Washington Law Review

Volume 78 | Number 1

2-1-2003

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BEGGARS CAN'T BE VOTERS: WHY WASHINGTON'S FELON RE-ENFRANCHISEMENT LAW VIOLATES THE EQUAL PROTECTION CLAUSE

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Abstract: The Washington State Constitution denies persons convicted of felonies the right to vote until their civil rights have been restored. Civil rights are restored when offenders complete all aspects of their sentence, including paying the legal-financial obligations imposed at sentencing. Payment of legal-financial obligations presents a significant hurdle to offenders trying to reclaim their right to vote. According to the Washington Department of Corrections, roughly 46,500 offenders in Washington have not had their right to vote restored solely because of unpaid legal-financial obligations. The right to vote is a fundamental right secured by the United States Constitution, yet the United States Supreme Court has affirmed that states have the right, under the Fourteenth Amendment, to disenfranchise persons convicted of crimes. While the constitutional requirements of felon disenfranchisement are settled, the requirements of felon re-enfranchisement are an open question. This Comment argues that felon re-enfranchisement laws must not discriminate in ways that violate the traditional voting rights requirements of the Equal Protection Clause. As one requirement, the U.S. Supreme Court has held that states cannot require the payment of money as a qualification for voting. Therefore, Washington's requirement that offenders pay their legal-financial obligations before re-enfranchisement violates the Equal Protection Clause because it conditions the fundamental right to vote on the payment of money to the state.

John[1] was released last year from a Washington State prison after serving time for a felony theft conviction. Although he has a job earning $7.50 an hour, John has not been able to pay the $1,200 in monetary sanctions—officially called "legal-financial obligations"[2]—that were assessed during sentencing. Suppose that under Washington State law, John does not have the right to free speech because he has not finished

1. Hypothetical created by the author for illustrative purposes.

2. WASH. REV. CODE § 9.94A.030(27) (2002) defines a legal-financial obligation as:

> [A] sum of money that is ordered by a superior court of the state of Washington . . . which may include restitution to the victim, statutorily imposed crime victims' compensation fees as assessed pursuant to RCW 7.68.035, court costs, county or local drug funds, court-appointed attorneys' fees, and costs of defense, fines, and any other financial obligation that is assessed to the offender as a result of a felony conviction. Upon conviction for vehicular assault while under the inuence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), legal-financial obligations may also include payment to a public agency of the expense of an emergency response to the incident resulting in the conviction, subject to RCW 38.52.430.

Although the statute does not hyphenate the phrase "legal-financial obligations," the two words are hyphenated throughout this Comment for clarity and to emphasize the connection between the legal and financial aspects of the obligation.

paying his legal-financial obligations. Under this law, Washington requires offenders to complete all aspects of their sentence, including payment of legal-financial obligations, before restoring their free speech rights.[3] Angered by a recent ballot initiative, John wants to express his views by passing out flyers on a street corner, but he is prevented from doing so until he pays his legal-financial obligations. Across town, Sarah is on the sidewalk handing out flyers on the same ballot initiative. She also was released from jail last year, but her family could afford to pay her $1,500 of legal-financial obligations. As a consequence, her free speech rights were fully restored upon payment.

The scenario described above seems preposterous. Surely no court would uphold a state law that restricted offenders' free speech rights following release from prison until they paid their legal-financial obligations.[4] Yet, while no state restricts First Amendment rights in this way, the scenario reflects the law in many states regarding another fundamental right: voting. Some states, including Washington, deny offenders the right to vote until they have paid their legal-financial obligations.[5] As a result, while John can pass out flyers expressing his feelings on the upcoming initiative, he cannot vote on it. Sarah, on the other hand, can vote. The only difference between Sarah and John is their ability to pay.

In the United States, an estimated 3.9 million U.S. citizens are disenfranchised because of criminal convictions, including over one million who have fully completed their sentences.[6] Forty-eight states

3. The author has invented this state law for illustrative purposes. No law in Washington State requires that offenders pay their legal financial obligations before regaining free speech rights.

4. No state has enacted a law that restricts offenders' free speech rights following release from prison. However, in *Turner v. Safely*, the U.S. Supreme Court stated that restrictions on prisoners' fundamental rights are permissible only if necessary to advance legitimate penological interests. 482 U.S. 78, 89 (1987). It is difficult to imagine a scenario where restrictions on released offenders' free speech rights would be necessary to serve legitimate penological interests.

5. Washington is among more than a dozen states that deny felons voting rights until they have satisfied all conditions of their sentence, including payment of legal-financial obligations. *See* UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, RESTORING YOUR RIGHT TO VOTE, *available at* http://www.usdoj.gov/crt/restorevote/restorevote.htm (last visited Jan. 3, 2003) (summarizing what offenders must do to restore their voting rights in each state.); Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 4 (Human Rights Watch and The Sentencing Project, October 1998). For example, Alaska (ALASKA STAT. § 15.05.030 (Michie 2002)), Connecticut (CONN. GEN. STAT. §§ 9-46, 9-46a (2001)), Minnesota (MINN. STAT. §§ 201.014, 609.165 (2002)), and Texas (TEX. ELEC. CODE ANN. § 11.002 (Vernon 2002)) deny felons the right to vote until they have completed all aspects of their sentence.

6. Fellner & Mauer, *supra* note 5, at 4.

restrict offenders' voting rights to some extent.[7] State restrictions range from disenfranchisement only during incarceration to permanent denial of the right to vote.[8] In Washington, persons convicted of felonies are disenfranchised until they have received a "discharge," which they will receive after they have served any prison sentence, completed community placement,[9] and paid all legal-financial obligations imposed during sentencing.[10] Felons may bypass this process only if the governor grants them a pardon.[11] As of 1998, more than 150,000 Washington residents did not have the right to vote because of felony convictions.[12] In addition, the Washington Department of Corrections (DOC) estimates that as of December 2001, 46,500 offenders remained disenfranchised solely because of pending legal-financial obligations.[13]

The United States Constitution does not expressly guarantee the right to vote, but the U.S. Supreme Court has nonetheless held that once states grant citizens the right to vote, voting becomes a fundamental right protected by the Constitution.[14] According to the Court, the right to vote is a "fundamental matter in a free and democratic society,"[15] and as such any infringement on that right must be "meticulously scrutinized."[16] In the last fifty years, the Court has struck down a number of state laws that restricted citizens' voting rights, including laws requiring payment of money to the state.[17] However, the Court has upheld state laws that

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7. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT IN THE UNITED STATES, *available at* http://www.sentencingproject.org/brief/pub1046.pdf (last updated Nov. 2002) (summarizing state felon voting rights laws); *see also* UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, RESTORING YOUR RIGHT TO VOTE, *available at* http://www.usdoj.gov/crt/restorevote/restorevote.htm (last visited Jan. 3, 2003) (summarizing what offenders must do to restore their voting rights in each state).

8. Fellner & Mauer, *supra* note 5, at 3–4.

9. Under Washington's Sentencing Reform Act, offenders are sentenced to periods of community placement rather than parole and probation. WASH. REV. CODE § 9.94A.700 (2002). While under community placement, the offender lives in the community but remains under the supervision of the Department of Corrections. *Id.*

10. WASH. CONST. art. VI, § 3 (denying the right to vote for all persons convicted of "infamous crimes" unless they have had their civil rights restored); WASH. REV. CODE § 9.96.050 (2002) (providing for the restoration of civil rights upon discharge).

11. WASH. REV. CODE § 9.96.010.

12. Fellner & Mauer; *supra* note 5, at 6.

13. DEPARTMENT OF CORRECTIONS, AGENCY FISCAL NOTE FOR SENATE BILL 6519 (2002).

14. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

15. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

16. *Id.*

17. *Harper*, 383 U.S. at 668.

disenfranchise persons convicted of crimes. In *Richardson v. Ramirez*,[18] the Court held that, in spite of the heightened protection of voting rights, Section 2 of the Fourteenth Amendment allows states to distinguish between persons convicted of crimes and all other citizens when granting the right to vote.[19] Since *Ramirez*, the Court has continued to uphold a state's ability to deny felons the right to vote upon conviction, but has struck down state disenfranchisement laws that are otherwise discriminatory.[20]

This Comment does not challenge Washington's right under Section 2 of the Fourteenth Amendment to disenfranchise persons convicted of crimes. Rather, it argues that Section 2, as interpreted in *Ramirez*, allows states to distinguish *between* offenders and other citizens for voting rights purposes but not *among* offenders in ways that violate traditional voting rights principles. This Comment contends that when reinstating offenders' voting rights states must comply with the voting rights requirements of the Equal Protection Clause and, therefore, may not impose qualifications that discriminate against certain offenders. Specifically, Washington may not require felons to pay money to the state as a prerequisite for re-granting voting rights.[21] Currently, Washington conditions the grant of offenders' voting rights on the payment of legal-financial obligations. Thus, Washington gives voting rights to some offenders but not others—even offenders convicted of the same crime—based on their economic circumstances.[22] By requiring payment of money to the state without advancing a compelling state interest, Washington's re-enfranchisement system violates the Equal Protection Clause.

The U.S. Supreme Court has not determined the constitutional requirements of felon re-enfranchisement. Consequently, this Comment draws on analogous precedent in cases protecting voting rights, cases identifying the scope of offenders' rights, and cases addressing other fundamental rights to demonstrate why Washington's re-enfranchisement requirement violates the Equal Protection Clause. Part I of this Comment describes Washington's felon disenfranchisement and re-enfranchisement laws and the effects of conditioning offenders' voting

18. 418 U.S. 24 (1974).

19. *Id.* at 54.

20. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

21. *Harper*, 383 U.S. at 666.

