Madison (Daniel), et al. v. State

No. 78598-8

CHAMBERS, J. (concurring in dissent) — I concur in Chief Justice Alexander's well reasoned dissent. Washington's felon disenfranchisement statute violates the state and federal constitutions because it discriminates against the poor.

I write separately to respond to my learned colleague Justice Madsen. For the reasons I laid out last year when we considered whether the State could constitutionally refuse to recognize same sex marriages, and for the reasons set forth by Justice Utter before me, I believe our state privileges and immunities clause forbids distributing fundamental rights on unequal terms. *See* Const. art. I, § 12 ("No law shall be passed granting to any . . . class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens . . . ."); *Andersen v. King County*, 158 Wn.2d 1, 120-28, 138 P.3d 963 (2006) (Chambers, J., concurring in dissent); *State v. Smith,* 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring). Nothing in the *Grant County* opinion I signed says otherwise. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). I applaud the majority for not perpetuating the notion that it did. *See* majority at 13-14. [1]

The text of our constitution does not distinguish between a statute that gives extra helpings of privileges to majorities or to minorities. Const. art. I, § 12. It prohibits both and we should too. *See Smith,* 117 Wn.2d at 283-91 (Utter, J., concurring). The statute before us, in effect, restricts re-enfranchisement to those rich enough to buy it. That grants one class of citizens, the comparatively wealthy, a privilege that does "not equally belong to all citizens." Const. art. I, § 12. That is an unconstitutionally

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[1] Again, I must respectfully disagree with my learned colleague, Justice Madsen, about what this court held in *Grant County. See Andersen v. King County,* 158 Wn.2d 1, 125-26, 138 P.3d 963 (2006) (Chambers, J., concurring in dissent). I find much comfort in Justice Utter's well reasoned concurrence in *Smith* where he eloquently demonstrated why we should not defer to federal equal protection analysis when interpreting our own privileges and immunities clause. It is probably true that the *motivation* for our own privileges and immunities clause was our founders' well founded desire to establish a state where government benefits were not handed out to the special favorites of the legislature. But, as I have said before, the clause is plainly written to have a broader application. *Andersen,* 158 Wn.2d at 123-24 (Chambers, J., concurring in dissent).

My learned colleague is certainly correct in implying that our body of state constitutional law is woefully small. But this is because state courts have only recently rediscovered their own state constitutions. *See generally Robert F. Utter, State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?,* 64 Wash. L. Rev. 19, 30 n.67 (1989) (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 501-02 (1977)). I strongly believe we should not substitute federal constitutional jurisprudence for our own merely because we have in the past used it without considering whether our own constitution would demand a different approach. *See generally* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. Balt. L. Rev. 379 (1980).

Finally, I do not read the cases my learned colleague cites as being either supportive or persuasive of the proposition that our independent privileges and immunities analysis under our state constitution should be limited to times when legislation favors a minority class.

unequal distribution of a basic, fundamental right; the "democratic system's coin of the realm;"[2] the basic, fundamental right to cast a ballot.

I respectfully concur in dissent.

[2] *Richardson v. Ramirez,* 418 U.S. 24, 83, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974) (Marshall, J., dissenting).

AUTHOR:
Justice Tom Chambers

WE CONCUR: