment in a state correctional facility.” In other words, a felony.

<sup>6</sup> Requiring respondents to pay restitution to victims in particular also comports with the spirit of our constitution’s victims’ rights provision. *See* Const. art. I, § 35.

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I concur in the majority's disposition of this case.

AUTHOR:

Justice James M. Johnson

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WE CONCUR:

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Justice Richard B. Sanders

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