22. WASH. REV. CODE § 9.96.050 (2002).

rights on the payment of legal-financial obligations. Part II provides an overview of the U.S. Supreme Court's voting rights doctrine. Part III acknowledges that states may disenfranchise persons convicted of crimes, but notes that the Court has not addressed re-enfranchisement of offenders. Part IV specifically highlights the Court's treatment of laws that condition voting on the payment of money and examines the extent to which other fundamental rights may be restricted based on a failure to pay legal-financial obligations. Finally, Part V argues that Washington's re-enfranchisement of offenders, only after paying legal-financial obligations, violates the Equal Protection Clause because it conditions the fundamental right to vote on the payment of money to the state without advancing a compelling state interest.

I. WASHINGTON CONDITIONS RESTORATION OF FELONS' VOTING RIGHTS ON THE PAYMENT OF LEGAL-FINANCIAL OBLIGATIONS

The Washington State Constitution denies to all persons convicted of felonies the right to vote unless they have had their civil rights restored.[23] Convicted felons' civil rights are restored if they complete all the requirements of their sentence, including jail time, community placement, and payment of all legal-financial obligations.[24] The civil rights restoration process reinstates all rights "lost by operation of law upon conviction."[25] The rights "lost by operation of law" include only political rights[26] and the right to bear arms.[27] Moreover, the right to vote is the only fundamental right lost upon conviction.[28] Many offenders have a difficult time satisfying their legal-financial obligations, resulting sometimes in permanent denial of the right to vote.[29]

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23. WASH. CONST. art. VI, § 3 ("All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise.").

24. WASH. REV. CODE § 9.96.050 (2002); *id.* § 9.94A.637 (2002).

25. *Id.* § 9.94A.637(3).

26. The right to vote, WASH. CONST. art. VI, § 3; WASH. REV. CODE § 29.10.097 (2002), and the right to serve on a jury, *id.* § 2.36.070, are the only political rights expressly lost upon conviction. However, a number of other political rights are contingent on being an eligible voter, including the right to run for office and to sponsor a voter's initiative. *Id.* §§ 29.15.010; 29.79.010.

27. *Id.* § 9.41.040(1)(b)(i).

28. *See infra* footnotes 39–47 and accompanying text.

29. *See infra* footnotes 68–72 and accompanying text.

A. Washington Denies Offenders the Right to Vote Unless Their Civil Rights Have Been Restored, Which Only Occurs Upon Payment of All Legal-Financial Obligations

The Washington State Constitution denies persons convicted of "infamous crimes" the right to vote unless their civil rights have been restored.[30] Washington law defines "infamous crime" as "a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility."[31] All felony crimes in Washington are captured under this definition.[32] Convicted felons' civil rights are restored if they complete all the requirements of their sentence, including paying legal-financial obligations,[33] or if they receive a pardon from the governor.[34] When offenders complete all aspects of their sentence, the sentencing court issues a certificate of discharge.[35] A discharge automatically restores an offender's civil rights, and the certificate of discharge must state that the offender's civil rights have been restored.[36]

Washington's civil rights restoration process reinstates all rights, including voting, "lost by operation of law upon conviction."[37] Besides the right to vote,[38] the only rights "lost by operation of law" are the right to serve on a jury[39] and the right to bear arms.[40] The U.S. Supreme Court has established that voting is a fundamental right protected by the U.S. Constitution.[41] However, the Court has not construed the right to serve on

30. WASH. CONST. art. VI, § 3.

31. WASH. REV. CODE § 29.01.080 (2002).

32. *Id.* § 9A.20.021(10).

33. *Id.* §§ 9.96.050; 9.94A.637.

34. *Id.* § 9.96.010. Section 9.96.020 provides that the governor may restore felons' civil rights by signing a civil rights restoration certificate. However, although the statute remains valid, the civil rights restoration by the governor was essentially supplanted by the Sentencing Reform Act's process of civil rights restoration upon discharge. *Id.* § 9.94A.637. Personal correspondence with Everett Billingslea, Counsel to Governor Gary Locke. (On file with the author). Consequently, current Governor Gary Locke does not restore civil rights for Washington offenders, but instead refers them to the sentencing court. *Id.*

35. *Id.*

36. WASH. REV. CODE § 9.94A.637(3) (2002).

37. *Id.*

38. WASH. CONST. art. VI, § 3; WASH. REV. CODE § 29.10.097 (2002).

39. WASH. REV. CODE § 2.36.070.

40. *Id.* § 9.41.040(1)(b)(i).

41. Reynolds v. Sims, 377 U.S. 533, 562 (1964); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 663 (1966).

a jury or the right of individuals to bear arms as fundamental rights.[42] Likewise, the Washington Supreme Court has not discussed the right to serve on a jury and has stopped short of applying fundamental status to the Washington State Constitution's right to bear arms.[43] Fundamental rights other than voting, such as the right to free speech and the right to be free from unreasonable search and seizure,[44] are not entirely lost upon conviction, and their restoration is not contingent on payment of legal-financial obligations.[45] Instead, other fundamental rights are only restricted during incarceration and parole when necessary to advance "legitimate penological interests."[46] Consequently, the only fundamental right restored through the civil rights restoration process, and thus the only fundamental right conditioned on the payment of legal-financial obligations, is an offender's right to vote.[47]

Washington's constitutional history does not provide a rationale for denying offenders of the fundamental right to vote,[48] nor does the legislative record provide an explanation for requiring felons to pay legal-financial obligations prior to regaining the franchise.[49] Other courts

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42. United States v. Miller, 307 U.S. 174, 178 (1939) (holding that the Second Amendment is a right held by the states and does not protect the possession of a weapon by private citizens).

43. State v. Krantz, 24 Wash. 2d 350, 353, 164 P.2d 453, 454 (1945) (upholding a Washington statute prohibiting persons convicted of crimes from possessing pistols).

44. Rights protected by the Constitution's Bill of Rights are fundamental. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1002 (6th ed. 2000).

45. Turner v. Safley, 482 U.S 78, 85 (1987).

46. *Id.* at 89.

47. Even though the right to bear arms is not fundamental, most offenders' right to possess firearms may be restored regardless of whether they have paid their legal-financial obligations. WASH. REV. CODE § 9.41.040(4)(b)(i) (2002). With or without payment of legal-financial obligations, most offenders can petition the sentencing court for the restoration of their right to possess a firearm if they have lived in the community for five or more consecutive years without being convicted of another crime. *Id.* Thus, offenders who have not paid their legal-financial obligations may have their right to possess a firearm restored, yet their right to vote—a fundamental right—will be denied because their sentence has not been discharged.

48. Washington's first disenfranchisement law was passed in 1866, when Washington was a territory. State v. Collin, 69 Wash. 268, 270 (1912). This law was incorporated into the Washington Constitution as Article VI, section 3 at the Constitutional Convention of 1889. *Id.* However, the delegates added the phrase "unless restored to civil rights" upon a separate motion. BEVERLY PAULIK ROSENOW, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, 638–39 (1962). The limited history that does exist from the Constitutional Convention does not describe the discussions surrounding felon disenfranchisement or the addition of the civil rights restoration provision. *Id.*; *see also* ROBERT F. UTTER & HUGH SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 122–23 (2002).

49. The requirement that offenders satisfy all conditions of their sentence, including payment of legal-financial obligations, before restoration of civil rights is part of the Sentencing Reform Act of

and commentators have attributed state felon disenfranchisement laws to a state's interest in promoting responsible use of the ballot.[50] However, no published court opinion or commentator has discussed states' rationales for requiring felons to pay their legal-financial obligations before regaining the right to vote.

B. *Washington Courts Assess Legal-Financial Obligations at Sentencing, and Failure to Pay Legal-Financial Obligations May Result in Civil or Criminal Sanctions*

When a person is convicted of a felony in Washington, the court must order the payment of legal-financial obligations as a part of the offender's sentence.[51] There are many different kinds of legal-financial obligations imposed in Washington, but the most common[52] are restitution,[53] a victim penalty assessment,[54] trial court costs,[55] fines,[56] and local drug penalties.[57] The sentencing court must impose a five hundred-

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1981. WASH. REV. CODE § 9.94A.637 (2002). The 1981 *Final Legislative Report, Legislative Digest and History of Bills of the Senate and House, House Journal,* and *Senate Journal,* all published by the Washington State Legislature, reveal no discussion of the restoration of civil rights upon completion of a sentence or of requiring payment of legal-financial obligations prior to restoration of civil rights.

50. *See* Shepard v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (noting that felons, "like insane persons[,] have raised questions about their ability to vote responsibly"); Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967) (stating that allowing felons to vote may lead to political corruption); Roger Clegg, *Who Should Vote?,* 6 TEX. REV. L. & POL. 159, 172 (2001) (arguing that felons should be denied the right to vote because their criminal acts call into question their trustworthiness and loyalty); Note, *The Disenfranchisement of Ex-felons: Citizenship, Criminality, and "the Purity of the Ballot Box,"* 102 HARV. L. REV. 1300, 1305–09 (1989) (surveying the justifications for felon disenfranchisement); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 162–63 (2000) (discussing historical justifications for felon disenfranchisement).

51. WASH. REV. CODE § 9.94A.760 (2002).

52. STATE OF WASHINGTON SENTENCING GUIDELINES COMMISSION, A COMPREHENSIVE REVIEW AND EVALUATION OF SENTENCING POLICY IN WASHINGTON STATE: 2000–2001, 57 (2001) [hereinafter COMPREHENSIVE REVIEW] (highlighting the most common forms of legal-financial obligations).

53. WASH. REV. CODE § 9.94A.753 (2002).

54. *Id.* § 7.68.035.

55. *Id.* § 10.01.160.

56. *Id.* § 9.94A.550.

57. The trial court may impose county or interlocal drug penalties at its discretion. *See* WASH. REV. CODE 9.94A.030(27); State v. Hunter, 102 Wash. App. 630, 634–35, 9 P.3d 872, 876 (2000).

dollar victim penalty assessment in all felony cases,[58] and restitution is mandatory where the crime results in harm to person or property.[59] Most other legal-financial obligations may be ordered at the discretion of the court or are mandatory only to the extent that the offender is able to pay.[60] Consequently, regardless of financial condition, every person convicted of a felony in Washington is assessed at least five hundred dollars in legal-financial obligations.

At sentencing, the court must establish a payment schedule based on the offender's financial resources.[61] The offender must abide by the payment schedule to avoid further sanctions.[62] From the date of sentencing, offenders are charged interest on their unpaid legal-financial obligations at a minimum rate of twelve percent per year.[63] If offenders fall behind in their payments, the state may pursue a number of debt collection devices, including garnishment of wages.[64] Additionally, the sentencing court and the DOC may impose sanctions, such as jail time or community service, if offenders willfully fail to pay legal-financial obligations.[65]

C. *Legal-Financial Obligations Present a Substantial Hurdle to the Restoration of Offenders' Voting Rights*

Many offenders have a difficult time meeting their legal-financial obligation requirements. Indigent offenders who are never able to pay are

58. State v. Curry, 118 Wash. 2d 911, 917, 829 P.2d 166, 186 (1992) (holding that the victim penalty assessment is mandatory because there is no statutory provision for waiver).

59. WASH. REV. CODE § 9.94A.753 (2002). Restitution must be ordered by the court in cases of damage to property or injury to person "unless extraordinary circumstances exist which make restitution inappropriate in the court's judgment." *Id.*

60. For example, trial court costs and fines are assessed at the discretion of the court. *Id.* § 10.01.160. Also, the Department of Corrections (DOC) supervision fees are mandatory but may be waived if the offender is unable to pay because of unemployment, handicap, or other extenuating circumstances that make payment difficult. *Id.* § 9.94A.780 (2002).

61. *Id.* § 9.94A.760(1). If the court does not set a payment schedule, the DOC must set one. *Id.*

62. *Id.* §§ 9.94A.634(3)(a)(i); 9.94A.634(3)(c).

63. Interest on criminal judgments accrues at the same rate as that required for civil judgments, and accrues at the highest rate permitted by law. *See id.* §§ 10.82.090; 4.56.110. The maximum interested rate permitted by law is the higher of: (1) 12% or (2) the rate of a 26-week T-bill plus four percent. *Id.* § 19.52.020.

64. *Id.* § 9.94A.760(3).

65. *Id.* §§ 9.94A.634(3)(a)(i); 9.94A.634(3)(c).

permanently ineligible for re-enfranchisement.[66] While the DOC and county courts track overall collection rates, they do not record how much the average offender is required to pay or how many offenders have difficulty paying their legal-financial obligations.[67] The limited evidence available regarding offenders' ability to pay suggests that thousands of offenders in Washington are currently unable to receive a discharge, and thus are ineligible for re-enfranchisement, because they cannot pay their legal-financial obligations. In a fiscal note to a 2002 Washington State Senate bill, the DOC estimated that as of December 31, 2001, about 46,500 offenders had completed all the requirements of their sentences except for paying their legal-financial obligations.[68] Additionally, approximately ninety percent of the offenders who appear before the sentencing court for failure to pay legal-financial obligations qualify for a public defender,[69] which means that they are at or below 125 percent of the federal poverty line.[70] The high rate of indigency among offenders who are delinquent in making their legal-financial obligation payments suggests that they simply lack the financial resources to meet their payment schedule. Data on collection rates also supports this conclusion. The DOC reports that in the year 2000 it collected only twenty eight percent of the assessed legal-financial obligations.[71] Of the mandatory victim penalty assessments imposed between 1995 and 2000, the DOC reports that it collected just 25.4 percent.[72]

In sum, convicted felons in Washington cannot regain voting rights until they have paid all legal-financial obligations imposed at sentencing. Therefore, although Washington has a process for restoring offenders' voting rights, that process is foreclosed to many offenders because they lack the financial resources to pay their debts. The U.S. Supreme Court's voting rights case law,[73] along with its opinions regarding other

66. If offenders do not pay their legal financial obligations they are ineligible for a sentence discharge; a discharge is a pre-requisite for re-enfranchisement. WASH. REV. CODE §9.94A.637 (2002).

67. Telephone Interview with Barbara Miner, Director of King County Clerk's Office (July 10, 2002).

68. DEPARTMENT OF CORRECTIONS, AGENCY FISCAL NOTE FOR SENATE BILL 6519 (2002).

69. DEPARTMENT OF COMMUNITY, TRADE, AND ECONOMIC DEVELOPMENT, LOCAL GOVERNMENT FISCAL NOTE FOR HOUSE BILL 2712 (2002).

70. Maureen O'Hagan, *Public Defenders Work for Nonprofits*, THE SEATTLE TIMES, Aug. 15, 2002, at B8.

71. COMPREHENSIVE REVIEW, *supra* note 52, at 56–57.

72. *Id.*

73. *See infra* Section II.

fundamental rights,[74] suggest Washington's bar on voting for failure to pay legal-financial obligations violates the Equal Protection Clause.[75] The following sections investigate this possibility.

II. VOTING IS A FUNDAMENTAL RIGHT SECURED BY THE EQUAL PROTECTION CLAUSE

Although the right to vote is not explicitly guaranteed in the text of the U.S. Constitution, the U.S. Supreme Court has held that once states grant citizens the right to vote, it becomes a fundamental right protected by the Constitution.[76] As a fundamental right, state laws alleged to restrict voting rights must survive strict scrutiny under the Equal Protection Clause.[77] To satisfy strict scrutiny, state laws must treat all citizens alike when providing the right to vote, unless disparate treatment is necessary to advance a compelling governmental interest.[78]

A. Once Granted by the State, the Right to Vote is Fundamental

Neither the text of the U.S. Constitution nor any constitutional amendment contains an affirmative grant of the right to vote,[79] and until the mid-twentieth century voting was not considered a fundamental right.[80] The Constitution scarcely mentions voting,[81] and the amendments that address voting rights do so only in negative terms, providing that the right to vote "shall not be abridged or denied" on account of race,[82] sex,[83] age,[84] or payment of a poll tax.[85] During the nineteenth century, the U.S. Supreme Court held that "the Constitution of the United States has not

74. *See infra* Section IV.

75. *See infra* Section V.

76. *Id.*

77. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

78. Wesberry v. Sanders, 376 U.S. 1, 18 (1964).

79. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 46 (2001).

80. *Id.*

81. The only mention of citizen electoral rights is in Article I, section 2 which states "The House of Representatives shall be . . . chosen every second Year by the People of the several States . . . . "

82. U.S. CONST. amend. XV.

83. U.S. CONST. amend. XIX.

84. U.S. CONST. amend. XXVI.

85. U.S. CONST. amend. XXIV.

conferred the right to vote upon any one."[86] Nonetheless, following the Civil War the Court began to recognize that voting was one of a citizen's most important political rights. In *Yick Wo v. Hopkins*,[87] the Court stated that, "[t]hough not regarded strictly as a natural right, but as a privilege merely conceded by society . . . [voting] is regarded as a fundamental political right, because [it is] preservative of all rights."[88] During the first half of the twentieth century, the Court did not address the constitutional status of voting rights but instead focused on the problem of disenfranchisement of African Americans.[89] Then, in a series of cases between 1959 and 1969, the Court expanded the scope of the right to vote and declared voting a "fundamental matter in a free and democratic society."[90]

According to the U.S. Supreme Court, the fundamental right to vote is implied in the U.S. Constitution's structure and arises once states provide citizens with the opportunity to vote.[91] In *Wesberry v. Sanders*,[92] the Court stated that "our Constitution leaves no room for classification of people in a way that unnecessarily abridges" the right to vote because "[n]o right is more precious in a free country than having a voice in the election of those who make the laws . . . . Other rights, even the most basic, are illusory if the right to vote is undermined."[93] The Court has acknowledged that states may determine the conditions under which the right to vote can be exercised,[94] but it has held that once states grant voting rights to their citizens they must not do so in a discriminatory manner.[95] Upon granting the franchise, states must treat all eligible voters similarly, unless disparate treatment is necessary to advance a compelling interest.[96]

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86. United States v. Cruikshank, 92 U.S. 542, 555 (1875).

87. 118 U.S. 356 (1886).

88. *Id.* at 370.

89. ISSACHAROFF ET AL., *supra* note 79, at 46.

90. Reynolds v. Sims, 377 U.S. 533, 562 (1964). *See also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964).

91. *Harper*, 383 U.S. at 665.

92. 376 U.S. 1 (1964).

93. *Id.* at 17–18.

94. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

95. *Harper*, 383 U.S. at 665.

96. Dunn v. Blumstein, 405 U.S. 330, 337 (1972); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626–27 (1969).

B. *State Laws Infringing on the Fundamental Right to Vote Are Subject to Strict Scrutiny*

The Equal Protection Clause forbids states from treating similarly situated people differently,[97] but there is no universal standard for determining whether a state law inappropriately imposes disparate treatment.[98] Instead, the U.S. Supreme Court employs three standards of review for Equal Protection challenges: strict scrutiny, intermediate scrutiny, and rational basis scrutiny.[99] Courts reviewing an Equal Protection challenge must chose between these standards based on the answers to two initial questions.[100] First, on what basis does the law classify groups of people for disparate treatment?[101] Second, what right is at stake?[102]

Laws challenged under the Equal Protection Clause receive strict scrutiny—the most intensive level of review—if the law involves disparate treatment based on suspect classifications such as race[103] or if the disparate treatment threatens a fundamental right.[104] Under strict scrutiny, courts will strike down state laws unless they are narrowly tailored to advance a compelling governmental interest.[105] Laws receive

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97. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

98. *See Dunn*, 405 U.S. at 335 (highlighting the three considerations encompassed within these two questions).

99. NOWAK & ROTUNDA, supra *note* 44, at 639.

100. *Dunn*, 405 U.S. at 335.

101. *Id.*

102. *Id.*

103. The U.S. Supreme Court has recognized race, alienage, and national origin as suspect classifications requiring strict scrutiny. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). *See also* NOWAK & ROTUNDA, *supra* note 44, at 640. The Court has declined to extend the suspect classification label to other groups of people, including the disabled and the poor. *See Cleburne*, 473 U.S. at 439 (people with disabilities); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (families with low incomes).

104. LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1454 (2d ed. 1988). Fundamental rights which invoke strict scrutiny include, inter alia, the right to vote, the right to marry, the right to travel, and those rights explicitly protected in the Bill of Rights. *See Dunn*, 405 U.S. at 336 (right to vote); Zablocki v. Redhail, 434 U.S. 374, 383 (1978) (right to marry); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); NOWAK & ROTUNDA, *supra* note 44, at 1002 (rights protected in the Bill of Rights).

105. Miller v. Johnson, 515 U.S. 900, 921 (1995). At times, the U.S. Supreme Court has used the word "necessary" rather than "narrowly tailored" in its articulations of the strict scrutiny test. *See Dunn*, 405 U.S. at 337. Both expressions of the strict scrutiny test capture the spirit of the Court's standard—that the restriction must not merely advance the compelling state interest but must be *essential* to its achievement—and are used interchangeably throughout this Comment.

intermediate scrutiny if they involve classifications that require heightened judicial review but are not "suspect" and do not implicate a fundamental right.[106] To survive intermediate scrutiny, state laws must substantially further an important governmental interest.[107] All other challenges receive rational basis scrutiny, which requires state laws to be rationally related to a legitimate governmental purpose.[108]

Regardless of the basis for classification, voting laws receive strict scrutiny because they implicate a fundamental right.[109] Under the strict scrutiny standard, laws that impose voter qualifications will be struck down unless they are necessary to advance a compelling governmental interest.[110] In *Reynolds v. Sims*,[111] the U.S. Supreme Court recognized voting as a fundamental right and directed courts to apply strict scrutiny, stating "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."[112] Further, in *Buckley v. Valeo*,[113] the Court stated that restrictions on the electoral process must survive "exacting scrutiny"[114] and will only be sustained if they further a "vital governmental interest."[115] The Court has struck down a number of voter qualifications on Equal Protection grounds because the qualifications imposed conditions that were not narrowly tailored to advance compelling governmental interests.[116] For example, the Court has invalidated voter qualifications that established a requirement of wealth,[117] required residents to pay property taxes in order to vote in school board elections,[118] excluded residents based on military status,[119] or imposed lengthy residency requirements.[120]

106. TRIBE, *supra* note 104, at 1613. The U.S. Supreme Court has recognized gender and illegitimacy as classifications that require intermediate scrutiny. *Id.* at 1614.

107. Clark v. Jeter, 486 U.S. 456, 461 (1988).

108. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988).

109. ISSACHAROFF ET AL., *supra* note 79, at 303–05.

110. *Dunn*, 405 U.S. at 337.

111. 377 U.S. 533 (1964).

112. *Id.*

113. 424 U.S. 1 (1974).

114. *Id.* at 93–94.

115. *Id.*

116. Gordon v. Lance, 403 U.S. 1, 5 (1971).

117. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966).

118. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622 (1969).

In sum, since the mid-twentieth century, the U.S. Supreme Court has upheld citizens' fundamental right to vote and permitted only those voter qualifications that are narrowly tailored to advance a compelling governmental interest. Most state voting rights restrictions have been struck down as unnecessary infringements on a fundamental right. However, as the next section illustrates, the Court has permitted one exception to the rule that states cannot treat citizens differently with respect to voting rights: states can exclude from the franchise citizens convicted of crimes.[121]

III. STATES CAN DISENFRANCHISE OFFENDERS UPON CONVICTION, BUT THE U.S. SUPREME COURT HAS NOT YET DECIDED THE CONSTITUTIONAL REQUIREMENTS FOR FELON RE-ENFRANCHISEMENT

Although the right to vote is fundamental, states may restrict offenders' right to vote without running afoul of the Equal Protection Clause if disenfranchisement laws are not otherwise discriminatory.[122] However, the U.S. Supreme Court has never addressed the Equal Protection Clause's requirements for felon re-enfranchisement laws. Interpreting Section 2 of the Fourteenth Amendment, the Court in *Ramirez* permitted states to deny the right to vote to persons convicted of crimes.[123] Under *Ramirez*, states do not violate the Equal Protection Clause when they distinguish for voting rights purposes between citizens who have committed crimes and those who have not.[124] However, in *Hunter v. Underwood*,[125] the Court clarified that felon disenfranchisement laws are not entirely immune from all Equal Protection challenges.[126] State disenfranchisement laws violate the Equal Protection Clause if the laws discriminate on a basis other than offender

119. Carrington v. Rush, 380 U.S. 89, 96–97 (1965) (striking down a Texas constitutional provision prohibiting members of the armed forces who move to Texas during the course of military duty from voting while they remain in the military).

120. Dunn v. Blumstein, 405 U.S. 330, 360 (1972).

121. *See infra* Section III.A.

122. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

123. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

124. *Id.*

125. 471 U.S 222 (1985).

126. *Id.* at 233.

status.[127] The Court has not decided whether states, when re-enfranchising offenders, are permitted to make distinctions using classifications such as race or economic status that cannot be used when granting the initial right to vote.

A. *The U.S. Constitution Permits States to Deny Voting Rights to Citizens Convicted of Crimes*

A state's ability to deny felons the right to vote is derived from Section 2 of the Fourteenth Amendment. According to Section 2, "representatives will be apportioned among the several States according to their respective numbers."[128] States that deny the right to vote to any eligible male "*except for participation in rebellion, or other crime*" will have their representation reduced in proportion to the number of persons denied the right to vote.[129] Based on the explicit exception of criminal convictions for apportionment purposes, the U.S. Supreme Court concluded in *Ramirez* that Section 2 of the Fourteenth Amendment implicitly authorizes states to deny the right to vote to persons convicted of crimes.[130]

In *Ramirez*, three California residents convicted of felonies sued their county clerk for refusing to register them to vote.[131] They argued that California's felon disenfranchisement law violated the Equal Protection Clause because it denied them the right vote while granting it to all other residents.[132] Their claim rested on prior U.S. Supreme Court voting rights cases, which held that states could not impose voter qualifications that distinguish between different groups of eligible voters based on irrelevant factors.[133] However, the Supreme Court's opinion in *Ramirez*, relying on the text and original intent of Section 2 of the Fourteenth

127. *Id.*

128. U.S. CONST. amend XIV, § 2 (emphasis added).

129. *Id.*

130. 418 U.S. 24, 54 (1974).

131. *Id.* at 31–33.

132. *Id.* at 33. The plaintiffs also claimed that California's felon disenfranchisement laws violated the Equal Protection Clause because county clerks throughout the state were inconsistent in their application of the felon disenfranchisement law, thereby arbitrarily granting some felons but not others voting rights. *Id.* Because the California Supreme Court had not considered this claim, the U.S. Supreme Court remanded the case for consideration of whether the counties' implementation of California's disenfranchisement law violated the Equal Protection Clause. *Id.* at 56.

133. *Id.*

Amendment, held that states do not violate the Equal Protection Clause when they disenfranchise felons based on their status as offenders.[134]

B. Felon Disenfranchisement Laws May Violate the Equal Protection Clause When They Are Otherwise Discriminatory

A decade after *Ramirez*, the U.S. Supreme Court clarified that state disenfranchisement laws can violate the Equal Protection Clause if the laws disenfranchised offenders on a basis other than criminal conviction.[135] In *Hunter v. Underwood*, citizens convicted of misdemeanor crimes challenged an Alabama constitutional provision that disenfranchised persons convicted of crimes "involving moral turpitude."[136] Alabama's definition of crimes of "moral turpitude" included misdemeanor offenses such as presenting a worthless check and petty larceny, but excluded more serious offenses such as second-degree manslaughter and assault on a police officer.[137] The plaintiffs argued that the selection of crimes "involving moral turpitude" was racially discriminatory, intending to disenfranchise blacks more often than whites.[138] The Court struck down Alabama's law, citing the unusual selection of crimes[139] and legislative history demonstrating that the constitutional provision was enacted with the purpose of disenfranchising blacks.[140] The *Hunter* Court held that felon disenfranchisement laws that are enacted with "the desire to discriminate" against persons on account of race and that in fact have a discriminatory effect violate the Equal Protection Clause.[141]

The explicit holding of the Court in *Hunter*—that felon disenfranchisement laws violate the Equal Protection Clause if they are

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134. *Id.* at 54.

135. 471 U.S. 222, 233 (1985). In *Ramirez*, the Court suggested, but did not decide, that felon disenfranchisement laws violate the Equal Protection Clause if otherwise discriminatory when it remanded the case to the California Supreme Court for consideration of whether California's implementation of its disenfranchisement law was arbitrary and therefore violated the Equal Protection Clause. 418 U.S. at 56. *See also supra* note 132.

136. *Hunter*, 471 U.S. at 223 (quoting the ALA. CONST. § 182 (1901)).

137. *Id.* at 226–27.

138. *Id.* at 224.

139. *Id.* at 227.

140. *Id.* at 229–30.

141. *Id.* at 233.

racially discriminatory[142]—suggests that where felon disenfranchisement laws are discriminatory on any basis other than offender status, they must survive a traditional Equal Protection analysis. To resolve the plaintiffs' Fourteenth Amendment claim, the *Hunter* Court did not first discuss *Ramirez* or disenfranchisement laws' immunity from Equal Protection challenges, but instead began with a traditional Equal Protection analysis.[143] Furthermore, at the end of its analysis, the Court noted that its decision was entirely consistent with the *Ramirez* decision because "§ 2 was not designed to permit . . . purposeful racial discrimination . . . ."[144] The *Hunter* Court's willingness to entertain an Equal Protection challenge based on racial discrimination without first considering the specific requirements of Section 2 of the Fourteenth Amendment demonstrates that felon disenfranchisement laws are not entirely immune from Equal Protection scrutiny.[145]

C. *The U.S. Supreme Court Has Not Considered the Constitutional Requirements of Felon Re-Enfranchisement Laws*

The constitutional requirements of felon re-enfranchisement remain an unsettled area of law because both *Ramirez* and *Hunter* exclusively addressed felon disenfranchisement. *Ramirez* considered whether states, under the crime exception in Section 2 of the Fourteenth Amendment, could deny felons the right to vote while granting it to all other citizens.[146] *Hunter* dealt with a state's initial decision about which crimes would fall under Section 2's crime exception and clarified that the state may not make those determinations for discriminatory reasons.[147] *Ramirez* and *Hunter* leave unanswered the central constitutional question of felon re-enfranchisement: whether states, when re-granting voting rights, can distinguish among offenders by imposing qualifications that would otherwise violate the Equal Protection Clause's voting rights requirements.

