No. 78598-8

MADSEN, J. (concurring)—I write separately because the majority unfortunately fails to follow the court's holding in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), that an independent analysis applies under article I, section 12 only where the challenged legislation grants a privilege or immunity to a minority class, that is, in the case of a grant of positive favoritism. This is because, as we concluded in *Grant County*, the language and history of the provision show that the concern underlying the state privileges and immunities clause, unlike that of the equal protection clause, is undue favoritism, not discrimination, and the concern about favoritism arises where a privilege or immunity is granted to a minority class. *Id*. at 806-10. Therefore, unless the challenged law is a grant of positive favoritism to a minority class, an independent state constitutional analysis is not appropriate.

The majority misreads *Grant County*, however, to say that an independent state constitutional analysis is always appropriate under article I, section 12. *Grant County* is quite clear that this was not the court's intent: "[T]he historical

context as well as the linguistic differences indicate that the Washington State provision requires independent analysis from the federal provision when the issue concerns favoritism." *Id*. at 809. *Grant County* does not justify the majority's conclusion that an independent state constitutional analysis is always appropriate under article I, section 12.

Here, no grant of positive favoritism to a minority class is at issue. Instead, the question is whether those felons who have been unable to discharge legal financial obligations that are part of their sentences are discriminated against by a law that bars them from voting until they fully satisfy all the terms of their sentences, including financial obligations. The court should apply the same constitutional analysis that applies under the equal protection clause of the United States Constitution because no grant of positive favoritism is involved.

I agree with the majority that under the equal protection clause, there is no impermissible discrimination in declining to restore voting rights unless and until a felon completes the terms of his or her sentence, including any legal financial obligations. *See Richardson v. Ramirez*, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974); *Farrakhan v. Washington*, 338 F.3d 1009, 1022-23 (9th Cir. 2003); *Green v. Bd. of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967). Accordingly, there is neither a violation of the equal protection clause, nor, applying the same analysis, a violation of article I, section 12.

I am also concerned about the majority's conclusion that the *Gunwall*[1]

factors "parallel inquiries made when interpreting a state constitutional provision to determine the extent of the protection it provides in a particular context." Majority at 12. Any constitutional analysis involves, among other things, an examination of the language of the provision, its relationship to other constitutional provisions, the existing and preceding statutory and common law at the time it was adopted, and other historical context. Constitutional interpretation is an examination of matters that illuminate the meaning of the provision at issue.

But care should be taken, and litigants should not simply repeat the same *Gunwall* analysis as is applied when first deciding whether a state provision with a similar federal counterpart should be independently applied. In *Gunwall* itself the court did not engage in the same inquiry in order to decide how to apply the constitutional provision at issue once the determination was made that an independent analysis was appropriate.[2]

I also disagree with the dissent's unwarranted emphasis on wealth.[3] The State does not, contrary to the dissent's view, create inequities between the rich and the poor by tying voting to the ability to pay. The plaintiffs were convicted of felony crimes and for this reason were disenfranchised; this is why they cannot

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[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).
[2] Similarly, in *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003), we noted that it was settled that an independent state constitutional analysis applies in the search and seizure context under article I, section 7, but we did not revisit *Gunwall* to determine how to interpret or apply the provision.
[3] The concurrence in the dissent engages in the same mistake.

vote. Regardless of whether they are rich or poor they will continue to be disenfranchised until they complete their sentences, including their legal financial obligations. They have no constitutionally protected right to vote. The legislature can change the requirements for reinstating a felon's right to vote if it concludes that requiring felons to pay all financial obligations before regaining the vote is too harsh a condition to place on such a precious attribute of citizenship, but it is not constitutionally required to do so.

Finally, Justice Chambers' concurrence in the dissent is also flawed. This court's analysis of the privileges and immunities clause is not in its infancy. There are cases as far back as 1905 analyzing this provision. Contrary to Justice Chambers' view, we are not in a better position to determine its meaning than were all of the jurists who have preceded us. We do not do justice to the precedent created by this court when we announce a new constitutional analysis that conflicts with our historical analysis and with the significant body of law that has existed for nearly the entirety of this state's existence. We should not simply ignore what has been said in favor of what we think ought to have been said. Such an approach is directly at odds with the often recognized precept that an interpretation of the state constitution made closest to the adoption of that document provides the best evidence of the drafters' intent. *See State ex rel. Gallwey v. Grimm*, 146 Wn.2d 445, 462, 48 P.3d 274 (2002); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 120, 937 P.2d 154, 943 P.2d 1358 (1997); *State v.*

Reece, 110 Wn.2d 766, 779, 757 P.2d 947 (1988); *see also, e.g., Gerberding v. Munro*, 134 Wn.2d 188, 199-201, 949 P.2d 1366 (1998); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989); *State ex rel. Gowan v. Superior Court of King County*, 81 Wash. 18, 20, 142 P. 452 (1914); *see generally* Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. Puget Sound L. Rev. 491, 521 (fall 1983).

