

Felon Disenfranchisement:

Why Perverts, Pedophiles,
Larsonists and Arsonists
Should All Be Allowed to Vote

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Chapter One: Suffrage in America

Introduction

Suffrage in America has historically shifted towards greater inclusiveness. While the process was never inevitable, and was not without some fits and starts, the overall change has been profound. This is due in part to certain philosophical and popular conceptions of democracy that have been embraced by the nation, but also because of certain political circumstances that have motivated certain groups to work for greater enfranchisement. One segment of the population that has been continually excluded from this movement includes prisoners and convicted felons. The continued disenfranchisement of this sector is an important dilemma, not only for its philosophical implications in the context of American democracy, but also because of the political impact of laws which take away voting rights from millions of people, a disproportionate number of whom vote overwhelmingly for Democrats. Control of the Senate and more than one Presidential election have hinged upon the disenfranchisement of felons, to pick two examples.

In this chapter I will briefly summarize the history of voting rights in America, considering both the philosophical and political issues that helped promote a more inclusive American suffrage. I will also examine the political consequences of felon disenfranchisement laws. Although the issue receives little national attention in the media, there are significant social and political consequences that stem from these laws, and I will briefly address those here.

There have been changes in felon disenfranchisement laws in several states over the last several years, and in the next chapter I will present examples of these changing laws, examining the channels through which these changes occurred, and in what general direction state law seems to be moving. I will also discuss possible demographic and political causes.

Following the discussion of these changes, I will examine the types of arguments presented on both sides of the felon disenfranchisement debate across the states I have chosen to study. How these arguments compare across states, and what arguments seem most politically salient will be considered in this chapter.

The following chapter is an examination of the legal and constitutional issues that are involved in this issue, looking at relevant Supreme Court cases, and also some cases on the Federal District Court level. I will argue that felon disenfranchisement laws are a violation of the Equal Protection clause of the Fourteenth Amendment because of their significantly discriminatory effect. The Voting Rights Act of 1965 and its subsequent amendments will also be considered, as well as some of the relevant legal history.

I will then consider how recent changes in felon disenfranchisement law compare to other changes in American suffrage, and how the popular arguments discussed in chapter two fit into this philosophical and political background.

American Suffrage

History

The last two hundred years of American history have seen suffrage grow by leaps and bounds. Our Founding Fathers did not formulate a country with inclusive suffrage, but rather

one that relied upon exclusive property and tax qualifications.¹ In the eighteenth century, and for much of the nineteenth, only white males meeting certain minimum economic requirements could vote. Catholics were also sometimes prevented from voting.² Throughout the nineteenth century, voting rights were gradually extended state-by-state to white males regardless of socioeconomic status. The end of the Civil War brought the Fourteenth and Fifteenth Amendments, which declared the principle of Equal Protection, and specifically enfranchised African American men. In 1920, voting rights were once again extended, this time to women (Nineteenth Amendment). This trend continued in 1964 with the Twenty-Fourth Amendment, which abolished the poll tax. The Voting Rights Act was passed in the same year also in an effort to more successfully extend voting rights to African Americans. In 1971, suffrage was further extended to Americans who had reached the age of eighteen (Twenty-Sixth Amendment). The three major extensions of suffrage: extending the vote to all white males, then to black males, and finally, to women, came only after long years of intensive struggle. These struggles were principally defined by two characteristics: principle, and political expediency.

Principle

Suffrage in early America was most notable for who it rejected, rather than who it embraced. In the eighteenth century and earlier, British electoral systems were widely admired precisely because of their emphasis on exclusive, rather than inclusive, suffrage,³ and British influence on who might vote in America was profound.⁴ This led to extensive exclusion of the poor and unpropertied, because, it was argued, those who contributed the most to society deserved to have the most influence in its direction,⁵ and contribution was always measured in economic terms, or taxes. Those with property were also thought to have more invested and more at stake than those without.

Some of the roots of the philosophy behind a more inclusive suffrage can be seen in 17th century Britain, where reformers like the Calvinists began to believe that men were created naturally equal to each other.⁶ Some of this influence can be seen in the Declaration of Independence, which proclaimed certain natural rights of men. These natural rights included the right of self-determination, which some believed should be extended to political determination and the right to vote.⁷ These values were successfully infused into the American national consciousness to such a degree that even by 1865: “it was impossible to convince the American people that universal suffrage had been a mistake” in part because “all children were taught they have a right to suffrage.”⁸ While “universal” suffrage still had not grown to embrace blacks or women, the national conception of suffrage was profoundly different than it had been a hundred years previously, and that transformation presages the next 50 years in which women and

¹ McGovney, Dudley O. *The American Suffrage Medley*. Chicago: University of Chicago Press, 1949, pp. 1.

² Williamson, Chilton. *American Suffrage: From Property To Democracy 1760-1860*. Princeton: Princeton University Press, 1960, pp. 15-16.

³ *Ibid.*, pp. 10.

⁴ *Ibid.*, pp. 6.

⁵ *Ibid.*

⁶ *Ibid.*, pp. 65.

⁷ Major John Cartwright, Thomas Rainsborough: see Williamson, 62-75.

⁸ *Ibid.*, pp. 285.

blacks—more than half the American adult population—would finally obtain the right to vote. The point is not that universal suffrage actually existed, but that people believed in it as an ideal, even though they were willing to exclude certain sectors from under its umbrella. It was something they were proud of, and it was part of the national conception of the country. This hypocrisy, of believing in the principle of universal suffrage, yet not extending voting rights to blacks and women, was exposed by different social movements, and exploited in an effort to expand voting rights. A belief in universal suffrage, all the while blacks and women were excluded, is not necessarily contradictory, if one struggles to understand contemporary attitudes regarding these groups. What blacks and women did, in part, was to change the way society thought about blacks and women, to persuade the public that they had the same natural rights as everyone else, that the conception of universal suffrage must include all sectors of the population.

The women's suffrage movement, for example, usurped one of the arguments of the Revolutionary War, that all men had certain inalienable rights, and argued that if this were true, it should also apply to women.⁹ A paper written by Elizabeth Cady Stanton, and presented to a congressional committee hearing, argued that as individuals, and as citizens, "[Women] must have the same rights as all other members, according to the fundamental principles of our government."¹⁰ These natural rights arguments clearly formed part of the foundation for the increasing inclusiveness of American suffrage. The triumph of these suffrage movements was partly to expose the national hypocrisy of "universal" suffrage and transform it into a reality.

Politics

While these more philosophic influences were important, political expediency was also a significant factor in extending suffrage. Many reformers supported the extension of suffrage as a means of acquiring support for certain political measures, and later regretted their advocacy when expected support didn't materialize, undermining the principled portion of their argument.¹¹ Furthermore, the competition for votes between Federalists and Republicans was an important factor regarding which party endorsed the expansion of suffrage.¹² In other words, the expectation of how these groups would vote once they were enfranchised was a significant factor in who fought for the principle of more expansive voting rights and who stood against it.

The attempt to preclude race as a qualification for suffrage proved a much more divisive issue. Southern white politicians proclaimed their inherent superiority, and declared that the North had forced a "great and cruel injury" upon the white race by "forcing upon [the south] the ignorant Negro vote."¹³ The idea that African American men deserved to vote in the same way that poor white men deserved to vote would take much longer to affix itself in our country's collective conception of democracy.

Political interests in the South and in the North were often decisive in persuading politicians to either support or oppose the 15th Amendment. Democrats in the North, for example, battled against the amendment because "they knew that Republican supremacy in the

⁹ Kraditor, Aileen S. *The Ideas of the Woman Suffrage Movement, 1890 - 1920*. New York: Columbia University Press, 1965, pp. 44.

¹⁰ *Ibid.*, pp. 46.

¹¹ Williamson (1960), pp. 284-5.

¹² *Ibid.*, pp. 171-2.

¹³ Tindall, George B. "The Campaign for the Disfranchisement of Negroes in South Carolina." *The Journal of Southern History* 224 (1949): 212-234; pp. 214.

North was at stake.”¹⁴ Southern Democrats, on the other hand, were especially cautious in their objection for fear of “antagonizing negro voters,” especially in states with notably large African American populations, such as Louisiana and South Carolina.¹⁵ Some Southerners also argued that the amendment would further erode state rights.¹⁶ In the end, the Amendment provided important Northern suffrage for African Americans which helped bring the Republicans to power, though Southern suffrage would continue to be thwarted through various Southern inventions, such as the grandfather clause and white primaries, not to mention frequent violence.¹⁷

The struggle for black voting rights was at times integrally linked with the women's suffrage movement. The National American Women Suffrage Association (NAWSA), one of the primary forces behind the adoption of the 20th Amendment, continually used a natural rights argument as part of their platform.¹⁸ More practical concerns, however, soon interfered. Frustration increased when black men were enfranchised ahead of white women, and the NAWSA increasingly began to abandon their support of universal suffrage in an effort to build Southern support for their movement.¹⁹ The enfranchisement of women was even seen as a possible means of ensuring white dominance over the black vote, because educational or property requirements could exclude most black women, adding substantially to the southern white polity.²⁰

Some of the debate regarding the expansion of suffrage once again revolved around the expected voting behavior of the newly enfranchised. Anti-progressive forces--the liquor industry being a notable example--fought the right of women to vote out of the fear that the female electorate would champion progressive causes.²¹ Nevertheless, after decades of struggling to build support, the 20th Amendment was finally ratified in 1920, though it was far from universally popular. The deciding state, Tennessee, ratified the amendment by only one vote, a 24 year old young man who finally switched his vote at the urging of his elderly mother.²²

Expansion of suffrage continued in 1964 with the ratification of the Twenty-Fourth Amendment, which eliminated the poll tax. The next year saw the passage of the Voting Rights Act which attempted to give teeth to the Fifteenth Amendment by granting the Executive branch a more direct means of enforcement.²³ Once again, it was passed only after decades of sometimes bloody struggle for the enforcement of civil rights, and it is often regarded as “the

¹⁴ Gillette, William. *The Right To Vote: Politics and the Passage of the Fifteenth Amendment*. Baltimore: The John Hopkins Press, 1965; pp. 49.

¹⁵ *Ibid.*, pp. 94.

¹⁶ *Ibid.*, pp. 95.

¹⁷ *Ibid.*, pp. 163.

¹⁸ Wheeler, Marjorie S. “A Short History of the Woman Suffrage Movement in America.” *One Woman, One Vote*. Ed. Marjorie S. Wheeler. Troutdale, OR: NewSage Press, 1995; pp. 12.

¹⁹ *Ibid.*, pp. 13.

²⁰ *Ibid.*

²¹ *Ibid.*, pp. 15.

²² *Ibid.*, pp. 19.

²³ Davidson, Chandler. “The Voting Rights Act: A Brief History.” *Controversies in Minority Voting*. Eds. Bernard Grofman and Chandler Davidson. Washington, D. C.: The Brookings Institution, 1992; pp. 15.

most successful piece of federal civil rights legislation ever enacted.”²⁴ This was followed in 1971 by the 26th Amendment, which granted 18 year olds the right to vote.

The consequence of all these movements and constitutional amendments is the growth of the American polity from rich, white men to the inclusion of the great majority of all adults, regardless of race, class, or gender. The denial of the vote to blacks and women, and strategies engaged to deny them the vote, such as the poll tax, are considered archaic policies that this country, as well as other democracies around the world, have abandoned in the interests of justice and a more robust democratic process.

The Disenfranchised

Aliens and Felons

Only two major adult groups now remain disenfranchised in America: aliens and convicted felons. Aliens present an interesting case, because at the same time that suffrage was being greatly expanded for just about everyone, their suffrage was being dramatically restricted, state-by-state. Arkansas was the last state to grant aliens the right to vote, which they revoked in 1926.²⁵ This trend is in stark contrast to international trends, which increasingly favor granting suffrage to aliens.²⁶

The United States also stands increasingly alone in its continued ambivalence towards the granting of suffrage to convicted felons--it is practically the only industrialized country that refuses to do so.²⁷ The matter has always been left for states to decide, and the laws vary substantially. Several states allow even prisoners to vote, while others deny enfranchisement for life upon a felony conviction.²⁸ The laws that restrict these rights have enormous repercussions, disenfranchising as many as 4 million Americans.²⁹

Principles

Some would argue that these laws contradict the nature of our democracy, which, as we have shown, has progressively declared that more and more of the population has a right to vote. The natural rights argument is still prominent among those who argue for greater enfranchisement, and voting has been called the “fundamental democratic right that preserves all others.”³⁰ Arguments against suffrage have traditionally taken a very different view, that voting is not a right, but a privilege that must be based upon merit,³¹ or that, somewhat paradoxically, it is both a right and a privilege.³² Roger Clegg, the (former) vice-president and general counsel

²⁴ Qtd. In Hench, Virginia E. “The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters.” *Case Western Reserve Law Review* 48 (1998): 727-779; pp. 744.

²⁵ Raskin, Jamin B. “Time to Give Aliens the Vote (Again).” *Nation* 5 Apr: 433-5; pp. 2.

²⁶ *Ibid.*, pp. 2-3.

²⁷ Thompson, Nicholas. “Locking Up the Vote.” *Washington Monthly*. Jan./Feb. 2001: 17-21; pp. 2.

²⁸ Hench (1998); pp. 795.

²⁹ Shapiro, Andrew L. “Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy.” *The Yale Law Journal* 103 (1993): 537-566; pp. 1.

³⁰ *Ibid.*, pp. 2.

³¹ Kent, Chancellor. “Chancellor Kent on Universal Suffrage.” **

³² Clegg, Roger. Prepared testimony before the House Judiciary Committee. 1999. From the Federal News Service.

for the Center For Equal Opportunity, testifying before the House Judiciary Committee, maintains that criminals are “less likely to be trustworthy, good citizens” and this is a good and just reason to deny them the vote. Furthermore, he asserts that for those in prison, even for misdemeanors, the process of voting may be hampered by “logistical problems”—problems which could best be solved, apparently, by simply not allowing them to vote. The privilege argument has also been intoned when arguing for literacy tests, poll taxes, male-only vote, and white-only vote. Despite historical evidence that the United States has traditionally moved in the direction of rights-based voting rather than voting as an act only afforded to the appropriately privileged, it is not a debate likely to be resolved in the near future, partly because it is not one that has been explicitly addressed in a universal fashion in our Constitution, and partly because few are willing to claim convicted criminals as their constituency. We will examine the arguments surrounding the issue of felon disenfranchisement in much greater detail in chapter two.

Minority Representation

Less arguable is the dramatic effect felon disenfranchisement has had upon minorities. Millions of people are disenfranchised, and those numbers are heavily skewed towards minorities, especially African Americans. A study undertaken by Human Rights Watch, a non-governmental organization, reports that about 3.9 million people are currently or permanently disenfranchised in America, which is about two percent of the eligible voting population.³³ This is more than ten times the number of people that decided the popular vote in the recent Presidential election. Almost three-quarters of the disenfranchised have already completed their sentences and are no longer in prison. States headed by a Governor Bush account for more than 1.2 million disenfranchised people alone. Of those 3.9 million disenfranchised felons, 1.4 million are black, more than a third of the 4.6 million black men who voted in 1996. There are eight states where more than one in five black men cannot vote—including almost one in three in Alabama and Florida.

The poor are also disproportionately affected by these laws. In a study of what factors affect the conviction and sentencing of criminals, the defendant's income was shown to be more important than prior arrest record, and the authors conclude that “the low-income defendant [has] a greater chance than the higher-income defendant of emerging from the criminal court with an active prison sentence.”³⁴ Consequently, the poor have a greater chance to be stripped of their voting rights than those who are more economically advantaged.

Political Impact

The political impact is immense. In Florida, for example, the Presidential race was decided by less than a thousand votes, while close to 200,000 blacks—who voted more than 90% in favor of Al Gore—were disenfranchised by state law due to either imprisonment or felony conviction. Jeff Manza and Christopher Uggen are working on a statistical analysis of this impact, funded the National Science Foundation. The study uses several statistical facts as a starting point: the number of felons disenfranchised nationwide, the disproportionate number of minorities among that population, and the much higher rate that blacks vote Democratic. They deduce that there is a potential for a strong impact on past elections. Taking into account

³³ United States Census Bureau. 31 July 2000. <<http://www.census.gov/Press-Release/www/2000/cb00-125.html>>

³⁴ Clarke, Stevens H. and Gary G. Koch. “The Influence of Income and Other Factors on Whether Criminal Defendants Go To Prison.” *Law and Society Review* 11 (1976): (57-93); pp. 81.

predicted felon voting preferences and predicted felon turnout, they conclude that “Disfranchisement laws thus provided a clear advantage to Republican candidates in almost every presidential and senatorial election from 1972-1998.”³⁵ They argue, for example, that their data “suggests that Democrats may well have controlled the Senate throughout the 1990s.”³⁶ They also state that if current disenfranchisement rates existed in 1960 (when they were much lower), it is likely that Richard Nixon would have defeated John F. Kennedy. Manza and Uggen also believe the data suggests Gore would have beaten Bush in the last presidential election even if only *ex-felons* had been allowed to vote. Clearly, it is hard to overstate the political impact of felon disenfranchisement.

Another interesting point in the study is that while Republicans have often been considered the political party toughest on crime, the Democrats have made a strong effort in recent years to alter this popular conception. The Clinton Administration, for example, promoted the largest federal anti-crime legislation ever, “the Violent Crime Control and Law Enforcement Act of 1994, which provided funds to employ 100,000 new police officers among other provisions.”³⁷ This “get tough on crime” approach may benefit Democrats among certain constituents, but it also means higher rates of incarceration and corresponding higher rates of disenfranchisement among minority groups that vote overwhelmingly Democratic.

Conclusion

Through the combination of perceived political gain and democratic principle, American suffrage has grown to encompass almost all American adults, and the right to vote has come to be considered one of the most fundamental. Nevertheless, felon disenfranchisement laws strip voting rights from millions of Americans, some who are still in prison, but many who live in the general community. Minorities are disenfranchised at a much greater rate than whites because they are disproportionately represented among felons. The political consequences are tremendous because minorities tend to vote for Democrats much more than Republicans. Partly because of these political consequences, felon disenfranchisement laws have been attacked around the country. Several states have changed their laws to make the franchise more inclusive. Some states have changed their constitutions to take away voting rights from inmates. These changing laws are the subject of the next chapter, where we will explore the how these changes came about.

³⁵ Manza, J., Uggen, C., and M. Britton. (2001, unpublished). “The Truly Disfranchised: Felon Voting Rights and American Politics,” pp. 21. *add

³⁶ *Ibid.*, pp. 24.

³⁷ *Ibid.*, pp. 9.

Chapter Two: Recent Changes in State Law

Introduction

Very few states allow prisoners to vote. Until recently, Maine, Vermont, Utah, Massachusetts, and New Hampshire were the only states. Recently, both Massachusetts (2000), and Utah (1998), altered their state constitutions and statutory code through voter referenda in order to strip prisoners of the right to vote. A New Hampshire law disenfranchising inmates was found unconstitutional by the State Superior Court in 1998, a decision which was subsequently overruled by the State Supreme Court in 2000. Maine and Vermont, then, remain the only states in which prisoners can vote. Laws vary significantly in other states. Generally, felons can vote (A) immediately upon release, (B) upon termination of parole or probation, (C), after these two conditions have been met, but also after a lengthy petition to the state, or (D) never again, barring a pardon from the governor. Many states also impose a waiting period of five years after the completion of the sentence. After five years, ex-felons may either begin the petitioning process, or be automatically allowed to register, depending on the state.

Other states are liberalizing restrictions on the franchise, making it easier for felons to register, rather than harder. A portion of Pennsylvania's disenfranchisement law was struck down recently, eliminating the five year waiting period. Delaware recently liberalized its laws through legislation, rather than legal channels. A law passed in the 2000 session automatically restores voting rights to certain ex-felons after the completion of their sentence and a five year waiting period. Connecticut also liberalized its laws, the legislature voting to automatically restore voting rights after an inmate's release from prison, rather than after parole and probation. Virginia changed its laws to make the required petitioning process slightly easier by shifting the burden of responsibility from the governor to the circuit courts. Meanwhile, in Alabama, a serious effort is being made to pass legislation that would automatically restore voting rights to ex-felons, rather than requiring a successful petition. Generally, it seems that the last two to four years have seen a substantial number of states move towards less restrictive laws governing voting rights for ex-felons, while voting rights for prisoners have moved in the opposite direction.

In this chapter we will briefly examine what has happened in the aforementioned states. I will summarize the legislative or legal changes, discussing both the procedure which was followed, and the results. In my conclusion I will revisit these changes and discuss possible demographic and political causes and consequences.

State by State Procedural Analysis

Utah

In 1997, when the issue of inmate voting was formally addressed in Utah, only three other states allowed prisoners to vote. Maine, Vermont, and Massachusetts were the others—clearly a different demographic than the overwhelmingly conservative Utah. A bill was proposed in the state legislature by Congressman Carl R. Saunders, a Republican, to strip both prisoners, and those on probation of the right to vote. This required two actions, a bill to change the statutory code, HB 190, and a bill to change the Utah Constitution, HJR 4, which also requires approval from the voters. Both bills first passed through the Judiciary Committee and the Government Operations Committee. The Judiciary Committee proposed to amend the bill so as not to strip the right to vote from those on parole or probation. The state attorney maintained that

distinguishing between incarcerated felons and those on parole or probation could create problems with the equal protection clause of the Fourteenth Amendment.³⁸ The amended bill, stripping the right to vote only from prisoners, was overwhelmingly passed by the legislature with only four 'no' votes.³⁹

Judging from the amount of press these bills received, the ease with which they passed through the legislature, and their overwhelming support from the voting public (82% approval), they were not at all controversial. Newspaper reports following the vote said that the result indicated only that "Utah joined the mainstream."⁴⁰ The ACLU decided that its legal options were few and released a statement arguing that the bill might technically be legal, but was simply bad policy. Some prisoners were upset, and some prison advocacy groups were also concerned, but ultimately, few people appeared concerned. Before passage of the bill, roughly ninety out of three thousand prisoners were registered to vote in Salt Lake County, the state's most populous. The bill penalized a group to which many are unsympathetic, and only affected a small portion of that group. The bill did provoke many prisoners to register to vote, increasing the registration rate six-fold.⁴¹ There were also allegations of illegal conduct in the repression of prison registration when an inmate attempting to help inmates register had his forms confiscated by prison officials citing a "security problem."⁴²

Massachusetts

Massachusetts followed a similar procedure, first passing legislation stripping inmates of the right to vote (House, no. 2883), then sending the issue to the voters to approve the constitutional amendment. The bill was first written to only disenfranchise those convicted of drug or sex offenses and murder, but was soon broadened to include all incarcerated felons.⁴³ It passed easily through the committee on House Steering, Policy and Scheduling, and the Senate committee on Steering, Policy and Scheduling.

Support was clear and decisive both in the legislature and at the ballot box, though not as overwhelming in Utah. The legislature voted about three-to-one in favor of the bill, compared to a total of five dissenting votes in Utah, and the public voted about two-to-one to approve the change, compared to the four-to-one margin in Utah.⁴⁴ Note that in both of these cases the public was significantly less approving than their respective legislatures. The ACLU vowed to fight the measure "tooth and nail," though clearly they were unsuccessful.⁴⁵ Estimates as to how many of Massachusetts prisoners vote are similar to those in Utah, though no firm numbers exist because they vote through absentee ballot, and inmate status is not recorded. Massachusetts has far more prisoners, however: about 12, 000.⁴⁶

³⁸ Should felons have voting rights? (1998, February 17). *The Salt Lake Tribune*, pp. A6.

³⁹ Moulton, K. (1998, November 4). Utah voters take away imprisoned felons' right to vote. The Associated Press.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Burton, G. (1998, August 25). Mail clerks at prison confiscate inmate's package of voter registration forms. *The Salt Lake Tribune*, pp. B2.

⁴³ McHugh, E. T. (1998, July 30). **

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ U. S. Department of Justice, Bureau of Justice Statistics:
<http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>.

Maine

Maine is one of the few states that still allows prison inmates to vote. This issue of felon disenfranchisement was raised in Maine in January 2001, when a York lawmaker proposed a bill to deny anyone convicted of “Class A” crimes the right to vote (affecting about 1,100 inmates).⁴⁷ The issue was also raised in twice in 1999, when the legislature rejected two bills that would have denied voting rights to a broader class of criminals.⁴⁸ The Maine Civil Liberties Union opposed the bill.

The legislature had mixed feelings about the bill. The House opposed the bill, by a narrow margin of 78-64, while the Senate supported the bill.⁴⁹ The legislative debates were heated and emotional, something lacking in the Utah and Massachusetts debates. The public, according to an opinion poll, narrowly opposed the bill, 44% to 42%. Clearly, then, the issue is more controversial than in Utah, and even Massachusetts. The bill is unsuccessful so far, though its fate in the 2002 session remains to be seen. Currently, no one in the state of Maine can be disenfranchised according to their criminal status.

Vermont

In February, 2001 a bill was proposed that would prohibit both imprisoned felons and those on parole from voting.⁵⁰ The completion of parole would result in the automatic restoration of voting rights. The bill was given its first reading and subsequently sent to the House Committee on Local Government where it now resides. There are approximately 1, 250 people incarcerated in state or federal facilities in Vermont.⁵¹

New Hampshire

Changes in New Hampshire law came through the courts rather than the legislature. David Fischer, serving an 11-22 year sentence for first-degree assault and witness tampering, appealed a New Hampshire state law barring inmates from voting in October of 1998, with the help of the New Hampshire Civil Liberties Union.⁵² Judge Arthur Brennan, of the Superior Court, overturned the law calling it unconstitutional under the New Hampshire state constitution.⁵³ He argued that voting is one of our most cherished national rights, and the state must provide a compelling justification for the restriction of that right.⁵⁴

The legislature soon responded to fears of bloc inmate voting, or inmates voting en masse to mold the community to their tastes, by proposing an amendment to allow inmates to vote only

⁴⁷ Carrier, P. (2001, May 16). House defeats amendment plan that would ban felons from voting. *Portland Press Herald*, pp. B1.

⁴⁸ *Ibid.*

⁴⁹ Adams, G. (2001, May 15). House votes to retain prisoners’ right to vote. *The Associated Press State & Local Wire*.

⁵⁰ Rutland lawmaker seeks to prohibit felons from voting. (2001, March 2). *The Associated Press State & Local Wire*.

⁵¹ U. S. Department of Justice, Bureau of Justice Statistics:
<http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>.

⁵² Inmate wants right to vote while in jail. (1998, October 24). *The Associated Press State & Local Wire*.

⁵³ Murphy, G. (1998, October 28). Judge says NH prison inmates can vote; state appeals. Inmate and voter leaning toward the GOP. *The Union Leader*, pp. A1.

⁵⁴ Wester, K. (1998, October 28). Inmate wins right to vote. *Associated Press State & Local Wire*.

in the communities where they resided prior to their imprisonment.⁵⁵ This was quickly followed by a constitutional amendment completely removing the right of inmates to vote.⁵⁶ These bills became irrelevant after the state successfully appealed the Superior Court decision. The state Supreme Court ruled that the New Hampshire constitution allowed the legislature to regulate the franchise in ways it thought reasonable, overruling the earlier Superior Court Decision. This decision effectively returned New Hampshire to the status quo of pre-October 1998, where felons are allowed to vote after completing their prison sentence. There are about 2, 140 prisoners in New Hampshire.⁵⁷

Delaware

Delaware is on the opposite end of the felon enfranchisement spectrum, denying convicted felons the right to vote even after the completion of one's sentence, including parole and probation. In January, 2000 a bill was proposed to amend the state constitution and automatically restore the right to vote to certain felons, excluding those convicted of sex crimes, murder, and bribery, five years after completing all terms of their sentence, including restitution (SB 350). The amendment required a two-thirds majority vote, and was approved by both the House and the Senate on two separate occasions, pursuant to the proper procedure for amending the Delaware constitution, and was signed into law by Governor Thomas R. Carper in June, 2000.⁵⁸ Official public approval of the amendment was not necessary. Support was widespread, and encompassed groups that frequently disagree including "Muslims, conservatives, and civil rights activists".⁵⁹ Delaware remains fairly restrictive in its regulation of the franchise, but has moved much closer to the middle with the passage of this bill. Approximately 20, 500 convicted felons reside in Delaware.⁶⁰

Connecticut

Until recently, Connecticut law was moderate in its restriction of the franchise, allowing felons to vote after completing the terms of their parole or probation. This would place Connecticut very close to the middle of the enfranchisement scale, compared to other states. In February, 2000, however, a bill was proposed to automatically restore voting rights to felons upon completion of their prison sentence (HB 5042).⁶¹ Similar bills have been proposed in the past, but none successfully. A similar bill was proposed in 1999, for example, as part of a campaign finance reform bill, but was not passed by the House.⁶² In 2000, the Connecticut Voting Rights Restoration Coalition, which includes more than 40 community, church and civil

⁵⁵ Hastings, W. (1999, January 20). Panel hears proposals to bar inmate voting. *The Union Leader*, pp. C2.

⁵⁶ *Ibid.*

⁵⁷ U. S. Department of Justice, Bureau of Justice Statistics:
<http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>.

⁵⁸ Briefs from Dover. (2000, January 13). *The Associated Press State & Local Wire*; Carper signs bill supporting voting rights for most ex-felons. (2000, June 14). *The Associated Press State & Local Wire*.

⁵⁹ Carper signs bill supporting voting rights for most ex-felons. (2000, June 14). **

⁶⁰ Thorne, C. (2000, June 28). Bill granting felons right to vote passes through legislature. *The Associated Press State & Local Wire*.

⁶¹ Gorlick, A. (2000, March 6). Bill would allow felons to vote immediately after prison release. *The Associated Press State & Local Wire*.

⁶² *Ibid.*

rights organizations, helped ensure the legislation passed the House, 90-59.⁶³ The bill was not, however, voted on by the Senate that year. In 2001, the House passed the bill through an 80-63 vote, and the Senate voted 102-46 to approve the bill.⁶⁴ An amendment was proposed to restrict holders of public office to those eligible to vote, but this was rejected. The passage of the bill made Connecticut the 22nd state to allow felons still serving probation to vote.⁶⁵ This change to Connecticut code did not require voter approval.

This was a significant liberalization of Connecticut law, restoring the right to vote to approximately 35, 000 people.⁶⁶ The Connecticut legislature is controlled by the Democratic party and faced significant opposition, as shown by the length of time it took to get the bill passed, and also by the number of ‘no’ votes. Nevertheless, the bill passed the Senate by more than a two-to-one margin.

Alabama

Alabama has traditionally been very restrictive in its laws. Alabama law currently allows felons to vote only after completing all the terms of their sentence, and successfully petitioning the governor. For the last two years legislators have been trying to link a voter ID bill with a measure to make it easier for felons to vote.⁶⁷ The former provision has traditionally been more popular with Republicans, and unpopular with Democrats, while the reverse has been true of the latter provision. In 2000, the latter measure was killed in committee, but is being revived in the current legislative session. The verdict is not in whether it will survive. It depends partly upon whether there are enough votes for the voter ID bill without the added amendment. Alabama houses about 22, 000 prisoners reside in state or federal prison.⁶⁸

Virginia

Virginia, like Alabama, is a southern state with a strong history of being both tough on crime and very restrictive in its regulation of voting rights. Until recently, felons could only vote after completing all terms of their sentence, waiting five years, and successfully petitioning the governor, placing Virginia in the group of states which most strictly regulate the franchise. About 200, 000 felons have lost the right to vote in Virginia, while roughly 150 a year recover their right to vote out of the over 600 that apply under Governor Jim Gilmore.⁶⁹ Recent legislation proposed liberalizing these laws, though not dramatically, by shifting the burden of the petitioning process from the office of the governor to Virginia circuit courts. Felons would still be disenfranchised for life without the approval of their petition, but they would, in theory,

⁶³ Daly, M. (2001, April 25). House approves direct primary bill, senate passes felon voting bill. The Associated Press State & Local Wire.

⁶⁴ Daly, M. (2001, April 11). House passes bill allowing felons on probation to vote. The Associated Press State & Local Wire.

⁶⁵ Chedekel, L. (2001, April 26). State felons move closer to voting booth. *The Hartford Courant*, pp. A1.

⁶⁶ Simpson, S. (2000, November 13). Out of jail, but barred from voting. *The Hartford Courant*, pp. A3.

⁶⁷ Rawls, P. (2000, April 19). Voter ID requirement close to becoming law. The Associated Press State & Local Wire.

⁶⁸ U. S. Department of Justice, Bureau of Justice Statistics:
<http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>.

⁶⁹ Whitley, T. (1999, November 30). Voting rights at issue. *The Richmond Times Dispatch*, pp. B4; Enfranchisement let ex-felons vote virginia ought to follow other states’ lead. (2000, July 8). *The Virginian-Pilot*, pp. B6.

have an easier path towards the approval of that petition. Those convicted of the manufacture or distribution of drugs, violent crimes, or election fraud would remain ineligible for life.

The bill passed by a relatively narrow margin of 60-39, but without debate. A related bill, requiring the Department of Corrections to notify newly released felons about the petitioning process, passed 87-12.⁷⁰ A reluctance for debate seemed to carry the day as a bill reducing the penalty for sodomy between consenting adults passed by a margin of only 51-49, but still failed to provoke debate. The felon voting rights bill was quickly killed after its passage in the House by the Senate Privileges And Elections Committee on a party-line vote without discussion.⁷¹ Several days later, however, an almost identical bill was approved by the same committee. The primary difference was that while the bill made provisions to allow felons to petition circuit courts instead of the governor, the governor retained his ultimate authority in each case. This was important partly because Virginia state constitution forbids the legislature from reducing the governor's authority without a constitutional amendment.⁷²

This version of the bill was finally approved through a vote-swap between certain black Democratic lawmakers who strongly supported the bill, and Governor Jim Gilmore, who desired more power to appoint judges.⁷³ The process angered some lawmakers, but black lawmakers maintained it was worth the trade,⁷⁴ despite the comparatively minor changes the bill created. Nevertheless, the passage of the bill resulted in heightened community awareness and involvement. Fourteen new advocates soon volunteered to help felons recover their voting rights.⁷⁵

Pennsylvania

From 1995 to 2000, Pennsylvania state law required ex-felons to wait five years after the completion of their sentence before registering to vote. A bill was proposed in April, 2000 to strike this waiting period.⁷⁶ The provision was added, with little attention, to a "motor voter" law, in 1995.⁷⁷ Though the original provision attracted little attention, the attempt to repeal the waiting period met stiff opposition and was defeated in the state House 80-118.⁷⁸

In June, 2000 the NAACP filed a lawsuit against the state of Pennsylvania challenging the law. The lawsuit claims the law creates distinctions between certain types of ex-felons that

⁷⁰ O'Dell, L. (2000, February 16). Bills on death appeals, felons' voting rights approved. *The Associated Press State & Local Wire*.

⁷¹ Barakat, M. (2000, February 29). Committee approves redistricting by actual census count. *The Associated Press State & Local Wire*.

⁷² Heyser, H. A. (2000, March 6). Senate panel oks bill to help restore felons' voting rights measure would send applications through circuit courts, rather than to governor. *The Virginian-Pilot*, pp. B6.

⁷³ Peter, J. (2000, March 8). Vote swap with black caucus helps gilmore pass judicial bill. *The Virginian-Pilot*, pp. B4.

⁷⁴ Enfranchisement let ex-felons vote virginia ought to follow other states' lead. (2000, July 8). *The Virginian-Pilot*, pp. B6. **

⁷⁵ Gibson, B. (2000, November 28). Group helping ex-felons regain their voting rights. *The Richmond Times Dispatch*, pp. B2.

⁷⁶ Durantine, P. (2000, April 21). Out-of-jail, ready-to-vote bill goes to house. *Pittsburgh Post-Gazette*, pp. B2.

⁷⁷ *Ibid.*

⁷⁸ Bull, J. M. R. (2000, May 18). House rejects votes for released felons. *Pittsburgh Post-Gazette*, pp. B6.

have no rational basis, and that this arbitrary regulation of the franchise is a violation of the equal protection clause of the Fourteenth Amendment.⁷⁹ The case was decided in favor of the NAACP on those grounds. The decision was issued shortly before the November election, which had an October 10th deadline for voter registration, and the ruling judge issued a temporary order allowing ex-felons to immediately register. The state attorney general declined to appeal. Pennsylvania houses close to 40,000 prisoners in state and federal prisons.⁸⁰

Washington

In April, 2000 a lawsuit was filed in Washington challenging felon disenfranchisement laws more generally, asserting that the disproportionate impact of the laws is a violation of the Voting Rights Act of 1965. A federal judge acknowledged the discriminatory impact, but dismissed the case citing the lack of evidence that the law itself was discriminatory.⁸¹ We will examine federal legal and constitutional issues in the next chapter. Washington houses approximately 14, 000 inmates in state and federal prisons.

Conclusion

Utah and Massachusetts pursued similar logistical paths in removing the right to vote from inmates. Their constitutions were clear in providing inmates the right to vote and appropriate legislative action was necessary to modify the states' constitutions in order to remove that right. Voter and legislative approval were high in both cases.

Maine's constitution was very similar, also allowing inmate voting. Legislators' attempts to change the constitution through legislative action proved relatively unpopular and were defeated, though not resoundingly. Future legislative action seems likely, though the possibility for success is unclear. Vermont also faces a challenge to inmate voting, though so far it has also faced an uphill battle. Utah is a much more conservative state than Massachusetts, Maine, or Vermont. The latter three are all quite liberal, however, and the difference in the outcome between Maine and Massachusetts is difficult to explain. It is especially puzzling because the minority population in Massachusetts is much higher, and organizations like the NAACP are heavily involved in the effort to retain voting rights for inmates. One might predict it would be easier in Massachusetts to preserve those rights than in Maine, but the results seem to indicate otherwise.

Delaware and Connecticut both moved towards a more inclusive franchise, loosening the restrictions on what type of felons are allowed to vote through legislative action. The respective bills were much more controversial than those in Utah or Massachusetts, judging from the legislative roll call. However, both bills passed convincingly. Alabama also moved towards a more inclusive franchise, though with far more difficulty. A potentially costly vote-swap was necessary to ensure the passage of the relevant bill. The changes in Alabama and Virginia were predictably smaller considering its more conservative demographic, but the movement seemed driven largely by black lawmakers. Race was also an important issue in Delaware and Connecticut.

⁷⁹ Rubinkam, M. (2000, June 8). NAACP files lawsuit on behalf of ex-felons prevented from voting. The Associated Press State & Local Wire.

⁸⁰ U. S. Department of Justice, Bureau of Justice Statistics:
<http://www.ojp.usdoj.gov/bjs/dtdata.htm#corrections>.

⁸¹ Prisoners file suit to reclaim the vote. (2000, April 5). *The Columbian*, pp. B2.

New Hampshire and Pennsylvania both moved towards a more inclusive franchise through legal challenges to local statutes. The New Hampshire law was found unconstitutional under the state constitution, though that ruling was soon overturned. The Pennsylvania case was found to be unconstitutional under the federal constitution. An attempt was also made to change Pennsylvania felon disenfranchisement laws through legislative means, but this was defeated.

It is perhaps difficult to draw broad conclusions about national trends from these examples, but it seems that voting rights for inmates is not a popular issue in most areas of the country. On the other hand, those states with very restrictive felon disenfranchisement laws seem to be moving towards greater inclusiveness. This movement seems propelled in part by inmate advocacy groups, but mostly by groups like the NAACP which are concerned with issues of racial disparity. This is evident not only in legislative changes, but also in the legal case in Pennsylvania. The ACLU and other civil liberties organizations are also very involved in these changes, as shown, for example, by the case in New Hampshire. Their political involvement seems more measured, however. The response by the Utah chapter of the ACLU, for example, was relatively small, perhaps because of the overwhelming support among the public for restricting inmate voting rights.

Chapter Three: The Arguments

Introduction

In this chapter I will analyze the arguments presented by proponents and opponents of felon disenfranchisement as represented in the states we examined in the last chapter. There are several major reasons why people argue against disenfranchisement, including the assertion that there is not a practical necessity to take away the right to vote, and that voting can significantly aid in the rehabilitation process. Some also argue it is better for the democratic process. Minority representation is also a concern, depending upon the state in which this issue is raised. Those in favor of disenfranchisement often argue that it is “fair” and “right” for those who have violated the laws of society to give up their right in helping to direct those laws and the governance of that society. These arguments can be grouped into several major categories. We will examine each of these arguments and see examples of how they are presented through the media.

Fairness:

There are several major types of arguments into which we can classify the public debate in these several states. First we will examine the category of arguments we file under *fairness*. The fairness argument generally involves the idea that voting is a means of participating in the making of law. It is a privilege that one should lose should one break the law. This is the *fair* outcome. The arguments are usually presented as a matter of principle, rather than as a solution to a problem or some other practical measure. It is also sometimes presented in the context of the social contract. If one breaks the social contract by committing a felony, then one should forfeit certain benefits as a consequence.

Utah critics of voting rights for felons usually phrase the issue in terms of fairness, positing voting as a privilege and not a guaranteed right. Basically, if someone commits a crime, it is not fair for that person to be able to help dictate what others can and cannot do. Rep. Carl Saunders, a Republican from Ogden, says “Someone who has been convicted of committing felonious crimes against society ought not to be able to vote for those who lead our society”.⁸² The issue of rehabilitation is not usually raised, although Saunders does argue that taking away voting rights from inmates will give them an incentive to rehabilitate themselves in order to regain those rights.⁸³ For the most part, however, it is not an issue of rehabilitation, but of fairness, of principle. Says Saunders, “It would be a statement of principle that we object to those felons having the privilege,” and finally, “it’s just not right.”⁸⁴

In a Deseret News editorial, the question is posed, “Why should someone who seriously violates societal rules and mores turn around and have a say . . . ?”⁸⁵ The answer, according to the Deseret News, is that they shouldn’t. The issue of rehabilitation is raised, but it is argued that this consideration is outweighed by the “forfeiture of rights rationale that accompanies criminal

⁸² Harrie, D. (1997, May 22). Legislature may abolish felon voting; only four states give prisoners the privilege; felon voting in Utah may be abolished. *The Salt Lake Tribune*, pp. A1.

⁸³ Donaldson, A. (1998, January 31). Utah house votes no to voting by inmates. *The Deseret News*, pp. A1.

⁸⁴ Harrie, D. *Ibid.*

⁸⁵ No vote for incarcerated felons. (1997, May 27). *The Deseret News*, pp. A8.

punishment.”⁸⁶ In other words, when someone commits a crime, they forfeit certain rights. That forfeiture should include the right to vote, because that forfeiture is fair. Those who violate society’s rules should not be allowed to determine those rules, or to choose the leaders. Furthermore, “[felons] ought to be disenfranchised because they have treated the law with disrespect.”⁸⁷ Voting is a “privilege,” not a guaranteed right, and the commission of serious crimes necessitates the denial of that privilege.

Much of the rhetoric surrounding the effort to restrict the voting rights of inmates in Maine again revolves around fairness. It is argued by the sponsor of the Maine bill, Republican Richard Bennett, that as part of felons’ debt to society, they should forfeit their right to help direct public policy. He says that “Law-breakers ought not to be law-makers.”⁸⁸

The Maine example adds a new wrinkle to the fairness argument: victim’s rights. Representative Mary Black Andrews’ sees the bill as a way of honoring her husband, a state trooper who was killed in the line of duty, and also the memories of all other Maine murder victims.⁸⁹ Andrews’ also argues that victim’s rights aren’t often acknowledged by the state, and that the right of felons to vote is a notable example. As Rep. Theodore Heidrich, a Republican from Oxford puts it, “When you’re murdered you never have the right to vote again.”⁹⁰ It doesn’t seem fair then, that the person who killed should have the right.

The head of the Maine chapter of Parents of Murdered Children, Debbie O’Brien, also supports the bill, arguing that voting is a privilege, and “No one needs a killer helping the state or country with making sound and important decisions.”⁹¹ Again, the right to vote is explicitly a privilege and one that should be taken away after a felony conviction.

Introducing victim’s rights has two major rhetorical effects. First of all, people pushing for disenfranchisement are no longer simply working to take rights away from felons, but are fighting to preserve the rights of the people that felons victimized. Secondly, the sponsor of the bill, Mary Black Andrews, was widowed through homicide, leaving her with two small children and a third on the way. Consequently, whenever the bill is mentioned in the press, Andrews and her story are also mentioned. The idea of felon disenfranchisement is then consistently associated with this widower and her children, and the battle she fights in her “husband’s memory.”⁹² This has the effect of ennobling disenfranchisement and personalizing an issue which doesn’t directly affect most people.

Similar arguments are also raised in Massachusetts. According to the *Boston Herald*, the bill denying inmates the right to vote is righting a “basic wrong.”⁹³ In the words of Rep. Paul K.

⁸⁶ *Ibid.*

⁸⁷ Vote no on prop 5, yes on all else. (1998, November 1). *The Deseret News*, pp. AA1.

⁸⁸ Adams, G. (2001, May 15). House votes to retain prisoners’ right to vote. *The Associated Press State & Local Wire*.

⁸⁹ Carrier, P. (2001, January 17). **

⁹⁰ Carrier, P. (2001, May 16). **

⁹¹ Carrier, P. (2001, January 17). **

⁹² Lawmaker wants to remove felons right to vote. (2001, January 17). *The Associated Press State & Local Wire*.

⁹³ Editorial; Yes on question 2: to right a wrong. (2000, October 26). *The Boston Herald*, pp. 036.

Frost, a Republican from Auburn, “Murderers have taken away the voting rights of their victims, they have forfeited their right to vote. Similarly, because criminals have committed these crimes, they “don’t deserve the right to vote. State Senator Richard T. Moore, a Democrat from Uxbridge says that it’s “inappropriate” for inmates to vote, and that they have too many rights as it is.⁹⁴ State Senator Robert A. Bernstein, a Democrat from Worcester, argues that those who don’t live by the rules of society do not deserve the benefits of living in that society, which presumably include voting.”⁹⁵ Voting is again not an inalienable right, but a privilege which must be earned through lawful conduct. This sentiment is echoed by the governor of Massachusetts, Paul Celucci, who says that “Those who can’t obey our most basic laws should and will have no say at the ballot box.”⁹⁶

Vincent A. Pedone, a Democrat from Worcester, believes that through their criminal conduct felons have demonstrated their indifference to the law and to their fellow citizens, and because of this neglect they should be excluded from participation. On a similar note, Republican House Leader Francis Marini, of Hanson, says “It makes no sense, we incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run our lives.”⁹⁷ Not only do we take away their right to run their own lives, but they have already demonstrated they are “incapable of running their own lives.”⁹⁸

All these statements point to the idea that the commission of a crime is an act which restricts the rights of others in society. The consequence should be an appropriate restriction of the rights of the perpetrator, a sort of tit for tat. By jailing convicted criminals, we reduce their ability to make decisions about how to live their lives, and it makes sense to similarly reduce their ability to direct our lives through voting. It is not a question of what policy will create the best outcome for society, or for felons; it is only a question of principle. All practical matters are excluded from consideration here.

In states where the ban on felon voting extends past incarceration, fairness arguments are still very common, though in this case, both sides use them. Proponents of felon disenfranchisement argue that voting is a privilege which one forfeits when one commits a crime against society. Pennsylvania state Rep. John Lawless says “You earn your rights back once you lose them. You just don’t get out of jail and earn your rights.”⁹⁹

On the other side, people argue that felons should be allowed to vote once they have been released from prison, rather than arguing in favor of inmates being allowed to vote, as in Utah et. al. People consequently argue that it is only fair for a person who has paid their debt to society to be allowed to vote. Malik Aziz argues that felons “do their time, they come home, they get a job, they do everything they’re supposed to do as far as being a person living in society. And then when election time comes around, they’re not able to participate in the electoral process that

⁹⁴ Astell, E. (1998, August 3). Inmate voting rights debated; Constitutional change proposed. *Telgram & Gazette*, pp. A1.

⁹⁵ State is closer to denying vote to felons in jail. (1998, July 30). *The Patriot Ledger*, pp. 06.

⁹⁶ McElhenny, J. (2000, June 27). A constitutional quandary: Should inmates be allowed to vote? The Associated Press State & Local Wire.

⁹⁷ McMillan, J. (1999, April 19). Four New England states only ones to allow prisoner voting. The Associate Press State & Local Wire.

⁹⁸ Crowley, M. (2000, June 29). Lawmakers favor ban of felons’ voting rights. *The Boston Globe*, pp. B3.

⁹⁹ Strawley, G. (2000, May 8). Bill would repeal five-year-old ban on ex-convicts voting. The Associated Press.

affects their community.”¹⁰⁰ Or, as Larry Frankel, executive director of the Pennsylvania chapter of the ACLU, puts it, “You can work, pay your taxes, but you can’t vote. That’s taxation without representation.”¹⁰¹

Felonious Influence

A less theoretical argument used to support the restriction of the franchise is the fear that inmates might vote in a way to undermine the values or ideals of the community and benefit criminals. For example, the spokesman for the Suffolk District Attorney in Massachusetts, James Borghesani, ruminates that “There have been a lot of proposals to outlaw county government. Now, I guess, county government is going to be dictated by the outlaws.”¹⁰²

Estimates of how many prisoners vote hover around five percent.¹⁰³ While the infrequency with which inmates exercise their right to vote was frequently raised in newspaper articles in Utah, the fear of how those inmates might vote was not usually an issue. It was usually raised as an argument for preserving the status quo. The sponsor of the relevant legislative bill in Utah, Rep. Saunders, disputes the importance of low voter registration rates among inmates. He argues the issue is practically important because “Adolf Hitler came to power on one occasion by a majority of one vote.”¹⁰⁴ Saunders also asserts that “I’ve known lots of elections decided by one vote . . . wouldn’t it be something if an election was decided by someone on murderer’s row?”¹⁰⁵ The assumption, again, is that felons have shown themselves to be morally corrupt and would make morally corrupt decisions for the rest of society if given the chance.

This issue was especially salient in Massachusetts because some inmates attempted to establish their own Political Action Committee, much to the dismay and “jaw-descending disbelief” to some people in the community.¹⁰⁶ Low voter turnout among inmates was not enough to reassure everyone that the inmate voting block was not potentially dangerous. The *Telegram & Gazette* notes for example that Massachusetts will “produce at least a few hand-wringing candidates eager to court the felon vote.”¹⁰⁷ Massachusetts talk radio host Howie Carr wrote an editorial about this issue, arguing that inmate voting could lead to a strong and malignant influence on the community. Michael Shea, an inmate and spokesman for the potential PAC, argued that the privatization of prison health care had resulted in a dangerous and deadly decline in the quality of service afforded to prisoners. Carr’s response was that Shea was a murderer anyway, and probably shouldn’t be so “squeamish about death.”¹⁰⁸ The article generally mocks the ability of inmates to make acceptable political choices, and implies that all inmates would vote the same, probably for whichever candidate is easiest on crime—the Democrat, presumably. Shea uses the example of Willie Horton’s reported preference for

¹⁰⁰ Strawley, G. (2000, May 8). **

¹⁰¹ Bull, J. M. R. (2000, May 18). House rejects votes for released felons. *Pittsburgh Post-Gazette*, pp. B6.

¹⁰² Sullivan, J. (2000, November 2). **

¹⁰³ See Donaldson, A. (1998, January 31)** and Sullivan, J. (2000, November 2)**, for example.

¹⁰⁴ See note 155, *supra*.

¹⁰⁵ Wallace, C. G. (1998, October 10). **

¹⁰⁶ Mixed amendments; speedier redistricting, felons’ franchise on ballot. (2000, October 27). *Telegram and Gazette*, pp. A14.

¹⁰⁷ Prisoner PACS; getting out the felon vote. (1997, August 11). *Telegram & Gazette*, pp. A6.

¹⁰⁸ Carr, H. (1998, October 14). Hard to feel sad for leaders of this PAC. *The Boston Herald*, pp. 022.

Michael Dukakis. These thoughts are echoed by Plymouth District Attorney Michael J. Sullivan who says that “It’s likely they (inmates) wouldn’t be voting for an incumbent district attorney.”¹⁰⁹

Similarly, a columnist from *The Boston Herald* argues that if inmates were more politically organized, they could elect the sheriffs softest on crime, and ensure that their living conditions would be relatively opulent. Inmates could relax by watching “Oz” on HBO, while wearing their new “Louis. Cuffs in sterling silver by Shreve,” and dining on “grilled mushroom caps stuffed with crabmeat.”¹¹⁰

The right of inmates to vote is also considered to have more severe repercussions. A *Bay Harbor Times* editorial argues that felons are prevented from owning firearms and that “allowing them to file absentee ballots from their cells could be construed as holding a loaded weapon.”¹¹¹ This also assumes that felons are consistently of a certain class of person who would not vote with the community’s best interests at heart.

This issue was also important in New Hampshire where inmates were briefly allowed to vote in the county in which they were imprisoned, rather than voting absentee in the county where they last resided. The fear of bloc voting was consequently more salient. House bill 213 was proposed to address the fear of “local voters being overruled through inmate balloting on any number of crucial issues including bonding for community projects or for candidates whose views are slanted toward inmates’ points of view.”¹¹²

Even proponents of inmate enfranchisement sometimes argue that giving inmates the vote would only matter if “there are so many people in jail that they can affect the vote,” implying that we might as well allow them to vote so long as their votes hardly count.¹¹³ This statement was from Massachusetts state Rep. William J. McManus II, a Democrat from Worcester who argued against the amendment which would strip the right to vote from felons. Sally Sutton of the Maine Civil Liberties Union which also argued publicly to preserve the right of inmates to vote, says she is “not sure what the problem is with allowing these people to vote because there aren’t enough of them to alter election outcomes.”¹¹⁴

Joshua Gordon, the Concord attorney who represented David Fischer in the case which temporarily overturned the New Hampshire statute disenfranchising inmates, is one of the few to explicitly deny that bloc voting is a legitimate fear. He argues that “inmates are different people and they are unlikely to vote the same on any one issue or for any particular candidate.”¹¹⁵ On the other hand, his client favored allowing prisoners to vote in the county in which they were incarcerated because “that would give prisoners a voting block and force legislators to reckon with them.”¹¹⁶

These examples illustrate that critics of felon disenfranchisement frequently debate the issue of how felons would vote on the same terms as their opponents. In other words, one side

¹⁰⁹ Sullivan, J. (2000, November 2). Campaign 2000; foes point to flaw in question 2. *The Boston Herald*, pp. 008.

¹¹⁰ Sciacca, J. (2000, October, 16). Time to take voting rights from the cons. *The Boston Herald*, pp. 004.

¹¹¹ Buell, J. (1999, May 25). Prison voting justified. *Bangor Daily News*.

¹¹² Hastings, W. (1999, January 20). Panel hears proposals to bar inmate voting. *The Union Leader*, C2.

¹¹³ McHugh, E. T. (1998, July 30). Convicts may ‘forfeit’ vote. *Telgram & Gazette*, pp. A1.

¹¹⁴ Lawmaker wants to remove felons right to vote. (2001, January 17). *The Associated Press State & Local Wire*.

¹¹⁵ Hastings, W. (1999, January 20). **

¹¹⁶ Webster, K. (1998, October 28). Inmate wins right to vote. *The Associated Press State & Local Wire*.

argues that felons would exert a malignant influence on the community, while the opposing side argues that not very many felons vote anyway. One alternative, for example, would be to argue instead that felons are a diverse population with varied values that cannot be so simply categorized, and that the restriction of a group's vote based purely on a presumption of its outcome is inappropriately undemocratic. Massachusetts state Sen. Cynthia Stone Creem, a Democrat from Newton says that the "Fear of prisoners using electoral clout to forward an evil agenda is ridiculous."¹¹⁷ The article does not, however, explain why Creem believes the fear is ridiculous--whether it is because the number of prisoners who vote is very small, or because the idea of inmates possessing a unified agenda of evil is itself ridiculous. That restricting the voting rights of a group for fear of how they will vote is unconstitutional does not exactly seem to be common knowledge among legislators here.¹¹⁸

Other States

Utah, Maine, New Hampshire, Vermont, and Massachusetts were until recently the only states which allowed inmates to vote.¹¹⁹ This minority position provided fuel for those working for more restrictive voting laws. The idea that the vast majority of the country does not allow inmates to vote was reason in and of itself to restrict the franchise in a way more congruent with the rest of the country.

Utah state Rep. Saunders cites his finding that Utah was one of only four states that allowed inmates to vote as one reason for sponsoring the legislation.¹²⁰ A *Deseret News* editorial also uses this factoid as a reason for further restriction.¹²¹ That Utah was one of only several states allowing inmates to vote was raised in nearly every article about the issue, though substantial discussion of this fact was rare.

A Massachusetts editorial in favor of removing inmate voting rights notes incorrectly that "only two other states—Maine and Vermont—allow prisoners to vote."¹²² Another article, under the headline "Four New England States Only Ones to Allow Prisoner Voting," reports that others call this fact a "dubious distinction."¹²³ A sponsor of the relevant Massachusetts legislation noted in a letter to the editor of *The Boston Globe* that Massachusetts is "one of only three states" where inmates are allowed to vote. Often, as in the example here, the statement is presumably self-explanatory; if very few other states extend these rights to inmates, then neither should we. The laws of the majority of other states are implicitly regarded as community standards to which all states should probably comply.

Joe Sciacca, a columnist for *The Boston Herald*, makes the argument more explicitly in an article under the headline "Time to Take Voting Rights From the Cons":

¹¹⁷ McElhenny. (2000, June 28). Legislature votes to bar jailed felons from voting. The Associated Press State and Local Wire.

¹¹⁸ See "Fencing Out" in the legal chapter for more.

¹¹⁹ Note that laws in Utah, New Hampshire and Massachusetts have all changed recently so that arguments in the press regarding how many states allow inmate voting are frequently different and sometimes inaccurate. The important thing is that these states were in a small minority, the exact size of that minority is unimportant.

¹²⁰ Donaldson, A. (1998, January 31). **

¹²¹ Wallace, C. G. (1998, October 10). **

¹²² Prisoner PACS; getting out the felon vote. (1997, August 11). *Telegram & Gazette*, pp. A6. **

¹²³ McMillian, J. (1999, April 19). Four New England states only ones to allow prisoner voting. The Associated Press State & Local Wire.

There are three states that impose no restrictions on the right of inmates to vote. Vermont. Maine. Guess what the other one is—you got it, the ever-enlightened Commonwealth of Massachusetts. Even Live Free or Die New Hampshire, where I swear half the legislature was abducted by aliens while driving on some dark, winding road in Chester and had their brains removed before being sent back to Concord, has more sense.¹²⁴

Sciacca clearly values the standard upheld by other communities, arguing that even states with less “sense” than Massachusetts have restricted the right of inmates to vote. This argument is reiterated by John Birtwell, a spokesman for Massachusetts Gov. Paul Cellucci, who said “Very clearly the people of Massachusetts understand voting is a privilege. That’s something the other 47 states have realized as well.”¹²⁵ An editorial in *The Boston Herald* supporting the restrict of inmate voting rights also notes that 47 other states strip voting rights from felons, following that factoid with the simple declaratory sentence: “But not here.”¹²⁶ The next sentence further emphasizes that Massachusetts is one of the “only places in the country where imprisonment is not an impediment to voting.”¹²⁷ The minority position of Massachusetts in relation to other states is reason enough to at least reexamine the relevant laws.

This argument can be turned upside down, however, as it was in a federal lawsuit raised in Washington state. The lawsuit sought to overturn all state laws disenfranchising felons under the Voting Rights Act of 1965. One of the attorneys working on the case argued that “We are the only industrialized nation in the world that still has felony-disenfranchisement laws.”¹²⁸ Here the argument is the same as that in Massachusetts and Utah: we should conform to broader community standards. In this case, however, the broader community is international rather than only national, and the standard is quite the opposite from that of the United States.

Critics of the first version of this argument include Massachusetts state Rep. Byron Rushing, a Democrat from Boston, who said “If Cellucci were around in 1790, they probably would be arguing that we need to keep slavery because there’s slavery in the other 12 states. That’s nonsense.”¹²⁹ In Utah, Burt Stringfellow raises the issue in his letter to the editor, rebutting the arguments here and asserting that this minority position should be a source of pride, not a motivating factor for changing the law.¹³⁰

Punishment

Proponents of felon disenfranchisement sometimes argue that disenfranchisement is appropriate punishment. They implicitly or explicitly endorse the purpose of prison as primarily punitive rather than rehabilitative. Massachusetts Gov. Paul Cellucci says, “If you go there to be punished, this should be part of the punishment.”¹³¹ After the Utah constitutional amendment was approved, Rep. Saunders said “[the voting public] made the statement loud and clear that

¹²⁴ Sciacca, J. (2000, October, 16). **

¹²⁵ Critics renew attack on proposed inmate voting prohibition. (2000, October 2). The Associated Press State & Local Wire.

¹²⁶ Editorial; Yes on question 2: to right a wrong. (2000, October 26). **

¹²⁷ *Ibid.*

¹²⁸ Prisoners file suit to reclaim the vote. (2000, April 5). Associated Press, *The Columbian*, B2.

¹²⁹ Critics renew attack on proposed inmate voting prohibition. (2000, October 2). **

¹³⁰ Stringfellow, Burt. (1997, June 10). **

¹³¹ McMillan, J. (1999, April 19). **

they are sick of crime and criminals”.¹³² While his analysis of voter attitudes may or may not be accurate, it does illustrate how many proponents of disenfranchisement see the issue. People against disenfranchisement also see disenfranchisement as a punitive measure, but one that is too punitive, one that hurts the rehabilitative process. Those in favor of disenfranchisement, on the other hand, may even scoff at the rehabilitative benefit of voting rights. In response to this argument Massachusetts state Rep. Francis Marini said “It didn’t seem to do much for them before they got to prison.”¹³³

Rehabilitation

Those who supported the right of felons to vote frequently appealed to the idea of rehabilitation. Craig Taylor, a Republican from Kaysville, Utah, and Chairman of the Senate Judiciary Committee, argued in favor of the right to vote for those on parole or probation, stating that former inmates need help integrating themselves back into society. They don’t need legislators “trying to beat them down at every turn.”¹³⁴ Rob Carlson, an inmate, argued that voting helps inmates take responsibility for themselves, and that the alternative is to become “even more institutionalized.”¹³⁵ Carlson also argued that losing the right to vote would make it more difficult to reenter society, and would “defeat the purpose of rehabilitation.”¹³⁶

What these people argue is that the ability of an individual to legally vote is strongly connected to that individual’s feelings of belonging in the community at large. That feeling of belonging is an important part of rehabilitation. Rather than imposing legal obstacles which only formalize feelings of alienation and make that separation *de jure*, society should extend voting rights to help foster the civil inclusion which may further the rehabilitative process. As state Rep. Greg Vitali, a Democrat from Delaware, Pennsylvania, said “You want people like that [felons] to feel included.”¹³⁷ In the words of Marianne Johnstone, a member of the Prison Information Network’s board of trustees, “If [felons] can fit into their community [by becoming a part of the decision making process] then they will be more likely to be part of it and not a problem in it.”¹³⁸

Interestingly, the major organization making the case for the right of Maine inmates to vote is the Maine Department of Corrections. Rehabilitation again plays a major role in the argument, which basically reads that because prisoners will one day rejoin society, giving them a stake in that society can help rehabilitate them. Inmates vote by absentee ballot, as in Utah, which the DOC argues helps to foster that sense of community, and also defuses any fear that inmates will develop a major voting bloc and control a local community. The idea that felons will be returning to local communities was reiterated by legislators like Rep. Lillian LaFontaine O’Brien, a Democrat from Lewiston who said “Let’s not further penalize them. We want to

¹³² Vote no on prop 5, yes on all else. (1998, November 1). *The Deseret News*, pp. AA1.

¹³³ McElhenny, J. (2000, June 27). **

¹³⁴ Should felons have voting rights? (1998, February 17). *The Salt Lake Tribune*, pp. A6.

¹³⁵ Donaldson, A. (1998, January 31). Utah house votes no to voting by inmates. *The Deseret News*, pp. A1.

¹³⁶ *Ibid.*

¹³⁷ Durantine, P. (2000, April 21). Out-of-jail, ready-to-vote bill goes to house. *Pittsburgh Post-Gazette*, pp. B2.

¹³⁸ Wallace, C. G. (1998, October 10). Utah will decide if incarcerated felons can keep vote. The Associated Press State & Local Wire.

rehabilitate them.”¹³⁹ The Maine Civil Liberties Union (MCLU) also advocated voting rights as an important part of the rehabilitation process.

In Massachusetts, state Sen. David P. Magnani, a Democrat from Framingham argued that “85 percent of felons serving time would return to the community” and that they “must be allowed to vote to reintegrate into society.”¹⁴⁰ The editorial position of the *Telegram and Gazette* also argues “from a standpoint of rehabilitation, severing inmates’ ties to society most soon will re-enter strikes us as being counterproductive.”¹⁴¹ Larry Weiser, a professor of law at Gonzaga University School of Law, says that restricting their right to vote hurts inmates’ chances for rehabilitation, and that “people in prison should be encouraged to be part of the mainstream.”¹⁴²

Alex Moody, an inmate from Philadelphia said shortly after being released from prison about regaining his right to vote “It’s a great feeling. Basically when you’re incarcerated, you’re a statistic. Now I’m no longer a statistic.”¹⁴³ Another inmate, David Fischer of New Hampshire, said that the inclusion of felons in the voting process “could turn many convicts away from their anti-authority attitudes.”¹⁴⁴

These arguments show a distinctly different interpretation of the normative nature of our criminal justice system from those who argue in favor of felon disenfranchisement. Not only do people on this side of the fence argue in favor of the rehabilitative benefits of voting, they also argue explicitly against the punitive nature of the restriction of voting rights. The Massachusetts proposal to end inmate voting is called “mean spirited,”¹⁴⁵ and “unusually punitive”¹⁴⁶ and it is argued that its only purpose is to “further punish inmates.”¹⁴⁷ Both sides agree that the restriction of voting has a punitive element, but disagree about whether this is fair or productive. In the words of Richard A. Hogarty, a professor of political science at the University of Massachusetts in Boston, explaining why he is in favor of voting rights for inmates, says “it takes a more conservative ideology to say felons should be punished and denied certain freedoms.”¹⁴⁸

Rationality

People also attacked felon disenfranchisement on the grounds that it did not serve any “productive purpose,” such as crime control.¹⁴⁹ Simple punishment is not considered a legitimate justification for the restriction of voting rights. Attacks on the purpose of franchise restriction were often linked with a critique of legislator’s motives, often accusing the legislators who propose to do away with felons’ voting rights of attacking an unpopular group for political gain with little public benefit.

¹³⁹ Carrier, P. (2001, May 16). House defeats plan that would ban felons from voting. *Portland Press Herald*, pp. 1B.

¹⁴⁰ Astell, E. (1998, August 3). **

¹⁴¹ Mixed amendments; speedier redistricting, felons’ franchise on ballot. (2000, October 27). **

¹⁴² Prisoners file suit to reclaim the vote. (2000, April 5). **

¹⁴³ Yen, H. (2000, September 30). Judge signs temporary order allowing ex-felons to register to vote. The Associated Press State & Local Wire.

¹⁴⁴ Webster, K. (1998, October 28). **

¹⁴⁵ Drinan, R. F. (2000, July 14). Let prisoners keep the right to vote. *The Boston Globe*, pp. A19.

¹⁴⁶ Astell, E. (1998, August 3). **

¹⁴⁷ McElhenny. (2000, June 28). **

¹⁴⁸ Astell, E. (1998, August 3). **

¹⁴⁹ McElhenny. (2000, June 28). **

State Sen. David P. Magnani, a Democrat from Framingham, Massachusetts, calls the Massachusetts amendment to end inmate voting a “political expediency.” He argues that we incarcerate people in the interests of public safety, and asks rhetorically, “Does this amendment increase public safety?” Note that the purpose of incarceration is explicitly not for punishment, but to increase public safety, and because felon disenfranchisement does not contribute to public safety, it is not considered an appropriate measure. Similarly, Ronal C. Madnick, executive director of the Worcester chapter of the ACLU says, “I don’t see the reason for this. Where does it make us any safer than we are now?”¹⁵⁰

State Sen. Cynthia Stone Creem, a Democrat from Newton, Massachusetts, states that felon disenfranchisement “will not reduce crime . . . make elections cleaner, or protect our electoral system.”¹⁵¹ State Rep. Patricia D. Jehlen, a Democrat from Somerville, Massachusetts, says about inmate disenfranchisement “This is not a problem. This is a solution in search of a problem.”¹⁵² Stephen Saloom, the executive director of the Criminal Justice Policy Coalition says “There has been no serious claim that prisoner voting represents a threat to our democracy. Yet we are poised to narrow this right in order to protect ourselves from a problem that does not exist.”¹⁵³

Burt Stringfellow is also very cynical regarding the motivation of the politicians responsible, asserting that this action is being undertaken simply to “shore up their popularity with constituents.”¹⁵⁴ This last theme is reiterated by the Utah chapter of the ACLU, which also argues that there is little to be gained through the measure, and that it basically amounts to “feel-good legislation.”¹⁵⁵ Rep. Jehlen also made reference to the obstacles already faced by inmates and their unpopular political standing stating “I hate piling on, I hate a bully who goes after people because he thinks it’s popular.”

The purpose of the bill was also questioned by the Maine Civil Liberties Union. Sally Sutton of the MCLU said “I’m not sure what the problem is with allowing these people to vote because there aren’t enough of them to alter election outcomes.”¹⁵⁶ This critique depends on the assumption that felons would make bad decisions for the public at large, but that too few inmates vote to make such a negative impact worth considering. Maine legislators also question the need for the bill, Senator Beverly Daggett, a Democrat from Augusta, reports “There was hardly a huge outcry from the public” to restrict inmates’ voting rights.¹⁵⁷

Proponents of enfranchisement argue that the point of incarceration is rehabilitation and crime control. Disenfranchisement serves neither of these purposes. It affects a small and unpopular group, and few inmates register to vote. The consequence of this reasoning is that disenfranchisement has no clear purpose or benefit and that legislators use the issue as a means of stirring up support for themselves at the expense of this unpopular group.

¹⁵⁰ Astell, E. (1998, August 3). **

¹⁵¹ Astell, E. (1998, August 3). **

¹⁵² Crowley, M. (2000, June 29). **

¹⁵³ Saloom, S. (2000, June 27). *The Boston Globe*, pp. A14.

¹⁵⁴ *Ibid.*

¹⁵⁵ Harrie, D. (1997, July 17). Panel backs resolution denying inmates the vote. *The Salt Lake Tribune*, pp. B7.

¹⁵⁶ Carrier, P. (2001, January 17). Bill would rule out voting by murderers; the proposal would also apply to Mainers convicted of such felonies as arson and kidnapping. *Portland Press Herald*, pp. 1A.

¹⁵⁷ Senate debates bill aimed at stripping prisoners’ voting rights. (1999, May 6). *The Associated Press State & Local Wire*.

The Democratic Process

Some people argue that the right to vote is a “fundamental freedom,” and one that should be preserved or extended, not taken away.¹⁵⁸ It is also argued that voting is essential to the democratic process, and a restriction of this right hurts the democratic process. In the words of the executive director of the Massachusetts chapter of the ACLU, John Roberts, “It is a sad day for Massachusetts when we tell people who are interested in participating in our democracy that they are not wanted.”¹⁵⁹ More dramatically, David Elvin, president of Citizens United for the Rehabilitation of Errants, says “People fought and died for the right to vote. In a democratic society, taking away the right to vote is one of the harshest penalties we can impose.”¹⁶⁰

A letter from Burt Stringfellow printed in the *Deseret News* addresses the larger issue of democracy. The issue of felon disenfranchisement is posited not just as a blow against individual or collective rehabilitation, but a “devastating blow to the democratic process.”¹⁶¹ Stringfellow states that 5.1 percent of the U. S. population will spend some amount of time in prison during their lifetime. It is the disenfranchisement of such a large segment of the population that Stringfellow finds so damaging to American democracy. Furthermore, Stringfellow sees this battle as just one more attempt by the government to restrict the rights of its citizens, and argues it should be resisted on that reason alone.

Utah Democratic legislators attacked the measure in part because they felt that the decision of who can vote and who cannot may be a question best decided by the voters, and not by legislators. Presumably, legislators should not be able to decide who votes because there is a danger they could restrict the right to vote in such a way that the remaining constituency is advantageous to themselves. Voting rights are outlined in the Utah constitution, however, and because the Utah constitution requires voter approval of constitutional changes or amendments, it is a question ultimately decided by the voting public, not by legislators. Legislators do decide the parameters of the question presented to the public, however, while the public can only vote thumbs up or thumbs down. Relatedly, Massachusetts state Rep. William J. McManus II, a Democrat from Worcester, asks “What about people who are incarcerated because of civil disobedience? How can they change laws they believe are wrong if they can’t vote?”¹⁶² This question also attacks disenfranchisement as a means of undermining the democratic process and usurping the power of the people to control their own government.

Those on the other side of the fence also call attention to the fundamental importance of voting. Instead of using that importance as a reason to extend the franchise, however, it is a reason to restrict the franchise to those who are worthy or deserving. Rep. Marini says that “The right to vote is the fundamental building block in democracy and it needs to be honored and exalted, and to have pedophiles, murderers and rapists voting, demeans it.”¹⁶³ This argument is usually connected to the fear of how inmates or felons would vote, which we have already discussed.

¹⁵⁸ Mixed amendments; speedier redistricting, felons’ franchise on ballot. **

¹⁵⁹ McElhenny. (2000, June 28). **

¹⁶⁰ McElhenny, J. (2000, June 27). **

¹⁶¹ Stringfellow, Burt. (1997, June 10). Convicts deserve to vote. *The Deseret News*, pp. A20.

¹⁶² McHugh, E. T. (1998, July 30). **

¹⁶³ Montague, R. (2000, October 29). Campaign 2000 / The propositions / Question 2; Proponents say vote is a privilege. *The Boston Globe*, pp. A30.

Race

A very common argument involved themes of race and equal protection.¹⁶⁴ These arguments address the issue of the racial inequities in America's criminal justice system, and also the importance of preserving minority voting rights. The importance of suffrage is raised in the context of the civil rights movement and the enormous struggles that were necessary to secure those rights. The debate regarding felon disenfranchisement is cast as an issue of racial justice and minority representation.

This argument was raised many a time in Utah, presumably, because there are few minorities in Utah. There are two main parts to this argument, each much more present in states with larger minority populations. The first is related to the civil rights movement in general and the right to vote in particular. The struggle for these rights and all the sacrifices contained in that struggle are still very salient for many legislators and others, especially blacks. Massachusetts state Rep. Benjamin Swan, a Democrat from Springfield, summarizes this position, arguing that it was "abhorrent that we would vote to take away the franchise rights of individuals. My grandfather was born a slave. He could not vote. During the civil rights era, I risked life and limb seeking the right to vote." This argument is strongly related to the argument above, about the importance of voting to the democratic process.

The second part to this argument concerns the disproportionate representation of minorities among prisoners. This fact, combined with disenfranchisement laws, results in a disproportionate reduction in the political voice of minorities, especially blacks. As a newspaper editorial puts it, "A strong argument against penalizing prisoners by withholding the vote is the overwhelming impact which the practice has on African-American men."¹⁶⁵ The NAACP continues to work diligently to oppose disenfranchisement laws for this reason.

It is sometimes argued, as I argue here in the legal chapter, that these laws are a violation of the constitution, or at least of the Voting Rights Act of 1965, and that the laws should be changed. While the argument is frequently made that because minorities are disproportionately impacted by disenfranchisement laws, the laws should be changed, it is not necessarily the case that people making this argument also believe disenfranchisement laws to be illegal, they may simply argue that the laws are unjust. This issue was raised frequently in states with large minority populations, such as Massachusetts. Several newspaper articles focused entirely on the issue of how many minorities spent time behind bars, concentrating partly on the tragedy of this fact alone, and also on the corresponding reduction in political participation rights. It is argued that felon disenfranchisement is not simply individual punishment, but "large-scale community disenfranchisement."¹⁶⁶

Those on the other side of this issue deny that race is or should be an issue in this debate. From their perspective, people are in prison for crimes they have been convicted of committing, and the loss of voting rights is a consequence of that conviction, not of their race. Massachusetts Gov. Paul Cellucci, said "I don't think it has anything at all do do with race. It has to do with punishing people for their crimes."¹⁶⁷ Robert Pambianco, chief policy counsel at the Washington

¹⁶⁴ The issue of race was never raised in any of the articles I examined regarding Utah changes to disenfranchisement laws, but was prominently raised in approximately half of the Massachusetts articles, for example.

¹⁶⁵ Drinan, R. F. (2000, July 14). **

¹⁶⁶ Rapoport, M. S. and K. Green. (2000, January 9). Restoring felons' voting rights: the right thing to do. *The Hartford Courant*, pp. C3.

¹⁶⁷ McElhenny. (2000, June 28). **

Legal Foundation, a conservative think tank, says about the overrepresentation of minorities in prison that “All this talk about race and statistics is a red herring thrown in by people who want to return to the ‘60s. It is an attempt to undermine efforts to keep violent offenders in prison.”¹⁶⁸ Rep. Francis Marini wrote a letter to *The Boston Globe* ending with “This change [removing voting rights from inmates] discriminates against no one except jailed criminals, regardless of race, color, creed, gender, or national origin.”¹⁶⁹ In other words, because the laws apply to all criminals equally, regardless of race, this should remove race as an issue. Disenfranchisement laws do not change the racial constitution of inmate population, they apply an equal penalty to all members of an already existing population.

The gulf between those who support felon enfranchisement and those who do not, especially as it relates to the “race card” is illustrated in part through this quotation:

Critics of efforts to restrict inmate voting are using the race card, as expected, claiming that because so many inmates are minorities, a voting ban would discriminate against minority voters. Or something like that. They don’t usually note, however, that many of the victims of minority inmates were, in fact, minorities themselves. They definitely won’t be making it to the poll in November because, in many cases, they are now deceased.¹⁷⁰

Presumably, the argument here is that minority crime disproportionately impacts minorities, and this has several consequences, including at least two ways in which it reduces their political voice. This is not a result of discriminatory laws, however, but simply the way of the world. The law affects all inmates equally, and from this perspective, it is fairly nonsensical that a law could be called discriminatory simply because it happens to affect minorities more frequently than whites.

Rhetoric

The way in which the two sides of this debate approach the issue is profoundly different. Whether one favors felon enfranchisement or not is often indicative of one’s beliefs about the purpose of the criminal justice system, and one’s feelings about racial equality. Not only that, but the two sides seem to have very different feelings about criminals themselves, whether they should be punished or rehabilitated, whether it is even possible for felons to find salvation, and what kind of people go to prison in the first place. Consequently, I think it is worthwhile to briefly explore the rhetoric employed by each side in making their arguments. More specifically, I will address the sharp division in the way each side characterizes the prison population and felons in general, especially focusing on a few particularly hostile examples. I will also examine how this characterization affects the arguments made, and the accuracy of the stereotypes. This analysis is strongly related to the arguments we have already examined.

Generally speaking, those in favor of enfranchisement characterize felons as people who we need to rehabilitate, people who have made mistakes and need our help to reintegrate themselves into society, to better themselves and to better contribute so society at large. People

¹⁶⁸ Palmer, L. D. (1999, February 28). Number of blacks in prison soars; Some blame poverty, police for widening racial disparity behind bars. *The Boston Globe*, pp. A14.

¹⁶⁹ Marini, F. (2000, July 22). Letters to the editor; Only felons in jail would be barred from voting. *The Boston Globe*, pp. A14.

¹⁷⁰ Sciacca, J. (2000, October 16). **

arguing for enfranchisement rarely personify felons through specific crimes. They are referred to as “inmates,” “felons,” or simply “people.” Their connection to the community, through either work release programs, or through most inmates’ eventual return to society, is frequently emphasized. In the most strongly worded examples, usually newspaper editorials written to persuade people of the importance of voting rights for inmates and felons, the importance of the right to vote is emphasized much more than the crimes that felons committed.

This approach is radically different from most people who argue against enfranchisement. Those on this side of the argument emphasize crime and punishment, rather than rehabilitation. They frequently emphasize that inmates and felons are unworthy and undeserving of the right to vote.

A typical example is a newspaper article from Massachusetts, in which the pro-enfranchisement representative refers to inmates as “people who are incarcerated” or as “people.” The other side calls them “murderers.”¹⁷¹ Another common substitute is “crooks.”¹⁷²

Newspaper editorials written from the perspective of those against enfranchisement are sometimes particularly virulent in their characterization of felons. In an article about the forming of a prison PAC, the *Telgram & Gazette* calls it “only the latest manifestation of some criminals’ unrepentant contempt for the public at large.”¹⁷³ An editorial in *The Boston Herald* by Joe Sciacca, arguing that inmates should not be allowed to vote, also laments that felons are *ever* allowed to vote. The writer’s views about rehabilitation are made even more clear when he states “But maybe we can boost election day turnout by leaving stacks of voter registration forms in the gas stations and 7-11s they’ll no doubt be holding up while on parole.” He blames civil libertarians and inmates rights groups who “are outraged by this effort to rob our *murderers* and *rapists* of their ability to participate in the democratic process.”¹⁷⁴ Sciacca also criticizes the terms used by proponents of enfranchisement, and myself, though he neglects suggesting any alternatives:

They call it “disenfranchisement.” Inmates are running to the Correctional Institute Law Library to look that one up. Use it in a sentence: “Excuse me, I would like to disenfranchise you of your wallet. Put all the money in the bag or I shall use this baseball bat to disenfranchise your face.”