Although no U.S. Supreme Court opinion has addressed the constitutionality of felon re-enfranchisement requirements, recently in

142. *Id.*

143. *Id.* at 227–28.

144. *Id.* at 233.

145. *Id.* at 227–28.

146. Richardson v. Ramirez, 418 U.S. 24, 55 (1974).

147. *Hunter*, 417 U.S. at 233.

Johnson v. Bush,[148] a federal district court in the Southern District of Florida considered whether a requirement that offenders pay restitution before becoming eligible for re-enfranchisement amounted to an unconstitutional poll tax.[149] Plaintiffs challenged that the restitution requirement was a poll tax equivalent, and therefore violated the Fourteenth and Twenty-Fourth Amendments, as well as the Voting Rights Act of 1965.[150] The federal district court did not consider the three bases of the plaintiffs' challenge separately, and merely held that Florida was entitled to summary judgment on the plaintiff's poll tax claims.[151] To support its grant of summary judgment, the *Johnson* court noted that Florida's restitution requirement was unlike traditional poll taxes because it was a part of Florida's civil rights restoration process rather than a requirement for voter registration or a restraint on exercise of the franchise.[152] In addition, according to the *Johnson* court, payment of restitution is related to an offender's "readiness to return to the electorate" and therefore is not an unconstitutional poll tax.[153] Moreover, the court suggested that upon conviction felons lose all stake in the right to vote, and consequently any decision by Florida to restore voting rights does not invoke constitutional protections.[154]

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148. 214 F. Supp. 2d. 1333 (S.D. Fla 2002).

149. *Id.* at 1342–43. The *Johnson* court has been the only court to consider whether a requirement that offenders pay money as a prerequisite to the restoration of voting rights violates the Equal Protection Clause. The Second Circuit, in a case opinion pre-dating *Hunter* and *Ramirez*, did consider whether offenders could challenge the constitutionality of state laws which require the payment of a fee for restoration of voting rights, but did not decide whether such requirements actually violate the Equal Protection Clause. *See* Bynum v. Conn. Comm'n on Forfeited Rights, 410 F.2d 173, 175–76 (2d Cir. 1969). In holding that the plaintiff's challenge was valid, the Second Circuit reasoned "[t]he focal question is whether [a state], once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can deny access to this relief solely because one is too poor to pay the required fee." *Id.* The Second Circuit referred the case to a three-judge panel, which never produced an opinion on the validity of Connecticut's re-enfranchisement requirements. *Id.* at 177. The Connecticut Legislature later repealed the re-enfranchisement statute that required payment of a fee. *See* CONN. GEN. STAT. § 9-48 (2001). More recently, the Fourth Circuit, in an unpublished opinion, rejected without much discussion the plaintiff's claim that Virginia's requirement that offenders pay money to apply for the restoration of their voting rights violated the Twenty-Fourth Amendment's prohibition against poll taxes. *See* Howard v. Gilmore, No. 99-2285, 2000 U.S. App. LEXIS 2680, at *4 (4th Cir. Feb. 23, 2000). The Fourth Circuit did not examine the re-enfranchisement requirements under the Fourteenth Amendment's Equal Protection Clause. *Id.*

150. *Johnson*, 214 F. Supp. 2d. at 1343.

151. *Id.* at 1342.

152. *Id.* at 1343.

153. *Id.*

154. *Id.*

Though the *Johnson* court held that Florida's restitution requirement was not a poll tax, the court, like the U.S. Supreme Court, did not directly decide the central question of felon re-enfranchisement. Can states, in their re-enfranchisement laws, distinguish between groups of felons in ways that otherwise violate the voting rights requirements of the Equal Protection Clause? The U.S. Supreme Court's opinions in analogous areas of law, explored in the next section, are helpful in answering this question.

IV. STATES CANNOT RESTRICT FUNDAMENTAL RIGHTS BASED ON AN INABILITY TO PAY MONEY TO THE STATE WITHOUT ADVANCING A COMPELLING INTEREST

Although the U.S. Supreme Court has not decided the requirements for felon re-enfranchisement laws, it has addressed restrictions of other fundamental rights based on an inability to pay. First, with respect to voting rights, the Court has held that states cannot condition voting on financial resources or payment of money to the state.[155] Second, outside the context of voting, the Court has held that states may not condition offenders' fundamental rights on the payment of legal-financial obligations and court costs.[156] Third, addressing fundamental rights more generally, the Court has held that states may not restrict citizens' fundamental rights because of a failure to pay pre-existing debt.[157] In addition, restricting fundamental rights to serve the state's "debt collection" interests is unconstitutional where the state has equally effective, yet less restrictive options available.[158]

A. States May Not Impose Voter Qualifications Based on Payment of Money to the State or an Individual's Affluence

Voter qualifications that require citizens to pay money to the state, most often identified with a poll tax requirement, violate the Equal Protection Clause.[159] Poll tax requirements are taxes, or the functional equivalent, that burden the exercise of an individual's right to vote. Poll

155. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665 (1966).

156. Williams v. Illinois, 399 U.S. 235 (1970); Griffin v. Illinois, 351 U.S. 12 (1956).

157. Zablocki v. Redhail, 424 U.S. 374, 388 (1978).

158. *Id.* at 389–90; *Williams*, 399 U.S. at 245.

159. *Harper*, 383 U.S. at 665.

taxes violate the Fourteenth[160] and Twenty-Fourth Amendments[161] of the U.S. Constitution, as well as the Voting Rights Act of 1965.[162] Moreover, the U.S. Supreme Court has stated that the Fourteenth Amendment's voting rights requirements prohibit more than explicit poll taxes, extending to any state requirement that introduces affluence as a qualification of voting.[163]

In *Harper v. Virginia Board of Elections*,[164] the U.S. Supreme Court struck down a Virginia law requiring voters to pay a $1.50 poll tax in order to vote in state elections.[165] According to the Court, a state's interest in voting is limited to the power to fix voter qualifications that "promote the intelligent use of the ballot."[166] Because "wealth, like race, creed or color, is not germane to one's ability to participate intelligently in the electoral process," states that introduce "wealth or payment of a fee as a measure of a voter's qualification . . . introduce a capricious and irrelevant factor."[167] Therefore, the Court concluded that distinguishing among citizens based on their ability to pay by conditioning voting on affluence or the payment of money violates the Equal Protection Clause.[168] In addition, the Court emphasized that voter qualifications based on affluence violate the Constitution no mater how large or small the degree of resulting discrimination.[169] To the Court, any discrimination based on financial condition is unacceptable.[170]

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160. *Id.* at 666.

161. The Twenty-Fourth Amendment prohibits the use of a state poll tax or any other tax to "deny or abridge" the right of citizens to vote in federal primary and general elections. U.S. CONST. amend. XXIV. In *Harman v. Forssenius*, the U.S. Supreme Court held that the Twenty-Fourth Amendment also prohibits requirements that are the functional equivalent of a poll tax. 380 U.S. 528, 540–41 (1965).

162. Congress, exercising its powers under the Fourteenth, Fifteenth, and Twenty-Fourth Amendments, prohibited the payment of a poll tax as a precondition for voting in Section 10 of the Voting Rights Act. *See* 42 USC § 1973(h) (2002).

163. *Harper*, 383 U.S. at 666.

164. 383 U.S. 663 (1966).

165. *Id.* at 668. *Harper* was decided two years after the passage of the Twenty-Fourth Amendment in 1964, which prohibited the collection of poll taxes in federal elections. U.S. CONST. amend. XXIV. Poll tax requirements for state elections were valid until the Court's decision in *Harper*. 383 U.S. at 666.

166. *Harper*, 383 U.S. at 666.

167. *Id.* at 668.

168. *Id.*

169. *Id.* at 665.

170. *Id.*

B. *States Cannot Distinguish Between Groups of Offenders Based on Their Ability to Pay Where Fundamental Rights Are at Stake*

Although the U.S. Supreme Court has permitted distinctions between offenders and other citizens for voting rights purposes, it has been less tolerant of distinctions between groups of offenders, especially where the distinctions fall along economic lines. The Court has held that the length of offenders' incarceration may not be conditioned on their ability to pay legal-financial obligations.[171] Furthermore, the Court has held that although states are not constitutionally required to provide appellate courts, if they do provide appellate review, it cannot be based on offenders' ability to pay money.[172]

1. *States Cannot Prevent Offenders from Regaining Their Liberty Because They Are Unable to Pay Legal-Financial Obligations*

States cannot restrict offenders' liberty longer than the maximum time permitted by statute because they are unable to pay the legal-financial obligations imposed at sentencing.[173] In *Williams v. Illinois*,[174] the Court invalidated an Illinois law requiring indigent offenders who were unable to pay their legal-financial obligations to remain in prison until they had worked off their debts.[175] According to the Court, the Illinois requirement violated the Equal Protection Clause because it determined which offenders would be released and which ones would not based on an ability to pay.[176] Although the Court recognized that "the sentence was not imposed upon appellant because of his indigency but because he had committed a crime," the Court held the law was nonetheless discriminatory because it presented some offenders with the opportunity to regain their freedom while effectively denying the same opportunity to other offenders because of their economic circumstances.[177]

The *Williams* Court acknowledged that judges have considerable discretion when sentencing offenders and may take into account a wide

171. Williams v. Illinois, 399 U.S. 235, 244 (1970).

172. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

173. *Williams*, 399 U.S. at 243.

174. 399 U.S. 235 (1970).

175. *Id.* at 243–44.

176. *Id.* at 244.

177. *Id.* at 242.

range of factors.[178] According to the Court, however, the Illinois law went beyond sentencing discretion to punish some offenders longer—beyond even the statutory maximum—solely based on their financial condition.[179] The Court noted that Illinois had imposed "different consequences on two categories of persons" and held that "the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offence be the same for all defendants irrespective of their economic status."[180] In later cases, the Court has construed its holding in *Williams* as prohibiting states from imposing a fine and then converting it to jail time because the offender does not have the financial resources to pay the fine.[181]

At the conclusion of it's constitutional analysis, the Court recognized that preventing states from incarcerating offenders for failure to pay legal-financial obligations would make collection somewhat more difficult, but the Court noted that it would not eliminates a state's ability to collect the debts altogether.[182] Dismissing the added burden to the state, the Court stated "the constitutional imperatives of the Equal Protection Clause must have priority . . . ." over the state's inconvenience.[183] Further, the Court reasoned that "administrative inconvenience would be minimal" because states have a wide variety of other debt collection options available that do not restrict offenders' liberty through additional incarceration.[184] Consequently, in *Williams*, the Court held that the denial of liberty through continued incarceration was unnecessary to advance the state's debt collection interest.[185]

178. *Id.* at 243.

179. *Id.*

180. *Id.* at 244.

181. Tate v. Short, 401 U.S. 395, 398 (1971). Further, in *Bearden v. Georgia* the Court held that due process prohibits states from incarcerating offenders for failure to pay legal-financial obligations without inquiring into the willfulness of the nonpayment and without considering alternative forms of punishment that do not restrict liberty interests. 461 U.S. 660, 672–73 (1983). The Court stated that automatic incarceration violates the Fourteenth Amendment because it is fundamentally unfair to incarcerate offenders solely because they lack the financial resources to pay their legal-financial obligations. *Id.*

182. *Williams*, 399 U.S. at 245.

183. *Id.*

184. *Id.*

185. *Id.* at 244–45.

2. *States Cannot Restrict Offenders' Access to Appellate Review Based on Their Inability to Pay Court Costs*

The fundamental right of offenders to access the courts may not be constrained by an inability to pay court costs.[186] In *Griffin v. Illinois*,[187] the U.S. Supreme Court invalidated an Illinois law that required defendants challenging a criminal conviction to purchase a copy of their trial court transcript.[188] According to the Court, Illinois' law violated the Fourteenth Amendment because "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[189]

As in the voting rights cases,[190] the Court held in *Griffin* that, although the right to access state courts is not mandated in the text of the U.S. Constitution, an offender's right to access appellate review is constitutionally required where the state provides an appellate court system.[191] The Court emphasized that states cannot provide for appellate review "in a way that discriminates against some convicted defendants on account of their poverty" because the ability to pay costs "bear[s] no rational relationship to a defendant's guilt or innocence."[192] As a result of the Court's decision in *Griffin*, distinctions between convicted defendants based on financial condition, which have the effect of restricting poor defendants' access to the court system, violate the Equal Protection Clause.[193]

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186. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

187. 351 U.S. 12 (1956).

188. *Id.*

189. *Id.* Seven years later, the Court extended the principle in *Griffin* by holding that states must also provide indigent defendants counsel for their first appeal of right. Douglas v. California, 372 U.S. 353, 357–58 (1963). However, in *Ross v. Moffitt*, the Court declined to extend this right to discretionary appeals. 417 U.S. 600, 617–18 (1974).

190. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); *see also supra* notes 91–95 and accompanying text.

191. *Griffin*, 351 U.S. at 18.

192. *Id.* at 17–18.

193. *Id.*

C. *States Cannot Condition Fundamental Rights on the Payment of Pre-existing Debts Unless the Restriction is Necessary to Advance a Compelling State Interest*

Courts apply strict scrutiny review to laws that restrict fundamental rights by imposing payment requirements.[194] To survive strict scrutiny, a restriction must be necessary to advance a compelling state interest and be narrowly tailored to effectuate only that interest.[195] The U.S. Supreme Court set forth these principles in *Zablocki v. Redhail,*[196] a case in which plaintiffs argued that a Wisconsin statute violated the Equal Protection Clause because it restricted the fundamental right to marry.[197] Wisconsin's law required marriage license applicants to be current in child support payments and to demonstrate that their children would not become public charges.[198] The Court agreed with the plaintiffs, concluding that the statute was an impermissible restraint on the fundamental right to marry.[199] The Court held that Wisconsin's law failed strict scrutiny because it was not necessary to advance the state's interest collecting child support, nor was it narrowly tailored to advance only that interest.[200]

Holding that the statute violated the Equal Protection Clause, the *Zablocki* Court recognized that the denial of a marriage license was a broad restriction that, at best, provided the state with an indirect method of child support collection.[201] The Court noted that the state's act of denying marriage licenses to those who were delinquent in child support payments may have *pressured* some people to pay, but the denial did not *in itself* increase the amount of money Wisconsin collected.[202] The only direct effect of Wisconsin's law was the restriction of a fundamental right.[203] According to the Court, the indirect pressures were unnecessary

194. Zablocki v. Redhail, 434 U.S. 374, 381, 388 (1978).

195. *Id.* at 387.

196. 434 U.S. 374 (1978).

197. *Id.* at 379.

198. *Id.*

199. *Id.* at 388. *See also* Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that state laws denying divorce to married couples based on an inability to pay court costs unconstitutionally restricts the fundamental right to marry).

200. *Zablocki*, 434 U.S. at 388.

201. *Id.*

202. *Id.*

203. *Id.*

in part because Wisconsin already had a number of other, "at least as effective" options for encouraging payment of child support obligations, including garnishment of wages, civil contempt proceedings, and criminal penalties.[204]

As illustrated above, in a variety of contexts, the U.S. Supreme Court has held that fundamental rights may not be conditioned on the ability to pay money to the state. The Court's insistence that the right to vote, the right to liberty, the right of access to the courts, and the right to marry cannot be conditioned on one's financial resources suggests that offenders' voting rights also cannot be conditioned on their ability to pay money to the state. The following section draws on these analogies to argue that Washington's re-enfranchisement law, which requires offenders to pay their legal-financial obligations before regaining their voting rights, violates the Equal Protection Clause.[205]

V. WASHINGTON'S FELON RE-ENFRANCHISEMENT LAW VIOLATES THE EQUAL PROTECTION CLAUSE BECAUSE IT CONDITIONS A FUNDAMENTAL RIGHT ON THE PAYMENT OF MONEY TO THE STATE

Washington State's requirement that offenders pay their legal-financial obligations before re-enfranchisement violates the Equal Protection Clause because it conditions the right to vote on offenders' ability to pay. The U.S. Supreme Court's decision in *Ramirez* permits Washington to distinguish between offenders and other citizens through felon disenfranchisement laws,[206] but it does not address re-enfranchisement. Although the constitutional requirements of re-enfranchisement laws are undetermined, the Court has suggested that ordinary Equal Protection principles apply where voting rights laws discriminate on a basis other than criminal conviction.[207] Washington's re-enfranchisement law impermissibly distinguishes among offenders based on their economic circumstances, rather than permissibly distinguishing between offenders and other citizens based on their status

204. *Id.* at. 389–90.

205. *See infra* Section V.B and V.C.

206. Ramirez v. Richardson, 418 U.S. 24, 54 (1974); *see also supra* notes 130–34 and accompanying text.

207. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985); *see also supra* notes 142–45 and accompanying text.

as an offender.[208] Because Washington's re-enfranchisement law implicates the fundamental right to vote, it must withstand strict scrutiny.[209] Washington's re-enfranchisement law fails strict scrutiny because it is not narrowly tailored to achieve Washington's interests in debt collection, responsible voting, or punishment.[210] Consequently, requiring offenders to pay their legal-financial obligations before re-enfranchisement violates the Equal Protection Clause.

A. Notwithstanding Ramirez, *Traditional Equal Protection Principles Apply to Washington's Felon Re-enfranchisement Law*

Under *Ramirez*, Washington is permitted to disenfranchise felons upon conviction because states may constitutionally distinguish for voting rights purposes between offenders and all other citizens.[211] However, Washington's felon re-enfranchisement law involves distinctions among offenders not distinctions between offenders and other citizens. The U.S. Supreme Court's opinion in *Ramirez* does not address whether distinctions among offenders are constitutional.[212] Consequently, *Ramirez*'s holding does not apply to felon re-enfranchisement, and its sanction of disenfranchisement should not be translated into a sanction of discriminatory re-enfranchisement laws.

Although *Ramirez* is inapplicable, the U.S. Supreme Court's holding in *Hunter*, which also deals with disenfranchisement, should be applied to felon re-enfranchisement laws. Unlike *Ramirez*, the issue in *Hunter* was not the state's decision to disenfranchise persons convicted of crimes while granting voting rights to other citizens.[213] Rather, the issue in *Hunter* was Alabama's decision to distinguish between black and white offenders when selecting crimes that would require disenfranchisement.[214] By applying a traditional Equal Protection analysis to Alabama's disenfranchisement law, the Court demonstrated

208. *See infra* notes 176–181 and accompanying text (establishing that states cannot distinguish between offenders based on financial circumstances) and notes 128–134 and accompanying text (establishing that states can distinguish among citizens based on offender status).

209. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 337 (1972); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 626–27 (1969).

210. *See infra* Part V.C.

211. *Ramirez*, 418 U.S. at 54.

212. *Id.*

213. Hunter v. Underwood, 471 U.S. 222, 224 (1985) (laying out the issue in *Hunter*).

214. *Id.*

that ordinary Equal Protection principles apply when states decide felon voting rights on a basis other than offender status.[215] Therefore, the *Hunter* analysis applies to any felon voting rights law—including a re-enfranchisement law—that distinguishes among offenders on a basis other than their criminal conviction.[216] Washington's felon re-enfranchisement law distinguishes among offenders based on ability to pay.[217] Thus, the *Hunter* analysis applies and Washington's re-enfranchisement restriction must satisfy traditional Equal Protection principles.

B. *Washington's Re-Enfranchisement Process Must Pass Strict Scrutiny*

Because normal Equal Protection principles apply to felon re-enfranchisement processes, courts must also determine the level of judicial review appropriate for re-enfranchisement laws. Generally courts make this determination by identifying the basis for the disparate treatment and the right at stake.[218] Washington's felon re-enfranchisement law separates offenders into two groups based on whether or not they have paid their legal-financial obligations.[219] In addition, Washington's felon re-enfranchisement laws involve a fundamental right: voting.[220] Laws that infringe a fundamental right based on an individual's financial circumstances require strict scrutiny.[221] Consequently, Washington's re-enfranchisement law must survive strict scrutiny under the Equal Protection Clause.

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215. *Id.* at 233; *see also supra* notes 142–45 and accompanying text.

216. For example, in *Hunter*, if Alabama had purposefully made it more difficult for blacks to be re-enfranchised than whites, it is hard to imagine that the result in the case would have been any different. *See supra* notes 135–45 and accompanying text.

217. WASH. CONST. art. VI, § 3 and WASH. REV. CODE § 9.94A.637 (2002) (re-enfranchising only those offenders who have paid their legal financial obligations and received a sentence discharge).

218. Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

219. WASH. CONST. art. VI, § 3 and WASH. REV. CODE § 9.94A.637 (2002).

220. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966) (establishing the right to vote as fundamental); WASH. CONST. art. VI, § 3 and WASH. REV. CODE § 9.94A.637 (2002) (linking voting rights to discharge and payment of legal financial obligations.)

221. Zablocki v. Redhail, 434 U.S. 374, 381 (1978).

1. *Washington's Re-Enfranchisement Law Treats Offenders Differently Based Solely on Their Ability to Pay Legal-Financial Obligations.*

By requiring that offenders pay their legal-financial obligations before re-enfranchisement, Washington separates offenders into two groups—those who have sufficient financial resources to pay their legal-financial obligations and those who do not—and grants only one group the right to vote. Washington's requirement thus results in the same unconstitutional separation of offenders based on ability to pay as the requirement struck down by the U.S. Supreme Court in *Williams*.[222] In *Williams*, the U.S. Supreme Court held that states cannot deny indigent offenders their liberty by requiring them to remain in prison beyond the statutory maximum in order to work off their debts.[223] The Court's reasoning in *Williams* suggests that states cannot create opportunities for non-indigent offenders to gain access to fundamental rights like liberty when the same opportunities are necessarily out of reach for indigent offenders.[224] Contrary to *Williams*, Washington law provides only those offenders with sufficient financial resources to pay their legal-financial obligations access to voting rights, and as a result the fundamental right to vote is necessarily out of indigent offenders' reach.

As the *Williams* Court held, the U.S. Constitution forbids disparate treatment based on individuals' financial resources, even if the state imposes the legal-financial obligations as part of a criminal sentence.[225] According to the Court, a law based on payment of legal-financial obligations is discriminatory when it presents some offenders with the opportunity to regain their fundamental rights but effectively denies the same opportunity to other offenders because of their economic circumstances.[226] In identifying the discrimination, the Court suggested that the focus should be on the effect of the state requirement rather than its source.[227] Therefore, courts should focus on the discriminatory effect of Washington's legal-financial obligations requirement (keeping poor

222. *See supra* notes 176–77 and accompanying text.

223. Williams v. Illinois, 399 U.S. 235, 243–44 (1970).

224. *Id.* at 242.

225. *Id.*

226. *Id.*

227. *Id.*

offenders, but not rich ones, from the franchise) rather than the source of the legal financial obligation (a criminal conviction).

2. *Given the Opportunity to Vote Through Washington's Re-Enfranchisement System, an Offender's Right to Vote Becomes Fundamental*

Because wealth is not a suspect classification within the U.S. Supreme Court's interpretation of the Equal Protection Clause,[228] laws that visit different consequences on offenders based on economic circumstances must also restrict a fundamental right in order to receive strict scrutiny.[229] Washington's re-enfranchisement law satisfies this second requirement because it implicates the fundamental right to vote. Though states do not have an affirmative, constitutional duty to provide citizens with voting rights, the Court has established that once states provide citizens with the opportunity to vote, that opportunity becomes a fundamental right protected by the U.S. Constitution.[230]

Like its grant of voting rights to all citizens, Washington does not have an affirmative, constitutional duty to give offenders the right to vote.[231] In fact, the U.S. Supreme Court has held that Section 2 of the Fourteenth Amendment allows Washington to deny offenders the right to vote while granting it to all other citizens.[232] Therefore, Washington may permanently disenfranchise felons—*all felons*—without any constitutional problems.[233] However, once Washington grants some offenders the right to vote, it has stepped outside the protection of Section 2 because it is no longer distinguishing between citizens based on whether they have been convicted of a felony, but is distinguishing among offenders based on some other criteria. Hence, Washington's decision to re-enfranchise offenders has the same effect as its decision to grant all citizens voting rights: an offender's right to vote again becomes fundamental and it cannot be restricted in ways that violate the Equal Protection Clause.

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228. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).

229. NOWAK & ROTUNDA, *supra* note 44, at 849–50.

230. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966).

231. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

232. *Id.*

233. *Id.*

In *Johnson,* the federal district court mistakenly refused to recognize an offender's fundamental right to vote.[234] According to the court, an offender's right to vote, within the context of re-enfranchisement, is not fundamental because that right has already been, and could continue to be, constitutionally withheld by the state.[235] In other words, the court suggested that felons lose all stake in the right to vote, and consequently offenders do not receive the Constitution's voting right protections during re-enfranchisement.[236] The *Johnson* court's reasoning is problematic for two reasons. First, it ignores the U.S. Supreme Court's analysis in *Hunter* that demonstrates that voting rights laws must survive a traditional Equal Protection analysis when they are discriminatory on a basis other than offender status.[237] Second, and more importantly, the court's holding is inappropriate because it ignores the fact that voting's status as a fundamental rights is directly linked to—and arises from—the state's grant of the right to vote. Therefore, while states can constitutionally take away *all felons'* voting rights and never restore them, states that choose to re-grant the right to vote to offenders thereby also invoke voting's status as a fundamental right. Thus, Washington may not establish re-enfranchisement requirements that grant the right to vote to some offenders while effectively denying it to others without satisfying the Equal Protection Clause's strict scrutiny standard. To survive this standard, the restriction must be necessary to achieve a compelling governmental interest.[238]

C. *Washington's Restriction of Offenders' Voting Rights Based on the Failure to Pay Legal-Financial Obligations Does Not Survive Strict Scrutiny*

Washington's re-enfranchisement requirement based on the payment of legal-financial obligations commits the same harm as the statute struck

234. 214 F. Supp. 2d. 1333, 1342–43 (S.D. Fla. 2002).

235. *Id.* at 1343.

236. *Id.*

237. *See supra* notes 215–17 and accompanying text. For example, despite *Hunter*'s implication to the contrary, the *Johnson* court's reasoning suggests a state could decide to re-enfranchise only offenders with last names beginning with the letters A-M without running into any constitutional problems. Faced with this hypothetical and *Hunter*'s holding, the *Johnson* court's assertion that re-enfranchisement requirements are completely outside the scope of the Constitution's voting rights protections seems unlikely.

238. Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

down by the U.S. Supreme Court in *Zablocki*: it conditions a fundamental right on the payment of legal-financial obligations without advancing a compelling state interest.[239] In *Zablocki*, the Court accepted for the purposes of argument that Wisconsin's interest in debt collection was compelling.[240] However, the compelling interest alone did not save Wisconsin's statute from constitutional defect.[241] The Court held that despite the presence of a compelling interest, the statute violated the Equal Protection Clause because the restriction was unnecessary to the advancement of that interest.[242] Compelling interests may also motivate Washington's restriction, but nevertheless the restriction fails strict scrutiny because it is not a necessary means of achieving those interests, and thus violates the Equal Protection Clause.

Although Washington's legislative record does not reveal the state's purpose behind conditioning the restoration of voting rights on the payment of legal-financial obligations,[243] court opinions and legal commentators have suggested three possible state interests.[244] First, states have an interest in collecting payment on outstanding legal-financial obligations.[245] Second, states have an interest in promoting responsible use of the ballot.[246] Third, states have an interest in punishing offenders for their crimes and for refusing to pay their legal-financial obligations.[247] While there is surely debate about the extent to which these state interests are "compelling," like the *Zablocki* Court, this Comment assumes *arguendo* that interests in debt collection, responsible voting, and punishment are compelling governmental interests and further that they are actual interests of Washington state. This Comment

239. Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

240. *Id.*

241. *Id.*

242. *Id.*

243. *See supra* note 49 and accompanying text.

244. *See supra* note 50 and accompanying text.

245. Williams v. Illinois, 399 U.S. 235, 245 (1970); *Zablocki*, 434 U.S. at 389–90.

246. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

247. In the last 100 years, states and courts have generally not advanced this interest when promoting disenfranchisement laws. KEYSSAR, *supra* note 50, at 162–63. However, in a motion for summary judgment in the case of *Johnson v. Bush*, the state of Florida did advance its punishment interests when explaining its re-enfranchisement restrictions. Defendant's Memorandum in Support of Motion for Summary Judgment, *Johnson v. Bush*, (Jan. 4, 2002) (00-3542-CIV-King). The trial court, rejecting the plaintiff's claim that the restitution requirement constituted an unconstitutional poll tax, did not address Florida's interest in punishment. 214 F. Supp. 2d 1333, 1342–43 (S.D. Fla. 2002).

accepts these interests as compelling to emphasize the fact that the central flaw in Washington's re-enfranchisement requirement is not the governmental interest put forward to support it. Rather, the fatal flaw in Washington's requirement is that the restriction is an unnecessary infringement on the right to vote and is not narrowly tailored to achieve compelling governmental interests. In requiring that restrictions of fundamental rights must achieve a compelling governmental interest, the U.S. Supreme Court has set the constitutional standard high. The Court requires states to demonstrate that their laws not only support a compelling interest, but also that they are essential and narrowly tailored to the interest's achievement.[248] Washington's re-enfranchisement restriction, analyzed in the context of its three interests, does not meet this standard.

