Andersen (Heather) et al. v. King County

No. 75934-1

CHAMBERS, J. (concurring in dissent) — I fully endorse the views of Justice Fairhurst in dissent. I write separately to express my disagreement with the lead opinion's analytical approach toward our state constitution's privileges and immunities clause, article I, section 12.

The lead opinion concludes plaintiffs have not established "that they have a fundamental right to marriage that includes the right to marry a person of the same sex." Lead opinion at 5. Because the lead opinion concludes that no fundamental right is implicated, the rest of its discussion on article I, section 12 is unnecessary and dicta.

Our state privileges and immunities clause provides:

> 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.

Const. art. I, § 12. This text envisions a two part analysis: (1) has a law been passed granting a citizen, class, or corporation a privilege or immunity, and if so, (2) does that privilege or immunity belong equally to *all* of us? *Id.* *Accord* James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State,* 4 Seattle J. Soc. Just. 383, 413-15 (2005).

The clause applies only if the law grants a privilege or immunity, though, of course, it may be susceptible to other constitutional challenges.

The lead opinion states, without holding, that unless a statute grants a privilege or immunity to a *minority* group, we will apply the tripartite approach the federal courts have developed to interpret the federal equal protection clause. It implies that we will follow the lead of the federal courts in both analysis and result. *But see Sofie v. Fibreboard Corp.,* 112 Wn.2d 636, 640, 771 P.2d 711 (1989);[1] *State ex rel. Bacich v. Huse,* 187 Wash. 75, 80, 59 P.2d 1101 (1936), *overruled on other grounds by Puget Sound Gillnetters Ass'n v. Moos,* 92 Wn.2d 939, 955, 603 P.2d 819 (1979). Although the lead opinion cites authority for its conclusion, I disagree with both its approach and its determination that the authorities cited lead naturally to its conclusion. The fact that we have taken this approach during the infancy of our interpretation of the clause does not turn it into the law of this state. Our constitution demands a deliberative process. We should not abdicate our responsibility to interpret Washington's constitution to the judicial branch of a different government, let alone defer to an interpretation of a different clause of a different constitution.

Because, by its plain language, history, and structure, article I, section 12 applies to any privilege or immunity granted by the State on

[1] In *Sofie,* Justice Utter cogently noted that this court had "generally followed the federal tiered scrutiny model of equal protection analysis . . . . because a separate analysis focusing on the language and history of our state constitution has not been urged." *Sofie,* 112 Wn.2d at 640 (citation omitted).

unequal terms and because I continue to believe, as we held in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004) (*Grant County* II), that our constitution protects the privileges and immunities of "*all citizens,*" I write separately.

WHAT ARE PRIVILEGES AND IMMUNITIES?

Privileges and immunities can be traced back at least to the Middle Ages in canonical law. At that time, they were rights granted to specific individuals or groups. *See* R.H. Helmholz, *Magna Carta and the* Ius Commune, 66 U. Chi. L. Rev. 297, 330, 349 (1999).[2] However, these terms acquired new meanings under English secular law. David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Res. L. Rev. 794, 802 (1987). Privileges and immunities came to encompass the basic rights of English and American citizenship that were granted to *all* citizens, not merely to some privileged group. *See Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C. C. 371 (C.C.E.D. Pa. 1823); *cf. Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180, 19 L. Ed. 357 (1869) (rejecting natural law approach); Bogen, *supra,* at 800.

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[2] *See also* Barbara Mahoney*, The Privileges or Immunities Clause in the Washington State Constitution: A Source of Substantive Rights?* 4-6 (Feb. 12, 2002*)* (unpublished manuscript available in the University of Washington Gallagher Law Library); Barbara J. Rhoads-Weaver, *Has the Legislature Crossed the Boundaries Imposed by Article I, § 12 of the Washington Constitution by Using Class Legislation to Grant Marriage Licenses Exclusively to Opposite-Sex Couples?* (Spring 2002) (unpublished manuscript on file in the Washington State Supreme Court).

More than a century ago, a legal scholar catalogued many state court decisions construing their own privileges and immunities clauses in terms of what was and was not included. W.J. Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 Mich. L. Rev. 286 (1902). Professor Meyers concluded, "[r]oughly, the 'privileges and immunities' belonging to a *citizen* by virtue of citizenship are 'personal' rights, that is, *private* rights, as distinguished from *public* rights." *Id*. at 290.

This court has never definitively defined "privileges or immunities" under our own constitution. We did come close more than a century ago, noting that "privileges and immunities [are] *those fundamental rights which belong to the citizens of the state by reason of such citizenship*." *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) (emphasis added) (citing Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 597 (6th ed. 1890)). In other words, in general terms, privileges and immunities are those personal, fundamental rights that belong to each of us by virtue of our citizenship.[3] The legislature may, perhaps, expand the privileges and immunities of citizenship, but where it does, it is bound by the constitution to do so on equal terms.

I conclude that properly read, article I, section 12 of the Washington

[3] I agree with my colleagues Justices Jim Johnson and Richard Sanders to this extent; the appropriate analytical approach to article I, section 12 is to determine (1) whether the law grants a privilege or immunity and (2) whether it is available to all on equal terms. *See* concurrence (J.M. Johnson, J.) at 8.

Constitution protects us against all governmental actions that create unmerited favoritism in granting fundamental personal rights. *See State v. Smith,* 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring). Again, nothing in the text of our constitution supports a conclusion that we should follow the federal interpretation of a different clause of the United States Constitution unless the law grants a privilege and immunity to a minority. Instead, we should conclude that our privileges and immunities clause protects against all laws that grant privileges or immunities, "which upon the same terms shall not equally belong to all." Const. art. I, § 12. While the privileges and immunities clause may have been inspired in part by preventing the State from granting privileges to a few, *cf. State v. Clark*, 291 Or. 231, 236, 630 P.2d 810 (1981), the clause protects all of us from privileges granted on unequal terms.

EQUAL PROTECTION VS. PRIVILEGES AND IMMUNITIES

If both equal protection and privileges and immunities involve the giving or withholding of rights, how do these concepts differ? There is certainly overlap—both "seek to prevent the State from distributing benefits and burdens unequally." *Smith,* 117 Wn.2d at 283 (Utter, J., concurring). But there are important differences analytically.

First, the denial of *any* right implicates the federal equal protection clause. U.S. Const. amend. XIV, § 1. The fact that the right is fundamental merely elevates the level of scrutiny. *See generally Korematsu v. United*

States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). But only the privileges and immunities of citizenship implicate article I, section 12. *Vance,* 29 Wash. at 458.

Second, both equal protection and privileges and immunities involve classifications. A law that grants a privilege to some necessarily excludes others based upon a classification. Classifications may of course be proper; there is nothing unconstitutional about limiting criminal penalties to those who have been properly tried and convicted of crimes or limiting the right to practice law to those who have passed a bar examination. Once a legitimate class has been defined, the law must treat its members the same. Equal protection prevents discrimination against some class; privileges and immunities prevents favoritism. *See Smith,* 117 Wn.2d at 283; *State v. Savage*, 96 Or. 53, 59, 184 P. 567, 189 P. 427 (1919).[4]

In *Smith,* Justice Utter wrote separately to analyze whether Washington's privileges and immunities clause should be interpreted independently and differently from the federal and state equal protection clauses. He largely embraced the analysis of our sister state, Oregon.

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[4]As the Oregon Supreme Court held: "The provisions of the state Constitution are the antithesis of the fourteenth amendment in that they prevent the enlargement of the rights of some in discrimination against the rights of others, while the fourteenth amendment prevents the curtailment of rights." *Savage*, 96 Or. at 59; *see also Tanner v. Or. Health Scis. Univ.,* 157 Or. App. 502 522-25, 971 P.2d 435 (1998) (construing Oregon's privileges and immunities clause to protect gays and lesbians).

Smith, 117 Wn.2d at 287-91 (citing *State v. Clark*, 291 Or. 231). One significant difference between equal protection and privileges and immunities is that an individual does not have to assert that she has been denied a right as an individual or as a member of a disfavored class. She need not show discrimination. She need only show that some person or class of which she is not a member has been singled out for a privilege she does not receive; unless, of course, the State can show a justification for the difference in treatment. Otherwise, the challenged legislation is beyond the power of the State to enact. Const. art. I, § 12. The standard set by the privileges and immunities clause is perhaps the best test of justice and equality under the law for all.