We do not write on a clean slate. Rather, contrary to the view expressed in the concurrence in the dissent, this court has historically found the privileges and immunities clause implicated under an independent state analysis when the law granted a special benefit or a special exemption to a favored minority class, i.e., in cases of undue favoritism. *See*, *e.g.*, *In re Application of Camp*, 38 Wash. 393, 80 P. 547 (1905) (city ordinance prohibiting any one from peddling fruits and vegetables within city but exempting farmers who grew the produce themselves violated article I, section 12 as granting privilege to a class of citizens); *City of Spokane v. Macho*, 51 Wash. 322, 98 P. 755 (1909) (Spokane ordinance regulating employment agencies was unconstitutional because it imposed criminal penalties on such entities engaging in false pretenses but not on other companies engaging in similar conduct); *City of Seattle v. Dencker*, 58 Wash. 501, 108 P. 1086 (1910) (Seattle ordinance unconstitutional under article I, section 12 where it imposed a tax on the sale of certain goods by machine but not on merchants selling the same

goods); *State v. Robinson Co.*, 84 Wash. 246, 146 P. 628 (1915) (state law that exempted cereal and flour mills from its provisions and authorized them to sell mixed feeding stuffs while placing conditions on other persons, companies, corporations, or agents selling the same thing violated article I, section 12); *Sherman Clay & Co. v. Brown*, 131 Wash. 679, 231 P. 166 (1924) (Seattle ordinance prohibiting second hand dealers from disposing of goods for 10 days after purchase or receipt but exempting purchasers of stoves, furniture or total contents of house violated article I, section 12 as being discriminatory as exempting a class within a class); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936) (act forbidding issuance of licenses to take salmon by gill nets except for those holding licenses in 1932 and 1933 set up arbitrary classification and conferred special privileges on those entitled to licenses in violation of article I, section 12), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 603 P.2d 819 (1979); *Pearson v. City of Seattle*, 199 Wash. 217, 90 P.2d 1020 (1939) (ordinance imposing license tax on solid fuel dealers plus additional amount for each solid fuel truck where liquid fuel dealers were not subjected to such fees was discriminatory and violated article I, section 12); *City of Seattle v. Rogers*, 6 Wn.2d 31, 106 P.2d 598 (1940) (ordinance making it unlawful to conduct a charity campaign without licenses where part of the proceeds was withheld as compensation for promoters and solicitors violated article I, section 12, where ordinance exempted the Seattle Community Fund);

Ralph v. City of Wenatchee, 34 Wn.2d 638, 209 P.2d 270 (1949) (ordinance requiring license fees for only nonresident photographers violated article I, section 12); *Larson v. City of Shelton*, 37 Wn.2d 481, 224 P.2d 1067 (1950) (statute permitting honorably discharged veterans to peddle and sell goods after obtaining free license, where others were required to pay license fees, violated article I, section 12); *Kaufman v. West*, 133 Wash. 192, 233 P. 321 (1925); *Verino v. Hickey*, 135 Wash. 71, 237 P. 5 (1925).[4]

Despite these cases and the consistent application of article I, section 12 they reflect, the concurrence in the dissent says that the privileges and immunities clause does not distinguish between grants of favoritism to minorities and majorities. But it cites not one case where this court has actually applied article I, section 12 independently in this way, and certainly none from the early years of statehood. The concurrence in the dissent would be hard pressed to find a body of cases historically applying *an independent state constitutional analysis* under article I, section 12 that is not coextensive with the equal protection clause in any circumstances other than a grant of positive favoritism to a minority class. In addition, the concurrence in the dissent also misrepresents, as does the majority,

[4] Of course, even if there is a distinction between classes that gives rise to an article I, section 12 inquiry, the provision is not violated if there is a sufficient basis for the distinction. *See*, *e.g.*, *State v. Sharpless*, 31 Wash. 191, 71 P. 737 (1903); *Bussell v. Gill*, 58 Wash. 468, 108 P. 1080 (1910); *Record Publ'g Co. v. Monson*, 123 Wash. 569, 213 P. 13, 215 P. 71 (1923); *City of Spokane v. Coon*, 3 Wn.2d 243, 100 P.2d 36 (1940); *Bauer v. State*, 7 Wn.2d 476, 110 P.2d 154 (1941); *see also Lenci v. City of Seattle*, 63 Wn.2d 664, 388 P.2d 926 (1964); *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wn.2d 584, 478 P.2d 232 (1970).

the court's decision in *Grant County*.

Finally, the concurrence in the dissent relies on Justice Utter's "well reasoned concurrence in [*State v.*] *Smith*[, 117 Wn.2d 263, 282, 814 P.2d 652 (1991) (Utter, J., concurring)]." Concurrence in dissent at 2 n.1. But Justice Utter observed:

> Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment for a few, rather than prevention of discrimination against disfavored individuals or groups.

Smith, 117 Wn.2d at 283 (Utter, J., concurring). My concurrence is fully in keeping with this historically accurate observation, as well as with the cases decided by this court. Unlike the concurrence in the dissent, I do not believe the court should disregard the cases historically carrying out the framers' intent to prohibit positive favoritism, particularly when the cases gave independent effect to article I, section 12.

It is entertaining to think about different interpretations that "might" have been given to article I, section 12, but the course was set long ago.

The implicit concern that discriminatory laws favoring majorities will go unchecked is unwarranted because both article I, section 12 and the equal protection clause apply in such cases, albeit under an identical analysis.

CONCLUSION

The majority misreads *Grant County* to say that an independent state constitutional analysis is always appropriate under article I, section 12. The court intended an independent analysis only where a grant of positive favoritism to a minority class is at issue. This is born out by the discussion in *Grant County* as well as by early cases decided under article I, section 12. As we recognized in *Grant County*, 150 Wn.2d at 809 n.12, article I, section 12 has required "invalidat[ion of] laws granting special advantages to certain people or classes of people."

I am concerned that the majority's discussion of state constitutional analysis may lead counsel to simply repeat all or part of the six-factor *Gunwall* analysis after it is settled that an independent analysis is appropriate. Rather than a rehash of the *Gunwall* factors, counsel and litigants should provide the court with their best legal assessment of and authority for interpreting and applying the state constitutional provision in a particular way, guided, where possible, by our decisions in that area.

I concur in the result of the majority, but not in its constitutional analysis.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR: