

## FELON DISENFRANCHISEMENT AS A LEGITIMATE STATE REGULATION

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### **Introduction**

Courts have upheld state disenfranchisement statutes that prohibit convicted felons from voting in any election and make it a felony for any person to register as an elector knowing that he will not be a qualified voter.<sup>1</sup> The United States Supreme Court expressly held that the exclusion of felons from voting has an affirmative sanction in Section Two of the Fourteenth Amendment.<sup>2</sup> Section Two of the Fourteenth Amendment has been interpreted as permitting states to disenfranchise those who participate in rebellion or commit some other crime.<sup>3</sup> However, there have been legal disputes regarding whether felons should be eligible to vote.

Opponents of felon disenfranchisement argue that voting is a fundamental right, even though the United States Constitution does not expressly guarantee that right, because it is easily implied from the fact that many amendments have addressed voting rights,<sup>4</sup> and the essential purpose of felon disenfranchisement statutes is punishment rather than regulation.<sup>5</sup> In this connection, they argue that felon disenfranchisement laws are unconstitutional bills of attainder and cruel and unusual punishment. Additionally, opponents of felon disenfranchisement focus on the practical impact of felon disenfranchisement laws; in particular, their focus is on the effect in the African American community.<sup>6</sup>

On the other hand, proponents of felon disenfranchisement argue that felon disenfranchisement statutes are not unconstitutional bills of attainder, do not violate constitutional proscription against cruel and unusual punishment and do not deny equal protection.<sup>7</sup> Furthermore, proponents argue that felon

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<sup>1</sup>*Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967); *Richardson v. Ramirez*, 418 U.S. 24 (1974); *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).

<sup>2</sup>U.S. Const. amend. XIV, §2; *Ramirez*, 418 U.S. at 53-54.

<sup>3</sup>*Ramirez*, 418 U.S. at 54, 56.

<sup>4</sup>*See* U.S. Const. amend. XV (prohibiting from denying the voting right on account of race, color, or previous condition of servitude); U.S. Const. Amend. XIX (extending the right to vote to women.); U.S. Const. Amend. XXIV (prohibiting poll taxes in elections for federal office); U.S. Const. Amend. XXVI (extending the right to vote to all citizens who are 18 years of age or older).

<sup>5</sup>Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1149 (2004).

<sup>6</sup>*City of Mobile, Ala v. Bolden*, 446 U.S. 55 (1980).

<sup>7</sup>*Green*, 380 F.2d at 451.

disenfranchisement is reasonably justified based upon the concept that “a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.”<sup>8</sup>

The present discussion posits that felon disenfranchisement statutes are not unconstitutional, unless it can be shown that they were enacted with the intent to disenfranchise a group of people based on race. This comment considers the disparate impact resulting in “the denial of the right to vote on account of race,” but concludes that the causal link between the disenfranchisement statutes and the impact on the African-American community is too attenuated.<sup>9</sup> Even though felon disenfranchisement statutes are constitutional, this comment does not support permanent termination of the voting rights of ex-felons; the scope of felon disenfranchisement statutes should change as social and political environments change.

### **Constitutionality of Felon Disenfranchisement**

Opponents of felon disenfranchisement argue that these statutes are unconstitutional bills of attainder.<sup>10</sup> However, “the bill of attainder clause only applies ‘to statutes imposing penalties.’”<sup>11</sup> Felon disenfranchisement statutes seem to have both penal and non-penal effects: punishment to reprimand the wrongdoer and regulation of the franchise.<sup>12</sup> However, when a statute has dual purposes, the main purpose of the statute is decided based on “the evident purpose of the legislature.”<sup>13</sup> Because the purpose of felon disenfranchisement statutes is “to designate a reasonable ground of eligibility for voting,” the statutes seem to be based on the non-penal purpose of regulating the franchise.<sup>14</sup> The purpose of the bill of attainder clause is “that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics.”<sup>15</sup> Under this doctrine, state legislatures can prevent a felon who possesses certain characteristics from voting.

The argument that all felon disenfranchisement statutes are cruel and

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<sup>8</sup>*Id.*

<sup>9</sup>Hayden v. Pataki, 449 F.3d 305, 313 (2d Cir. 2006) (citing 42 U.S.C. § 1973(b) (2008)).

<sup>10</sup>*Green*, 380 F.2d at 449; *See* Art. I, §§ 9-10 (The prohibitions on ‘Bills of Attainder’ prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.).