DOES IT MATTER WHETHER A MAJORITY OR MINORITY RECEIVES THE PRIVILEGE OR IMMUNITY?

This court has never held, after full due consideration, that the effect of article I, section 12 is limited to positive grants of favoritism to a minority class. The lead opinion unfortunately makes reference to "grant[s] of positive favoritism to minorities," as having some constitutional significance in our analysis, but relies upon *Grant County* II, 150 Wn.2d 791, and *Smith*, 117 Wn.2d at 282 (Utter, J., concurring). Lead opinion at 11. The opinion I signed in *Grant County* II did not hold that the protections of the privileges and immunities clause effectively extended only to outraged majorities, and saying that we did so hold then does not make it a holding of the court

now.[5]

In *Grant County* II, this court concluded that our state privileges and immunity clause was different from and may provide greater protections than its federal counterpart. *Grant County* II*,* 150 Wn.2d at 811. Because of our shared history and textual similarities between Washington's and Oregon's privileges and immunities clauses, we have relied heavily on Oregon Supreme Court opinions. The only difference between the Washington and Oregon clauses is Washington's added reference to corporations. We explained that the corporate reference was added because our framers were gravely concerned with the effect of large concentrations of wealth and the undue political influence of corporations. *Grant County* II, 150 Wn.2d at 808.

After a review of history and case law, this court concluded simply, "[f]or a violation of article I, section 12 to occur, the law, or its application, must confer a privilege to a class of citizens." *Grant County* II, 150 Wn.2d at 812. *Grant County* II relied upon both *Smith*, 117 Wn.2d 263, and *Clark*, 291 Or. 231.[6] There is nothing in these cases or the authorities upon which

[5] I stress that the lead opinion does not explicitly hold that the privileges and immunities clause applies only when a statute grants a privilege or immunity to a minority.

[6] It is important to remember that in *Smith*, the issue discussed by Justice Utter was whether disparate treatment between juvenile defendants and adult defendants either discriminated against juveniles in violation of equal protection or was a privilege for adults. In the criminal justice system, adults are not a minority. Similarly, in *Clark* the issue was whether a preliminary hearing available to most criminal defendants but not to those indicted by grand jury was

they rely that should lead to the conclusion that the class receiving the benefit must be a minority class before we will independently examine our state constitution. Such a limitation upon our state's privileges and immunities clause would be, in my view, a far greater limitation than any other state has placed on its privileges and immunities clause in the modern era.

HAS THE PRIVILEGES AND IMMUNITIES QUESTION BEEN ANSWERED?

Finally, the lead opinion begins its privileges and immunities analysis at the end of the analysis. The proper question is whether marriage is a fundamental right that belongs to each of us by reason of our citizenship. Our founders would have answered that question with a resounding yes! Having determined that marriage is a privilege of citizenship, the next step is to determine whether the privilege is available to all on equal terms. This step necessarily requires the court to determine whether the challenger is challenging a valid classification.

Instead of engaging in an independent analysis of the State's privileges and immunities clause, the lead opinion relies upon the analytical framework developed to interpret the federal equal protection clause. Given the resolution of this case and my adherence to the dissent, I find it unnecessary to explore this issue further. However, it is important to stress that the lead opinion has neither addressed nor answered the

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a privilege to the majority.

important privileges and immunities arguments raised by the respondents. Resolution of these important questions will have to wait for another day.

CONCLUSION

I take the time to discuss article I, section 12 of our state constitution because, in constitutional terms, it is still in its infancy. But it is clearly not the same as equal protection. While the privileges and immunities clause in the fourteenth amendment to the United States Constitution was arguably to prevent states from granting fundamental rights to some of its citizens and not others, to our founders it was also a major component of the guaranty of equality for all. Article I, section 12 should be permitted to be interpreted and applied as our founders intended. As the judicial body charged with its interpretation, we should do so with utmost care. We should interpret our constitution only when the issues are properly framed and argued by real parties at interest and essential to the outcome of the case, not when they have been rendered effectively irrelevant by the court's disposition of predicate issues. While I certainly understand the temptation to reach every issue, if only to show that we thought it through, I do not believe it is the best way to develop our jurisprudence.

With these observations, I concur in dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Susan Owens