Sciacca seems critical of both inmates’ intellectual ability as well as their capacity for change or reform.

In another editorial, Howie Carr says “All the murderers, rapists, perverts and robbers have to get their absentee ballots back to the cities and towns they terrorized all those years.”¹⁷⁵ His article addresses the arguments given by inmates about why they feel it is important for them to have a political voice. His rebuttals are largely *ad hominim*. He gives a statement from an inmate, then criticizes it through a sometimes graphic recapping of the inmate’s crimes. He quotes Michael Shea, for example, an inmate in Massachusetts, and his concerns regarding prison health care. His response to Shea’s concerns is a description of Shea’s crime: “[he] took a

¹⁷¹ McHugh, E. T. (1998, July 30). **

¹⁷² Carpenter, P. (2000, May 19). Criminals lose right to vote in second bid. *The Morning Call*, pp. B1.

¹⁷³ Prisoner PACS; getting out the felon vote. (1997, August 11). **

¹⁷⁴ Sciacca, J. (2000, October 16). (emphasis added) **

¹⁷⁵ Carr, H. (1998, October 14). **

knife and sliced the woman from beneath her waist all the way to her abdomen—a 14-inch gash in all.” He does not address the privatization of prison health care and the possible consequences.

While the rhetoric from these editorials is much more inflammatory than that of most of the arguments I examined, the characterization of inmates seems to more or less accurately portray the feelings of many who argue in favor of disenfranchisement.

In another example, Massachusetts state Rep. Francis Marini, explaining his reason for proposing to eliminate voting rights for inmates said “I found it bizarre that if you stole the ballot box, you were prohibited from voting but if you kill the town clerk you could be voting in the next election.” Marini’s proposal eliminated voting rights for all inmates, not simply murderers, but his representative example used murder, what many consider the most serious and reprehensible crime. This tactic was frequently used in Maine also, but in Maine the proposed law would restrict the right to vote specifically from murderers and other violent criminals, thus the characterization is more accurate.

Conclusion

While the states we have examined are often very different demographically, and also vary widely in the exclusiveness with which they regulate the franchise, arguments made by both sides were often very similar. Generally, those on the political left argued in favor of enfranchisement because they felt it was beneficial to rehabilitation, and that to restrict the right to vote was a purely punitive measure that provided no benefit to the public good. They also argued that it was better for the democratic process to include more citizens in the decision making process. They attacked critics of enfranchisement for attacking an unpopular group purely for perceived political benefit, rather than to fix an existing problem or in some way contribute to the public good.

In states with large minority populations, race was also an important issue. Proponents of greater felon enfranchisement in these states argued forcefully that felon disenfranchisement laws unfairly and harmfully restricted the political voice of minorities. The complication of racial disparity in the criminal justice system usually inflamed the issue, involving powerful political organizations like the NAACP and generally drawing much more attention to felon disenfranchisement laws than was the case in states with more homogenous populations. Presumably, this is because groups like the NAACP have much greater power, membership and influence, than prisoner’s rights groups. For many people on the left, race is the most important feature of felon disenfranchisement. The issue of racial disparity and felon disenfranchisement is tied into several issues, including, of course, political representation. But it also includes people’s concerns about largely black communities disintegrating through poverty and crime, and the role that voting can play in helping convicted felons reintegrate into their communities. It is not seen as a solution in and of itself, simply one piece of the puzzle.

Opponents of felon enfranchisement frequently argued that it is inherently unfair to allow those who break the law to help make the law. They also believed that the punitive quality of taking away one’s right to vote served a purpose in itself. Rather than arguing for the inclusion of convicted felons in the political process, they usually advocated their exclusion for fear of the malevolent influence of these convicted criminals. They did not believe race to even be a valid variable in the debate; they argued that a felony conviction was the only consideration, not one’s race. Their response to concerns about racial disparity and political representation is to deny the validity of race as a concern, and thus avoid addressing what the left often sees as the most important feature of the problem.

Both sides used other states as examples to which we should look for guidance. In states with greater than average restrictions on voting rights, proponents of felon enfranchisement argued that other states' had more appropriately generous laws in this respect and that standard should be followed. In states with lesser than average restrictions on voting rights, opponents of felon enfranchisement argued that other states' had appropriately restrictive laws in this respect and that standard should be followed.¹⁷⁶

¹⁷⁶ Many of the states I have examined have very different demographic and legal conditions. Included in this analysis were states from the South, the West, and New England. Some states were moving towards greater inclusiveness, others were moving towards greater exclusiveness. While the examples I used to illustrate the different types of arguments may seem to come more from one state or another, the arguments were similar across all these different states. I have not used examples from all states simply because the examples become too repetitive. Where differences existed, I tried to draw attention to those differences. Here are sources for more examples of the different arguments, organized by state with the relevant arguments in brackets:

Connecticut: Rapoport, M. S., and K. Green. (2000, January 9). Restoring felons' voting rights: the right thing to do. *The Hartford Courant*, pp. C3 [race, rehabilitation, democratic process]; Gorlick, A. (2000, March 6). Bill would allow felons to vote immediately after prison release. *The Associated Press State & Local Wire* [rehabilitation]; Give voting rights to ex-felons. (2000, March 24). *The Hartford Courant*, pp. A14 [fairness]; Altimari, D. (2000, April 19). House would let convicts vote sooner. *The Hartford Courant*, pp. A3 [rehabilitation, felonious influence]; Springer, J. (2000, September 21). Encouraging former felons to vote; voting rights restoration coalition launches statewide advertising campaign. *The Hartford Courant*, pp. B9 [democratic process, felonious influence]; Simpson, S. (2000, November 13). Out of jail, but barred from voting. *The Hartford Courant*, pp. A3 [fairness, rehabilitation, race]; Pyle, R. (2001, January 15). Voting rights the theme in King birthday observances, *The Associated Press State & Local Wire* [race]; Christoffersen, J. (2001, February 21). Bill to allow felons on probation to vote passes committee, *The Associated Press State & Local Wire* [race, rehabilitation, punishment]; Daly, M. (2001, April 11). House passes bill allowing felons on probation to vote, *The Associated Press State & Local Wire* [race, rehabilitation, punishment]; Chedekel, L. (2001, April 12). House approves bill restoring voting rights to felons, *The Hartford Courant*, pp. A10 [race, punishment]; Daly, M. (2001, April 25). House approves direct primary bill, Senate passes felon voting bill, *The Associated Press State & Local Wire* [democratic process, rehabilitation].

Chapter Four: Legal and Constitutional Issues

Introduction

In the previous two chapters we examined the types of arguments people employed to either promote or retard felon disenfranchisement, and the means which people employed to change these laws. These changes were frequently enacted through the courts. In this chapter we will examine the legal and constitutional issues raised by felon disenfranchisement and explore the relevant case history to try and determine whether these state laws are both legal and constitutional.

There are several major constitutional issues included within felon disenfranchisement. First I will examine the issue of what standard of scrutiny is most appropriate, or how intimately the judiciary need examine laws of felon disenfranchisement. The first of these is the standard of reasonableness. This standard leaves substantial leeway for states to determine who among their people is qualified to vote, under the assumption that the Constitution leaves this matter primarily to the states and is not necessarily subject to federal interference.¹⁷⁷ Second is the standard of strict scrutiny which Justice Marshall believes most applicable.¹⁷⁸ This standard of strict scrutiny shifts the burden of proof in this instance to the state; because the right to vote is so fundamental, the state must delineate why these laws are necessary in order to preserve a substantial and compelling governmental interest.

The second major issue is what must be proved in order to show a violation of the Equal Protection clause of the Fourteenth Amendment, discriminatory intent or merely discriminatory results. Under the first, a violation of Equal Protection consists primarily of a deliberate attempt to discriminate against a certain group or class of people, and this intent must be proven in order to declare a violation of the Equal Protection clause. The second argues that it is sufficient only that the results of a given piece of legislation are undeniably discriminatory. Once prejudiced results have been established the standard of strict scrutiny must apply, and the burden is upon the state to justify the essential nature of the legislation.

I will argue here that the felon disenfranchisement laws attack such a fundamental democratic right and that furthermore, the results of these laws have had such discriminatory effects in disenfranchising such a disproportionate number of minorities, the burden must rest upon the state to prove how these laws protect a compelling state interest, regardless of the intent behind the laws. The sum is that these laws produce prejudiced results in reducing the political voice of minorities with no substantial justification, and they are consequently unconstitutional under the Equal Protection clause of the Fourteenth Amendment.

Standards of Judgement

The Standard of Reasonableness

The standard of reasonableness is one possible standard that might be considered appropriate for problems like felon disenfranchisement. Part of the argument for this standard can be found in a United States Court of Appeals for the Second Circuit decision in 1967.¹⁷⁹ This

¹⁷⁷ *e.g.*, *Green v. Board of Election*. 405 U. S. 337. (1967).

¹⁷⁸ *e.g.*, *Dunn v. Blumstein*, 405 U. S. 330, (1972) and *Richardson v. Ramirez*. 94 S. Ct. 2655 (1974).

¹⁷⁹ *Green v. Board of Election*. 405 U. S. 337. (1967).

case involved an individual, Gilbert Green, convicted of organizing a Communist Party in an attempt to overthrow the government through force and violence. After serving time in prison for said charges, and also for contempt, he was unable to register to vote in the state of New York. He consequently appealed to the judiciary arguing this was a breach of the Equal Protection clause. Judge Tyler dismissed his claims, primarily for failing to present a substantial federal question. On appeal, Judge Friendly argued for the “established principle that ‘a 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.’”¹⁸⁰ In other words, a reasonable justification is sufficient to deflect charges of a violation of the equal protection of the laws. Felon disenfranchisement laws are then to be considered a reasonable regulation of the franchise, a power generally reserved for the states, whose laws are generally afforded a presumption of constitutionality if a rational basis can be found by the Court.¹⁸¹ The reasonableness standard is appropriate for some claims, some deference should certainly be afforded to the states and their respective legislatures in order that the people may attempt to regulate society in a manner most amenable to the community. When the issue of representation is raised, however, a stricter standard must apply, because when a group is denied representation, they lack the means to change state law and must rely on judicial remedy, which brings us to the standard of strict scrutiny.

The Standard of Strict Scrutiny

While the standard of strict scrutiny stretches long into the history of the Court, I will be content to trace it back to its first major application to voting rights. Chief Justice Earl Warren wrote in his majority opinion in *Reynolds v. Sims*¹⁸² that “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”¹⁸³ It is because of the fundamental importance of this right that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”¹⁸⁴ The charge that this domain properly belongs to the individual states is answered by Warren through *Gomillion v. Lightfoot*¹⁸⁵: “When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”¹⁸⁶ Andrew L. Shapiro reports that since *Reynolds v. Sims*, this standard of strict scrutiny has been the standard of review for “almost every voting question reaching the Court.”¹⁸⁷

The consequence of this strict standard of review is that “if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a

¹⁸⁰ *Ibid.* Judge Friendly, quoting *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U. S. 580 (1935).

¹⁸¹ *Kramer v. Union Free School District*. 395 U. S. 621 (1969).

¹⁸² 377 U. S. 533. (1964).

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ 364 U. S. 347.

¹⁸⁶ *Ibid.*

¹⁸⁷ Shapiro (1974), p. 588.

*compelling state interest.*¹⁸⁸ It is not enough to merely construe some arrangement of the facts as reasonable, there must be specific and substantial grounds for the state's restriction of the franchise.

It is also not enough that the laws in question address the issue of the state's compelling interest, they must also "be tailored so that the exclusion of [members of a certain class] is necessary to achieve the articulated state goal" and must be constructed to meet "the exacting standard of precision [the Court] requires of statutes which selectively distribute the franchise."¹⁸⁹ The bar has been set appropriately high; in order for states to regulate the franchise, they must do so in a way that appropriately and precisely addresses a substantial and compelling state interest.

Compelling State Interest

Richardson v. Ramirez

The current Constitutional precedent within this arena is the Supreme Court's ruling in *Richardson v. Ramirez*.¹⁹⁰ Three former inmates who had completed their parole petitioned the California Supreme Court for a *writ of mandate*, asserting that the denial of voting rights to them, and to others similarly situated, constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. The California Supreme Court ruled in their favor, and the State of California then petitioned the Supreme Court for *certiorari*. The Supreme Court ruled 6-3 that the felon disenfranchisement laws were not a violation of the Fourteenth Amendment because Section Two of the Amendment specifically excludes from protection those citizens who have participated in "rebellion, or other crime."¹⁹¹ The majority's interpretation of this clause asserts that the phrase "other crime" somehow endows felon disenfranchisement laws immunity from strict scrutiny, because the phrase specifically allows this type of regulation of the franchise. While this exclusive phrase may at first seem conclusive, a closer look will prove otherwise.

The decision was not unanimous. Justice Marshall, joined by Justice Brennan and Justice Douglas (in part), wrote the dissent.¹⁹² First of all, the phrase "other crime" is a suspect one, in Marshall's opinion. Section Two was first sent to a committee containing the phrase "participation in rebellion" and it emerged from the committee with the words "other crime" "inexplicably tacked on."¹⁹³ The only explanatory reference for this phrase is "unilluminating at best."¹⁹⁴ The majority opinion, written by Justice Rehnquist, concurs that the intention behind this section is difficult to discern due to lack of evidence, but what legislative record there is "indicates that this language was intended by Congress to mean what it says."¹⁹⁵ In support of this claim, Justice Rehnquist quotes Representative Eckley of Ohio: "But suppose the mass of the people of a State are pirates . . . would gentlemen be willing to repeal the laws . . . to give them

¹⁸⁸ *Kramer v. Union Free School District*. 395 U. S. 621 (1969). Emphasis added.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Richardson v. Ramirez*. 94 S. Ct. 2655.

¹⁹¹ The United States Constitution.

¹⁹² Much of Marshall's decision is concerned with whether the Court had jurisdiction in this case, or whether, as Marshall asserts, the State court had independent grounds. We will, however, concentrate on the merits, especially the intent of the second section, which Marshall also addresses.

¹⁹³ Justice Marshall's dissent, *Richardson*.

¹⁹⁴ *Ibid.*

¹⁹⁵ Justice Rehnquist's majority opinion, *ibid.*

an opportunity to land their piratical crafts and . . . assist in the election of a President [?]"¹⁹⁶ Justice Marshall avoids any discussion regarding the fear of a pirate uprising or of a piratically elected President, but counters that Section Two had "little to do with the purposes of the rest of the Fourteenth Amendment," and that it should clearly not be construed as any sort of limitation on the rest of the Amendment.¹⁹⁷ Others have also challenged Rehnquist's reading of the amendment, both before and after the ruling.¹⁹⁸ Some assert that the words "other crime" were only added to "rebellion" to "ensure that Southern rebels could be easily excluded from the franchise during the Reconstruction period"¹⁹⁹ and that "it is not conceivable that today 'other crime' can possibly be read as *any* other crime . . . [S]ection two only allows disenfranchisement of persons who have committed a crime that would rationally be related to the corruption of the electoral system. For these reasons, I would argue that the phrase should be interpreted in such a way that it is consistent with the rest of the amendment. It should not stand as a loophole allowing the very violations that the rest of the amendment was intended to prevent.

In any event, *Richardson v. Ramirez* clearly brings Section Two into conflict with the rest of the Fourteenth Amendment. The claimants and Marshall's dissenting opinion both invoke the "compelling state interest" test as a means of resolving the conflict.²⁰⁰ The majority opinion, however, disagrees, explicitly denying that this is an issue of state interest. Justice Rehnquist argues that there is no reason for the state to meet this criterion because:

[W]e may rest on the demonstrably sound proposition that Section One, in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which Section Two imposed for other forms of disenfranchisement.²⁰¹

I disagree with Justice Rehnquist's interpretation. The point is not that Section One "bar[s] outright" felon disenfranchisement laws, which would be nonsensical, but that these laws have been enacted in such a discriminatory way that they clearly violate the Equal Protection Clause. To restate, the claim is *not* that these two sections are necessarily and inherently contradictory. The claim is that, through practice, laws have been passed under Section Two which *do* contradict Section One, because these laws have clearly discriminatory effects. While it is not necessarily the case the laws passed under the dubious sanction of Section Two's "other crimes" phrase would contradict Section One, it has been the case in practice. Thus I must agree with the claimants, and with Marshall, that there is a need to demonstrate a compelling state interest, or the laws must be voided under the power of the Equal Protection Clause.

Perhaps Judge Hufstедler of the U. S. Court of Appeals for the Ninth Circuit puts it best when he states that "Courts have been hard pressed to define the state interest served by laws

¹⁹⁶ Congressional Globe, 39th Cong., 1st Session, 2535 (1866), qtd. in Justice Rehnquist's majority opinion, *Richardson*.

¹⁹⁷ Justice Marshall's dissent, *ibid*.

¹⁹⁸ Shapiro (1993), p. 546.

¹⁹⁹ *Ibid*.

²⁰⁰ "[If] a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" 405 U. S., at 337, qtd. by Marshall in *Richardson*.

²⁰¹ Justice Rehnquist's majority opinion, *ibid*.

disenfranchising persons convicted of crimes.”²⁰² Justice Marshall seems to agree and makes a convincing case that there is no compelling state interest to deny felons the right to vote, though he maintains the burden rests on the state to prove their case. He briefly addresses three main arguments: (1) He denies that felons have any less interest in the way society is governed. It should be self-evident that ex-cons participate in society and depend upon it in the same way as those who do not possess a criminal record. (2) He also argues that the laws are unnecessary to prevent election fraud, because most people who are disenfranchised are done so for different crimes. (3) Finally, he asserts that denying a certain group the vote because of the way they might vote is “constitutionally impermissible”.²⁰³ I will examine the possibly compelling state interests that Marshall lists, and provide a more detailed rebuttal of each.

Precisely Tailored Legislation

*Kramer v. Union Free School District*²⁰⁴ offers several convincing rebuttals to possible arguments of compelling state interest. The heart of the case is whether someone can vote in an election in which they arguably have no interest. A young bachelor, living with his parents in New York, sued for his right to vote in an election for school board, which previously only allowed either those who paid property taxes or those who had children enrolled in the schools to vote in said elections. The Court ruled that the law was an unconstitutional violation of the Equal Protection clause of the Fourteenth Amendment.

In the Court’s opinion, Chief Justice Warren first established that the state must prove a compelling state interest in order to restrict the franchise, and that it must then address the interest in a reasonable and precise manner.²⁰⁵ This second notion addresses two possible compelling interests that Marshall raises, the importance of what interest convicts might have in how society is governed, and the manner in which states can preserve the integrity of the ballot box.

First, while it should be obvious at first glance that not only do inmates have a great interest in how society is governed because most eventually return to society, many states also disenfranchise felons who are *in* society, whether they are on work-release, parole, probation, or have actually completed all terms of their conviction. Furthermore, it may be safely assumed that many felons have family and friends in society, further adding to the weight of their interest. There are then, at least two classes of felons, those in society or who will return to society, who clearly have a direct and substantial interest at stake, and those who will never return to society, who have only an indirect and less substantial interest at stake. The problem here is that felon disenfranchisement laws do not distinguish between “lifers,” who never leave prison, and non-lifers. As I have noted, some states disenfranchise for life, regardless of release. Warren’s statement regarding New York’s regulation of the election of the school board, laws which “permit inclusion of persons who have, at best, a remote and indirect interest . . . and, on the other hand, exclude others who have a distinct and direct interest”²⁰⁶ seems an accurate parallel in this respect to felon disenfranchisement laws. It is for this reason Warren determines that the New York election laws do not “accomplish [their] purpose with sufficient precision to justify

²⁰² *Dillenburg v. Kramer*, 469 F.2d 1222 (1972).

²⁰³ *Carrington v. Rash*, 380 U. S. 94, qtd. by Justice Marshall in his dissenting opinion in *Richardson*.

²⁰⁴ 395 U. S. 621 (1969).

²⁰⁵ As we have discussed in paragraph three under Strict Scrutiny.

²⁰⁶ *Ibid.*

denying appellant the franchise”.²⁰⁷ I would argue the same is true with felon disenfranchisement laws. Further evidence for this standard can be found in Marshall’s 1972 opinion in *Dunn v. Blumstein*²⁰⁸: “Statutes affecting constitutional rights must be drawn with ‘precision,’ *NAACP v. Button*, 371 U. S. 415, 438 (1963); *United States v. Robel*, 389 U. S. 258, 265 (1967), and must be ‘tailored’ to serve their legitimate objectives. *Shapiro v. Thompson, supra*, at 631.”²⁰⁹

This standard for exacting precision further applies to the admirable goal of preserving the integrity of the ballot box. Many states specifically prohibit persons found guilty of election fraud from participating in elections, but also extend that to all other felons, ostensibly for the same reason. I do not find this argument particularly compelling for the same reason as above. It is distinctly unclear that those found guilty of drug possession, for example, are at a greater risk for committing election fraud, and must consequently be stripped of the right to vote. Felon disenfranchisement laws rarely distinguish between types of crimes, and so are too all encompassing to act with sufficient precision. In the words of Judge Hufstедler, “When the facade of the classification has been pierced, the disenfranchising laws have fared ill.”²¹⁰ Furthermore, if one could actually determine that felons were more likely to commit election fraud of one type or another, it is unclear why taking away their right to legally vote would somehow impinge upon their ability to illegally vote. It is of course possible that felons are more likely to commit election fraud, and that the most efficient solution is to prevent them from voting, but again, the burden of proof is on the state, and the state has yet to prove this case, or even to make a meaningful effort.

Fencing Out

The argument now brings us to the idea that states must prevent felons from voting because they might band together and influence society in some nefarious manner (reminiscent of Rep. Eckley’s fear of a piratically elected President). This fear is further illustrated by Judge Friendly’s assertion that “a contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.”²¹¹ Unfortunately for Judge Friendly’s argument, the notion that qualified electors could be denied the right to vote because of concerns regarding the manner in which they might vote is so lacking in a constitutional foundation as to be as without merit as anything can be. In the case of *Carrington v. Rash*²¹², a serviceman sued for the right to vote, which was denied him by the state of Texas for fear that the collective voice of transient servicemen may overwhelm that of a small, civilian community²¹³. This charge is answered through an opinion by Justice Stewart, who was joined by six of his brothers: ²¹⁴

“Fencing out” from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. ‘The exercise of rights so vital to the maintenance of

²⁰⁷ *Ibid.*

²⁰⁸ 405 U. S. 330 (1972).

²⁰⁹ *Ibid.*

²¹⁰ *Dillenburg v. Kramer*, 469 F.2d 1222 (1972).

²¹¹ *Green v. Board of Education*, 405 U. S. 337, (1967).

²¹² 380 U. S. 89, (1965).

²¹³ *Ibid.*

²¹⁴ J. Harlan dissented, and J. Warren did not participate.

democratic institutions'²¹⁵ cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents.

One's opinions of another party's political beliefs is not a relevant determinant in whether the party in question is allowed to express those beliefs through the proper political channels, even if the majority of one's fellows finds those views not in the common interest, or even treacherous and abhorrent. In other words, "[a]ll too often, a lack of a ['common interest'] might mean no more than a different interest"²¹⁶ and " 'differences of opinion' may not be the basis for excluding any group or person from the franchise, *Cipriano v. City of Houma*, 395 U. S., at 705-706."²¹⁷

I would add that some states allow felons to vote even while in prison. Roughly twenty states allow felons to vote after fulfilling the requirements of their prison sentence and probation. A convincing argument for compelling state interests would have to include why it is in some states' interests to restrict the right of felons to vote, but not in some other states' interests. When the citizens of Utah recently voted to deny felons the right to vote, was it because they saw a new and compelling state interest that had been previously unaddressed in the last 100+ years? It seems unlikely. In fact, in 1996, only 95 prisoners were registered to vote in Salt Lake County, which is the most populous in Utah.²¹⁸ Representative Carl Saunders, the sponsor of the resolution, was not swayed by these statistics, arguing instead that "Adolf Hitler came to power on one occasion by a majority of one vote".²¹⁹ True, perhaps, but certainly not a convincing argument for the restriction of such a fundamental right. My argument here should not be construed to mean that the seeming lack of felon voters is a reason to give them the vote, only that the danger of inmates' malevolent influence is overstated. Any possible inmate voting bloc, for example, is easily dismantled by requiring inmates to vote by absentee ballot according to their last county of residence.

The Precedent For Prejudiced Results

Hunter v. Underwood

In 1985, the unanimous Supreme Court opinion in *Hunter v. Underwood*²²⁰ struck down an Alabama law which stripped the right to vote from those convicted of crimes of "moral turpitude."²²¹ The key to the Court's decision, however, was convincing evidence that the Alabama law was enacted with the express purpose of discriminating against blacks. Chief Justice Rehnquist wrote the opinion and was careful to point out that while the "neutral state law" produced "disproportionate effects along racial lines," the burden of justification did not shift to the state until clear evidence that the motivating factor behind the legislation was racial discrimination.²²² Rehnquist explicitly states that the Court is not deciding whether the law

²¹⁵ *Schneider v. State*, 308 U. S. 147, 161.

²¹⁶ *Evans v. Cornman*, 398 U. S., 423, qtd. by Marshall in *Dunn v. Blumstein*, 405 U. S. 330, (1972).

²¹⁷ *Dunn v. Blumstein*, above.

²¹⁸ Harrie, Dan. "Panel Backs Resolution Denying Inmates the Vote." *The Salt Lake Tribune*. 17 July, 1997.

²¹⁹ *Ibid.*

²²⁰ 471 U. S. 222.

²²¹ *Ibid.*

²²² *Ibid.*

would or would not be valid, absent “impermissible motivation.”²²³ The clear evidence of intent to discriminate satisfies the Court that the law is unconstitutional under the Fourteenth Amendment, as “We are confident that [Section Two of the Fourteenth Amendment] was not designed to permit . . . purposeful racial discrimination . . . which otherwise violates Section One of the Fourteenth Amendment.”²²⁴ So while Rehnquist denies that the Court has decided whether discriminatory intent is necessary to strike down felon disenfranchisement laws, he also very carefully notes that “[Official] action will not be held unconstitutional solely because it results in a racially disproportionate impact.”²²⁵ Consequently, although *Hunter v. Underwood* did strike down felon disenfranchisement in Alabama, it does not exactly shine as a resplendent beacon of hope to other felons and ex-felons seeking the franchise.

Nevertheless, I feel that there is significant precedence within the Court’s history which shows that the evidence of discriminatory intent is not necessary to prove a violation of the Fourteenth Amendment. I should also note that there is significant evidence many of these laws, especially in the south, were explicitly enacted to deny black suffrage.²²⁶ I don’t wish to imply a denial of this history, only to argue that proving intent is not necessary, partly because of the difficulty inherent in proving legislators’ intent.

A Sufficient Condition For Violation of the Equal Protection Clause

The cases that form the primary foundation for this argument are *Harper v. Virginia State Board of Education* (1966) which forbade poll taxes in state elections, thus overturning *Breedlove v. Suttles* (1937), *Furman v. Georgia* (1973), which found the death penalty unconstitutional, and *Brown v. Board of Education* (1954), which proclaimed the unconstitutionality of segregated schools. It is our hope that these cases, combined with evidence of the grossly discriminatory practices of felon disenfranchisement can provide a constitutional basis for federal involvement, at all levels, in order to ensure our electoral machinery runs in a less prejudiced and more democratic fashion. Other cases, also relevant to our argument, will be briefly discussed under the section on the Voting Rights Act of 1965, below.

Harper v. Virginia State Board of Education

In *Harper v. Virginia State Board of Education*, the Court found that poll taxes--in state elections--were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, overruling the previous precedent of *Breedlove v. Suttles*. Douglas's majority opinion invokes a past precedent which declares that the right to vote is a "fundamental political right, because [it is] preservative of all rights."²²⁷ The right of franchise has been conferred upon the electorate, and as such, "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."²²⁸ It is a right that is "too precious, too

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*, quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U. S., at 264-265, (1977).

²²⁶ See Hench, Virginia E. "The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters." *Case Western Reserve Law Review* 48 (1998): 727-779, and Tindall, George B. "The Campaign for the Disfranchisement of Negroes in South Carolina." *The Journal of Southern History* 224 (1949): 212-234.

²²⁷ Ducat, Craig R., and Harold W. Chase. *Constitutional Interpretation*. St. Paul: West Publishing Co, 1988; pp. 944.

²²⁸ *Ibid.*, pp. 943-4.

fundamental to be so burdened or conditioned."²²⁹ Furthermore, Douglas writes, "we conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard"²³⁰ because "wealth or fee paying has . . . no relation to voting qualifications."²³¹

In states which disenfranchise felons and prisoners, however, one's wealth is instrumental in determining one's right to vote. Those with greater resources can afford more competent representation and consequently have a greater chance of achieving a more favorable sentence. The poor are convicted at a higher rate than those with middle and upper class backgrounds.²³² Additionally, Florida also requires that in order to reacquire one's right to vote after a felony conviction, one cannot owe the state more than one thousand dollars,²³³ an explicit example of suffrage being based in part upon one's "wealth or fee paying" which, again, has "no relation to voting qualifications" according to Justice Douglas.²³⁴

The issues of race and class are indisputably intertwined because of the excessive minority representation present among the poor. Police racism and questionable police policy like racial profiling can also contribute to a greater than proportional representation among the incarcerated, because logically, those more frequently targeted for scrutiny will be those more frequently found in violation of the law. It is not, however, our intention to disentangle the relationship between race, class, and the disproportionate numbers of minorities convicted of criminal offenses. Rather, it is our goal to show that because both these factors correlate so highly with felon disenfranchisement, and because both wealth and race have been found by the Court to be unconstitutional means of qualifying voters, felon disenfranchisement laws have significant grounds for nullification.

Brown v. Board of Education of Topeka

In *Brown v. Board of Education of Topeka*, Kansas, Chief Justice Warren, in delivering the unanimous opinion of the court, relies primarily not upon the prejudiced intent behind segregation laws, but upon the unequal effects that segregated education promoted. Chief Justice Warren refers to an earlier precedent of the Court²³⁵ in maintaining that students must be able to interact with other students if they are to achieve the best possible education.²³⁶ Relying in part upon contemporary sociological and psychological literature, Warren also asserts that segregation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."²³⁷ Warren makes no comment regarding the intent of the laws, and implicitly denies the importance thereof, when he concludes that only because segregated schools are "inherently unequal," students in segregated schools have been "deprived of the equal protection of laws guaranteed by the Fourteenth Amendment."²³⁸

²²⁹ *Ibid.*, pp. 945.

²³⁰ *Ibid.*, pp. 944.

²³¹ *Ibid.*, pp. 945.

²³² Clarke and Koch (1976). **

²³³ Thompson (2001), pp. 2. **

²³⁴ Chase and Ducat (1988), 945. **

²³⁵ *McLaurin v. Oklahoma State Regents*, 339 U. S. 637.

²³⁶ O'Brien, David M. *Constitutional Law and Politics*. New York: Norton, 1991; pp. 1308.

²³⁷ *Ibid.*

²³⁸ *Ibid.*, pp. 1310.

This can be applied to felon disenfranchisement in several respects. First of all, there are the negative psychological effects associated with the loss of voting rights, which could conceivably contribute to recidivism. As ex-con Alex Friedmann says, "If society doesn't care enough about former prisoners to treat them as citizens, with the rights of citizens, then why should former prisoners care enough about society to act like law-abiding citizens?"²³⁹ Ex-con Heywood Fennell calls a vote "power . . . and it helps give you the opportunity to rebuild your life."²⁴⁰

Secondly, it is clear that the laws have an unequal effect, disenfranchising the poor and minorities at a much greater rate than the rest of the population, as we have already seen. While the intent of the various policy makers responsible for segregation may not have been to handicap African Americans, and while those responsible for felon disenfranchisement laws may not have intended to deny equal electoral power to the poor and minorities, the result is the same.