First, Washington's interest in collecting payment on outstanding legal-financial obligations does not justify the broad infringement on offenders' voting rights because the restriction is not necessary to the advancement of the state's debt collection interests. Like the law struck down in *Zablocki*, Washington's denial of voting rights until payment of legal-financial obligations is, at best, an indirect method designed to influence offenders' decision to pay their legal-financial obligations.[249] For example, offenders who are denied re-enfranchisement may or may not pay their outstanding legal-financial obligations because nothing in Washington's re-enfranchisement restriction compels them to pay. Yet, as the U.S. Supreme Court indicated in *Zablocki* and *Williams*, state restrictions on fundamental rights that only indirectly advance the "collection device rationale" are unconstitutional, especially where the state has a number of more direct collection options available.[250] In fact, Washington has a number of more direct, and almost certainly more effective,[251] methods for collecting payment on offenders' legal-financial obligations. For example, Washington may enforce collection through

248. *See* NOWAK & ROTUNDA, *supra* note 44, at 639.

249. *Zablocki*, 434 U.S. at 389–90. Discouraging regulation of voting rights as a way to achieve unrelated state interests, the Court held has that "the use of the franchise to compel compliance with other, independent state objectives is questionable in any context." Hill v. Stone, 421 U.S. 289, 299 (1975).

250. *Zablocki*, 434 U.S. at 389–90; *Williams*, 399 U.S. at 245.

251. Because the act of denying offenders' voting rights until payment does not in itself collect additional money, it is impossible to quantify the effect of Washington's re-enfranchisement restriction on the collection of legal-financial obligations.

garnishment of wages[252] and sale of real property.[253] And, parties other than the state can collect the legal-financial obligation of restitution through a civil action.[254] These direct measures provide a sharp contrast to Washington's re-enfranchisement restrictions, in which the only direct effect is the denial of the right to vote. Following the Court's decision in *Zablocki*, Washington's denial of offenders' voting rights is not a narrowly tailored means of advancing its debt collection interests because the state's other collection devices do not infringe on offenders' fundamental rights.[255]

Second, Washington's interest in promoting the responsible use of the ballot is not advanced by its restriction of offenders' voting rights based on non-payment of legal-financial obligations. Courts have accepted a state's interest in responsible voting for some voting rights restrictions such as literacy tests[256] and felon disenfranchisement.[257] In *Johnson*, the federal district court also cited Florida's responsible voting interests as justification for its re-enfranchisement restrictions, stating that states have an interest in determining felons' "readiness to return to the electorate."[258] For Washington's payment requirement to be necessary for the advancement of a responsible voting interest, the state must demonstrate that offenders who have paid their legal-financial obligations are more responsible voters, and therefore more ready to return to the electorate, than offenders who have not paid them. A successful demonstration of this sort, however, is severely limited by the U.S. Supreme Court's opinion in *Harper*, which made clear that possessing the financial resources to pay a fee is not relevant to a citizen's ability to participate intelligently in the electoral process.[259] As *Harper* suggests, the payment requirement by which Washington re-enfranchises some offenders but not others is an irrelevant consideration

252. WASH. REV. CODE § 9.94A.760(3) (2002).

253. Legal-financial obligations are enforceable in the same manner as a civil judgment, which may be enforced through the sale of real property. *See id.* §§ 9.94A.760(4); 4.56.190.

254. *Id.* § 9.94A.760(4).

255. *Zablocki*, 434 U.S. at 389–90.

256. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959). Despite the U.S. Supreme Court's sanction of literacy tests, Congress abolished them in the South as part of the Voting Rights Act of 1965, and extended the ban nationwide in 1970. ISSACHAROFF ET AL., *supra* note 79, at 124.

257. *See supra* note 50 and accompanying text.

258. Johnson v. Bush, 214 F. Supp. 2d. 1333, 1343 (S.D. Fla. 2002).

259. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966).

in promoting the intelligent use of the ballot.[260] Consequently re-enfranchising only those offenders who have paid their legal-financial obligations is not a necessary and narrowly tailored means of advancing responsible voting interests.

Third, Washington's re-enfranchisement restriction is not a narrowly tailored means of advancing the state's punishment interest. In citing a punishment interest, Washington is likely targeting one of two types of offender misbehavior: willful failure to pay legal-financial obligations or criminal activity. As shown below, in both cases of misbehavior, Washington's punishment interest is not advanced by its re-enfranchisement restriction.

Washington cannot use continued disenfranchisement as a way of punishing delinquent debtors because the voting rights restriction is not narrowly tailored to those offenders who are willfully refusing to pay their legal-financial obligations. Under Washington's re-enfranchisement law, voting rights are withheld not only from offenders who are willfully refusing to pay their legal-financial obligations but also from indigent offenders who are unable to pay. However, indigency does not equal misbehavior.[261] Poor offenders will necessarily take longer to repay their legal-financial obligations because their limited financial resources will require lower monthly payments.[262] As a result, withholding re-enfranchisement until payment of legal-financial obligations does not punish only misbehaving offenders, but it punishes all offenders who have limited financial resources. The re-enfranchisement restriction is not a narrowly tailored means of punishing misbehaving offenders who refuse to pay their debts.

Washington's felon re-enfranchisement requirement is also not narrowly tailored to advance its interest in punishing criminal behavior because the extent of offenders' punishment through disenfranchisement

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260. *Id.*

261. *See generally* Bearden v. Georgia, 461 U.S. 660 (1983) (holding that it is fundamentally unfair to incarcerate offenders for non-payment of legal-financial obligations without considering the willfulness of the non-payment).

262. In fact, Washington law requires that the sentencing court establish offenders' legal-financial obligations payment schedule based on an offender's financial resources. WASH. REV. CODE §§ 9.94A.760(1); 9.94A.760(10) (2002). Because the statute requires sentencing judges to base the payment schedule on an offender's financial resources, poor offenders will be ordered to pay lower monthly payments than non-indigent offenders. The lower monthly payments guarantee that poor offenders will be denied voting rights for a longer period than non-indigent offenders with the same legal-financial obligation requirement. *See id.*

is conditioned on the irrelevant factor of their ability to pay, rather than on their criminal activity.[263] Offenders are sentenced to a number of distinct forms of punishment, of which legal-financial obligations and disenfranchisement are two mandatory and independent types.[264] However, in conditioning the restoration of voting rights on payment of legal-financial obligations, Washington blends these two distinct forms of punishment, causing the extent of offenders' disenfranchisement to be conditioned on their ability to pay legal-financial obligations.[265] As a result, certain offenders receive the additional punishment of continued disenfranchisement based not on the severity of their crime, or any other legitimate sentencing consideration, but on their ability to pay the legal-financial obligations.

The U.S. Supreme Court's opinion in *Williams* is a useful guide for understanding the constitutional flaw in this punishment arrangement. The *Williams* Court declared that states cannot incarcerate offenders longer than the statutory maximum just because they are poor,[266] essentially holding that states cannot impose a fine and then convert it to extended jail time if the offender does not have the means to pay the fine.[267] *Williams'* principles apply to Washington's re-enfranchisement requirement because Washington imposes legal-financial obligations, and subsequently conditions the duration of disenfranchisement on offenders' ability to pay, in the same way that Illinois conditioned the duration offenders' jail time on their ability to pay imposed fines. Accordingly, Washington's re-enfranchisement restriction, which reserves extra punishment for poor offenders, is not narrowly tailored to advance Washington's interest in punishing all criminal behavior.

In sum, requiring payment of legal-financial obligations before re-enfranchisement is a broad infringement on the fundamental right to vote. The re-enfranchisement restriction is not justified by Washington's three compelling interests because, like *Zablocki*, the infringement of the fundamental right is not necessary or narrowly tailored to the

263. *See Harper*, 383 U.S. at 668 (holding that ability to pay is an irrelevant factor in voting).

264. The sentencing court must assess at least $500 in legal-financial obligations and it must revoke the offender's right to vote. *See supra* Part I.A.; Part I.B.

265. *Cf.* Williams v. Illinois, 399 U.S. 235, 243 (1970) (holding that Illinois could not blend distinct forms of punishment—imprisonment and fines—by requiring poor offenders to remain in prison until the fine was paid.).

266. *Williams*, 399 U.S. at 243.

267. In *Tate v. Short*, the Court endorsed this reading of *Williams'* holding. 401 U.S. 395, 398 (1971).

governmental objectives. Therefore, Washington's re-enfranchisement law fails strict scrutiny. To comply with Equal Protection requirements, Washington should eliminate the requirement that offenders pay their legal-financial obligations before regaining voting rights.

VI. CONCLUSION

Washington's re-enfranchisement law treats offenders differently—granting some, but not others, the right to vote—based solely on their different abilities to pay legal-financial obligations. What is more, voting is the only fundamental right Washington restricts in this way. The disparate treatment inherent in Washington's re-enfranchisement requirement is particularly troubling given the U.S. Supreme Court's directive that affluence or the payment of money cannot be a condition of voting. Washington's re-enfranchisement provisions must be held to the same Equal Protection standard as laws enfranchising all other citizens: restrictions are only permissible if narrowly tailored to achieve a compelling governmental interest. Washington's re-enfranchisement law does not meet this strict scrutiny standard because the infringement of offenders' voting rights is unnecessary to advance Washington's compelling governmental interests. Consequently, it violates the Equal Protection Clause, and Washington should eliminate its requirement that offenders pay their legal-financial obligations before regaining voting rights.