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958)).

<sup>15</sup>*Green*, 380 F.2d at 449 (citing *United States v. Brown*, 381 U.S. 437, 454 (1965)).

unusual punishment has no merit, because felon disenfranchisement statutes do not purport to punish a felon, but rather exercise a non-penal purpose in order to regulate the franchise.<sup>16</sup> Even if depriving convicted felons of the franchise is considered punishment, felon disenfranchisement statutes are not cruel and unusual, because most statutes do not permanently deprive voting rights of felons. Of those states that permanently bar felons from voting, several have moved to curtail these deprivations. When felon disenfranchisement statutes were first enacted, even permanent denial of voting rights was not deemed cruel and unusual, because nearly all felonies were punishable by death in 18th century England.<sup>17</sup> However, this is not true today. Even though felon disenfranchisement is regulation rather than punishment, permanently depriving all convicted felons of the franchise exceeds its regulatory purpose.

Felon disenfranchisement statutes do not violate the Equal Protection Clause, based on an established principle that “statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.”<sup>18</sup> A state has authority in reasonably deciding that “perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.”<sup>19</sup>

The conclusion that felon disenfranchisement statutes are constitutional does not mean that those statutes which were enacted with some hidden discriminatory intent are also constitutional under the Fourteenth Amendment. Felon disenfranchisement statutes applying any voting qualification or standard that results in the denial of the right to vote on account of race should be found unconstitutional.<sup>20</sup> Courts have applied strict scrutiny in evaluating laws that prevent felons from voting, if the plaintiff proves that the law’s original enactment was motivated by a desire to discriminate against African Americans on account of race and the law continues to this day to have that effect.<sup>21</sup> However, most felon disenfranchisement statutes were enacted before African Americans were allowed to vote. Therefore, the statutes could not have been enacted with a discriminatory intent. Though difficult to prove, if felon disenfranchisement statutes indeed constitute “race-based voter disenfranchisement,” the statutes cannot withstand a Fourteenth Amendment

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<sup>16</sup>*Id.* at 450.

<sup>17</sup>*Id.* (citing Radzinowicz, *A History of English Criminal Law*, ch. 1 (1948)).

<sup>18</sup>*Id.* at 451 (citing *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935)).

<sup>19</sup>*Id.*

<sup>20</sup>*Hayden*, 449 F.3d at 310.

<sup>21</sup>*Id.*

challenge.<sup>22</sup>

Opponents of felon disenfranchisement contend that the statutes have disparate impact on minorities, particularly African Americans, by excluding them from the political process.<sup>23</sup> However, evidence of a correlative relationship between African Americans and disenfranchised felons does not amount to a determination that the statutes cause a denial or dilution of the African American vote on account of race.<sup>24</sup> Because this disparate impact does not directly result from felon disenfranchisement statutes, but stems from disproportional treatment of African Americans in the criminal justice system in which African Americans commit more crimes,<sup>25</sup> evidence of racial discrimination in the criminal justice system must be shown.<sup>26</sup> While plaintiffs are not required to prove discriminatory intent, they must show some “demonstrable causal connection between a challenged felon disenfranchisement statute and purposeful racial discrimination.”<sup>27</sup> However, plaintiffs have failed to produce evidence demonstrating that felon disenfranchisement statutes are used as a tool to discriminate against minority voters.<sup>28</sup>

Felon disenfranchisement statutes resulting in “the denial of the right to vote on account of race” are unconstitutional; but this argument is separate and distinct from the more general argument that all felon disenfranchisement statutes shall be found unconstitutional. Without showing that the state enacted its felon disenfranchisement statute with discriminatory intent, or that the state has purposefully used its felon disenfranchisement statute to discriminate against African Americans, the argument that all felon disenfranchisement statutes are unconstitutional because of their discriminatory impact in the African American community lacks merit. The link between the injury to the African American community and the felon disenfranchisement statute is too attenuated.

## **Conclusion**

The conclusion that felon disenfranchisement statutes are constitutional does not mean that every state should continue its present disenfranchisement statute. Because felon disenfranchisement statutes have existed since the 1700's,<sup>29</sup>

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<sup>22</sup>*Id.* at 323.

<sup>23</sup>Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 627 (2004).

<sup>24</sup>*Muntaqim v. Coombe*, 366 F.3d 102, 116-17 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 480 (2004), *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004).

<sup>25</sup>Daniel S. Goldman, *supra* note 23.

<sup>26</sup>*Muntaqim*, 366 F.3d at 117.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*

<sup>29</sup>*Green*, 380 F.2d at 450-51.

some aspects of the statutes are unfit to be applied in today's circumstances. However, states have absolute power to enact and amend their own felon disenfranchisement statutes. In fact, the application of felon disenfranchisement statutes varies by state. Kentucky has a lifetime bar for all felony convicts.<sup>30</sup> Some states have a lifetime bar that may be lifted with restoration of civil rights.<sup>31</sup> Others prohibit a person from voting while he or she is completing a criminal justice sentence,<sup>32</sup> incarcerated or serving parole sentences,<sup>33</sup> or only while he or she is incarcerated.<sup>34</sup>

Even though felon disenfranchisement statutes are constitutional, a permanent restriction of voting rights of ex-felons must be curtailed. A person who commits a serious crime can be rehabilitated as a member of society. After felons serve their sentence and are released, they must be given an opportunity to live a normal life.

In recent years, several state legislatures have reduced restrictions disenfranchising ex-felons.<sup>35</sup> Despite these movements in some states, others continue to adhere to their lifetime bar for all felony convictions. It might take a long time to curtail lifetime restrictions on voting rights. However, social progress in state legislatures can remedy problems with felon disenfranchisement.

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<sup>30</sup>Ky. Const. § 145.

<sup>31</sup>Ala. Const. art. VIII, § 182; Va. Const. art. 2, § 1; Iowa Code § 48A.6(1) (1999); Neb. Rev. Stat. §§ 29-112 (1995) 32-313(1) (1998); Wash. Rev. Code §§ 9.94A.637, 885(2) (2003); Wyo. Stat. Ann. §§ 6-10-106, 7-13-105, 7-13-801 (Michie 2001).

<sup>32</sup>Ariz. Const. art. VII, § 2(c); Ark. Const. amend. 51, § 11(a)(4); Fla. Const. art. VI, § 4; Ga. Const. art. II, § 1; Kan. Const. art. V, § 2; La. Const. art. I, §§ 10, 20; Minn. Const. art. VII, § 1; Mo. Const. art. VIII, § 2; N.C. Const. art. VI, § 2(3); R.I. Const. art. II, § 1; Tex. Const. art. VI, § 1; Idaho Code § 18-310(1), (2) (1997).

<sup>33</sup>Cal. Const. art. II, § 4; Alaska Stat. §§ 12.55.185, 15.05.030, 33.30.241 (Michie 2002); Colo. Rev. Stat. § 1-2-103(4) (2000); Conn. Gen. Stat. § 9-46(a) (2002); N.Y. Elec. Law § 5-106(2) (McKinney 1998); W. Va. Code § 3-2-2(b) (2002); Wis. Stat. §§ 6.03(1)(b) (1996), 304.078 (1999).

<sup>34</sup>Ill. Const. Art. 3, § 2; Mass. Const. art. III; S.D. Const. art. VII, § 2; Haw. Rev. Stat. § 831-2(a) (1993); Ind. Code § 3-7-46-2 (1997); Mich. Comp. Laws §§ 168.492, 168.758 (1989); Mont. Code Ann. § 13-1-111(2) (2001); N.H. Rev. Stat. Ann. § 607-A:2(I)(a) (1986); N.D. Cent. Code § 12.1-33-01(1)(a) (1997); Ohio Rev. Code Ann. §§ 2961.01, 5120:1-1-14(A), (B) (West 2000); Or. Rev. Stat. § 137.281(1), (3)(d) (1991); Utah Code Ann. §§ 20A-2-101(2), 20A-2-101.5(2) (1998).

<sup>35</sup>Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat*

and *Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 583 (2003), [www.socsci.umn.edu/~uggen/Behrens\\_Uggen\\_Manza\\_ajs.pdf](http://www.socsci.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf). "In 2000, Delaware abandoned its requirement of a pardon to restore voting rights, though offenders must still wait five years after completion of sentence to vote. Since July 1, 2001, New Mexico has automatically restored voting rights to felons upon completion of sentence. As of January 1, 2003, Maryland requires a three-year waiting period before restoring the franchise to most recidivists, liberalizing its former law that permanently disenfranchised recidivists. Similarly, Nevada liberalized its law in 2003 and now restores voting rights to nonviolent first-time felons upon completion of sentence." *Id.*