The question of intent as a fundamental criterion for judgement of worth, efficacy, or permissibility, is a rather questionable approach in regards to policy. If a lawmaker designs legislation, for example, with the explicit intent to deny the vote to Asians through devious voter registration requirements, but the law instead results in increased registration and turnout among Asians (and not at the expense of other groups), is the law unconstitutional and should it be struck down as such on the basis of its intent? Conversely, if a law is designed to ensure greater equality under the law, but in fact returns the reverse, is it not unconstitutional under the Fourteenth Amendment? It seems, that when it comes to policy, the merits should be evaluated on the basis of results rather than intent, not only because the latter is frequently more elusive than the former, but also because it seems they may frequently diverge. When it comes to law, it's not the thought that counts. The Fourteenth Amendment dictates that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws" (Section One). There is no mention of intent, only results. Presumably then, a law which denies a person equal protection of the laws, is explicitly what the Fourteenth Amendment denies, regardless of intent.

Furman v. Georgia

This issue is raised in *Furman v. Georgia*. Justice Douglas, in his concurring opinion, writes that "any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment." This seems to precisely describe felon disenfranchisement laws, which purport to apply to everyone equally, but in practice restrict the voting rights of far more blacks than whites. Douglas continually maintains that in order to be constitutional, penal laws must not be arbitrarily or unequally applied to the poor, minorities, or "unpopular groups."²⁴¹ Particularly compelling is his use of the words "unpopular" and "despised" to emphasize that social and political standing are not proper criterion for judging the application of penal law. Convicted felons are perhaps the quintessential member of this category. Not only are they more often economically disadvantaged ethnic minorities, but conviction of a crime carries with it a penetrating stigma which compounds the political difficulty caused by systemic denial of their voting rights; there are few citizens and even fewer politicians who are willing to advocate on their behalf. Their political voice has been crippled through the divestment of their voting rights, and few are willing to risk the possibly

²³⁹ Thompson, Nicholas. "Locking Up the Vote." *Washington Monthly*. Jan./Feb. 2001: 17-21; pp. 2. **

²⁴⁰ *Ibid.*

²⁴¹ Chase and Ducat (1988), pp. 970. **

precarious association with such a stigmatized group that advocacy would require. In short, they are the minority group most at risk from the tyranny of the majority, and consequently require the greatest protection from the courts according to the letter and the spirit of the Fourteenth Amendment as expressed by the Court's decision and concurring opinions in this case.

The Voting Rights Act of 1965

The Voting Rights Act of 1965 was written to remedy the substantial electoral disadvantage faced by minorities. Despite the federal government's efforts to improve minority representation, communities across the country found ways to circumvent the law and submerge the minority vote through myriad redistricting schemes. While vote denial, the restriction or inhibition of the ability of minorities to register or vote, was certainly becoming rare, vote dilution, where minority votes are individually counted, but never equal the majority required for the election of actual representation, was becoming increasingly common²⁴². I will now examine one example of the difficulties faced by people seeking a judicial remedy to vote dilution, how this relates to the Voting Rights Act of 1965 and subsequent amendments, and why this is so relevant to felon disenfranchisement.

Intent and Results

In 1980, a case was decided by the Supreme Court which further retarded minority representation: *Mobile v. Bolden*²⁴³. In this case, a class action law suit was brought to bear against the city of Mobile, Alabama, on behalf of all African-American residents, charging that the manner in which city commissioners were elected diluted black voting strength and was a violation of the Fourteenth and Fifteenth Amendments. The District Court agreed, despite their finding that blacks could register and vote without hindrance. The Court ordered that the city commission, which jointly exercised all legislative, executive, and administrative power in the city, be disbanded and "replaced by a municipal government consisting of a mayor and a city council composed of members selected from single-member districts."²⁴⁴ The District Court's opinion was affirmed on appeal, but reversed by the Supreme Court in a 6-3 decision. Justice Stewart wrote the majority opinion and was joined by Chief Justice Burger, and Justices Powell and Rehnquist. He argued that because purposeful discrimination was not found in this instance, it could not stand as a violation of the Fourteenth Amendment. Justice Blackmun concurred with the result, but not with the argument, believing that the District Court had overstepped their bounds of judicial discretion by mandating such sweeping changes in the system of city governance, and should have instead considered alternative methods of structuring the electoral system to represent black voters.

Marshall again argued in dissent that the fact of discriminatory impact was sufficient to find a violation of the Fourteenth Amendment, and found support for this view with Justice Brennan. Marshall strongly disagreed with the plurality opinion's interpretation of past cases, arguing that in *Fortson v. Dorsey*²⁴⁵, "the first vote-dilution case to reach this Court, we stated explicitly that such a claim could rest on either discriminatory purpose or effect."²⁴⁶ The next

²⁴² Hench, 744. See *supra* at 54.

²⁴³ 446 U. S. 55 (1980).

²⁴⁴ *Ibid.*

²⁴⁵ 379 U. S. 433 (1965).

²⁴⁶ *Mobile v. Bolden*, 446 U. S. 55 (1980).

year in *Burns v. Richardson*²⁴⁷, Marshall notes that the Court threw out a claim that the Fourteenth Amendment was violated by a certain electoral scheme, because, in part, the plaintiff had not proved “invidious effect,”²⁴⁸—not intent. Said Marshall, “It could not be plainer that the Court in *Burns* considered discriminatory effect a sufficient condition for invalidating a multimember districting plan.”²⁴⁹ Here, then, are several more illustrations of the ample precedence for the Court acting on the basis of discriminatory intent, rather than discriminatory purpose.

In 1982, Congress took notice of the extreme difficulty persons had in seeking redress of vote dilution through judicial means. In 1982, Congress revised the Act to make clear their intention to prohibit any "voting qualification or prerequisite . . . or standard, practice, or procedure" applied by a state with either the intent *or the effect* of denying or abridging the right to vote on account of race or color.²⁵⁰ This change simply made this portion of the act more consistent with latter sections about districting which stressed results over intent. Under this new standard, “an election law violates the Act if, under ‘the totality of circumstances,’ the law results in a protected minority group having ‘less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”²⁵¹ The effect of felon disenfranchisement is the unequal denial of voting rights to minorities, which seems to suggest the issue falls squarely under the rubric of this clause.

Wesley v. Collins

This has not been the case in practice, which brings us to *Wesley v. Collins*.²⁵² Charles Wesley pleaded guilty to being an accessory after the fact to the crime of larceny and received a suspended sentence. Consequently, he was stripped of his right to vote, pursuant to Tennessee statute under T. C. A. 2-19-143, the Tennessee Voting Rights Act of 1981.²⁵³ With the help of the Natural Rights Center, “a public interest law project active in civil rights”, he challenged the validity of the statute under the Fourteenth and Fifteenth Amendments, as well as the Federal Voting Rights Act Amendments of 1982.²⁵⁴ His case was dismissed by the district court, and his appeal was heard by the United State Court of Appeals for the Sixth Circuit.

After first dismissing with prejudice the Natural Rights Center for failure to prove its standing in the case, Judge Krupansky quickly establishes that (1) the Voting Rights Act “guarantees that an individual’s vote will not be diluted” and (2) that “the challenging party need not prove discriminatory intent to establish a violation.”²⁵⁵ Judge Krupansky then, however, quickly undercuts a primary purpose of the 1982 Amendments by stating that proof of discriminatory effect does not “establish a *per se* violation of the Voting Rights Act”, but “merely directs the court’s inquiry into the interaction of the challenged legislation.”²⁵⁶

²⁴⁷ 384 U.S. 73, 1966.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ Voting Rights Act of 1965; Hench (*), pp. 746. **

²⁵¹ Shapiro (1993), p. 550.

²⁵² 791 F. 2d 1255 (1986).

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*

Krupansky then immediately returns to the issue of discriminatory intent, allowing that while there is ample evidence of a history of racial discrimination, “the effects of which continue to this day,” this discrimination is still not enough to condemn present day action, which is not, in his opinion, unlawful.

He maintains that the state has a legitimate and compelling interest in denying felons and ex-felons the vote and repeatedly refers to the state’s “undisputed authority” to do so, relying on this “undisputed authority” as evidence of a compelling state interest, without actually stating what that compelling interest might be. He relies partly on *Richardson v. Ramirez* to establish this “undisputed authority,” ignoring the substantial dispute within the Court regarding this case. It is also unclear why Krupansky calls the the most pertinent and disputed question in the case “undisputed.” In other words, if the matter is truly “undisputed,” it is somewhat inexplicable that it managed to come to his attention in the form of a class action lawsuit. Also inexplicably, Krupansky asserts that “the disenfranchisement of felons has never been viewed as a device by which a state could discriminatorily exclude a given racial minority from the polls.”²⁵⁷ Presumably, the claimants in the case would disagree, as would the claimants in *Mobile v. Borden*, and the Supreme Court, which decided in that case that the felon disenfranchisement laws of Alabama served to “discriminatorily exclude a given racial minority from the polls,” as I have already discussed.²⁵⁸

In conclusion, Krupansky asserts that felons are excluded from voting because of conscious choices they have made, not inherent racial characteristics, and for this reason, “the disproportionate impact suffered by black Tennesseans does not ‘result’ from the state’s qualification of the right to vote.”²⁵⁹ This seems to imply that the state is not responsible for the consequences of the law, that indeed no consequences follow from the law at all, the consequences come from the individual choices that people make. The disproportionate impact is, however, a direct *result* of the decision to apply the penalty of disenfranchisement to felony convictions. The situation must be examined in the aggregate, where it is clear certain choices will be made over and over again in a clearly established pattern. The clear and predictable consequence—the *result*—of the law, then, is the disproportionate suppression of the minority vote. This is the essence of the results test, not what Krupansky asserts.

So while the judicial interpretation of the 1982 Amendments has not so far been the absolutely flawless and crystalline gem such as one might hold to the horizon as a bright and brilliant beacon of justice, but rather “the evisceration of the results test,” the Voting Rights Act of 1965 and subsequent amendments remain the greatest hope for felons and ex-felons seeking enfranchisement.²⁶⁰ This is partly because the text of the Act is less ambiguous than the Constitution, and partly because reparative legislation has received little support around the country, though as we have seen in previous chapters, there are exceptions which are possibly indicative of a changing trend.

Conclusion

Felon disenfranchisement has already been considered an unconstitutional violation of the equal protection clause of the Fourteenth Amendment in *Hunter v. Underwood*, but only because

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ Shapiro (1993), p.564.

there was clear and convincing evidence that the laws were enacted with discriminatory intent. I argue here that *Harper v. Virginia State Board of Education*, *Brown v. Board of Education of Topeka*, and *Furman v. Georgia* all provide precedent for the strict scrutiny of laws which restrict a fundamental democratic right in a discriminatory way, even if the laws are neutral on their face. While the cases all dealt with different issues, the decisions in each case confirmed that the pattern of discrimination was sufficient, regardless of the intent behind the law. The pattern of discrimination is no less clear in the instance of felon disenfranchisement laws. I have also examined possible state interests that are raised by this issue, such as fencing out and preventing election fraud, and provided examples of case law which explicitly deny the validity of those interests, or deny the appropriateness of current felon disenfranchisement laws to address valid interests.

The Supreme Court's recent case history has ignored this precedent of the sufficiency of discriminatory results, the majority of the Court insisting on the proof of discriminatory intent. There are two competing precedents, and the majority of the Court has opted for the latter. Congress has taken note, amending the Voting Rights Act of 1965 to make the results test explicit and reduce or remove the burden of having to prove intent. The courts, as seen in *Wesley v. Collins*, have yet to take that cue from Congress. Felon disenfranchisement laws have not been struck down for either Constitutional reasons, or statutory reasons under the Voting Rights Act. Consequently, the rights of felons and ex-felons to vote are still subject to state law, with the result that minorities are stripped of the right to vote at a rate about four times that of whites. New challenges are needed to force the courts to reexamine their application of the results test under *Wesley v. Collins*, such that the amendments of 1982 become the substantial and meaningful addition Congress intended.

Chapter 5: Conclusion

Felon disenfranchisement is a non-issue for most of the country. Even in places where it involves voter-approved changes to the state constitution, as in Utah, it has caused little controversy. In other areas of the country, however, the combination of large minority populations and racial disparity among convicted felons, can lead to enormous concern over felon disenfranchisement. This is especially true when those felons have completed their prison terms and have returned to the community. Concern over political expression and community can lead to efforts to change the law and include felons in the political process. On the other hand, the idea that people who have broken the law still have the ability to change laws as they serve prison terms, provokes some lawmakers to take away the right to vote from prison inmates.

This change has taken several different routes, both legislative and legal, at the federal level and at the state level. States such as Utah and Massachusetts have moved to a more exclusive franchise, passing popular legislation which stripped prisoners of the right to vote. Legislators in Connecticut and Delaware, on the other hand, have passed legislation to make it easier for felons who have completed their prison terms to vote. Legal challenges by civil rights groups and the NAACP have been attempted with varying degrees of success in, for example, Pennsylvania and New Hampshire. It seems likely that the NAACP and other organizations will continue their efforts to return voting rights to felons. From the cases studies here, it seems that people are somewhat open to allowing felons to vote, providing they are no longer in prison. Conservatives are generally opposed to any relaxing of felon disenfranchisement laws.

The two sides of this debate, those that argue for greater inclusion of felons in the political process and those that argue against greater inclusion, seem to have fundamentally different beliefs about crime and punishment. Proponents of enfranchisement seem to conceive of the criminal justice system as a means of rehabilitating criminals, and also believe that the system has a responsibility to help felons reintegrate into society. Opponents seem to believe that the criminal justice system is more suited to punishment than rehabilitation. For them, regulating the franchise is a matter of fairness and of principle; those that break the law should not be allowed to make the law. Proponents of felon enfranchisement also argue on the basis of principle, and of preserving the integrity of the democratic process, but also emphasize the practical importance of minority representation and the rehabilitation of criminals. Practicality does not play a large role in the arguments of opponents of enfranchisement, probably because they are difficult to make.

Proponents of enfranchisement also consider racial disparity a significant problem with felon disenfranchisement laws. The reduction of the political voice of minorities, groups already suffering from a lack of political representation, is a major, negative consequence of felon disenfranchisement laws. Opponents of felon enfranchisement do not believe race to be a valid variable in the debate; criminals are punished on the basis of the crimes they have been convicted of committing, and their race is irrelevant.

Race is also a significant factor in the legal context of this issue. Felon disenfranchisement laws strip the right to vote from a very sizeable minority population. Voting rights are denied at a rate much greater for blacks than for whites. Reviewing the equal protection clause of the Fourteenth Amendment, the Voting Rights Act of 1965, and the relevant case history, leads to the conclusion that if the ability of a certain group to vote is severely restricted by law, that law must be justified by the state. The state must show a compelling reason that necessitates the execution of that law. I have argued that there is no compelling reason to deny

felons the right to vote, and a review of arguments presented in various states reveals no such reason. In fact, as I have noted, arguments in favor of felon disenfranchisement generally avoid any practical considerations, such as deterrence, and stick to intangible considerations, such as appropriate punishment.

Another portion of the argument against allowing felons to vote is the assertion that felon voting would assert a malevolent influence upon the community at large. It seems clear that allowing felon voting would have significant political consequences, and that these consequences would probably benefit Democrats. If this counts as a malevolent influence, then these arguments must be considered correct. However, denying a certain group the right to vote for fear of how they would vote is strictly unconstitutional, as I established in chapter three. The unconstitutionality of “fencing out” was never raised in any of the articles I reviewed. Both sides seem to accept the idea that if felons were to band together in nefarious ways, it would be okay to outlaw their vote. The argument revolved around whether this was a probable outcome, rather than if it was a legitimate consideration.

The consequence of these laws is difficult to overestimate, including, possibly, the ultimate outcome of several Senate and Presidential elections. The political benefits of a more inclusive franchise seem to fall almost entirely to the Democrats. This may be one reason liberals are more open to felon enfranchisement and conservatives are opposed. As in our discussion of the history of American suffrage, it seems that there are both principles and political gains at stake here. I believe, however, that neither Democrats or Republicans are arguing against their perceived ideology for political gain. It seems, rather, that the pursuit of goals traditionally within the realm of their respective ideologies are also compatible with practical political goals. In other words, Republicans can pursue their traditional “tough on crime,” pro-states’ rights ideals, while also benefiting from the disenfranchisement of likely Democratic voters. Democrats can argue in favor of rehabilitation over punishment, while also pursuing the enfranchisement of likely supporters.

This issue seems to have become more salient to select publics in recent years, and I think that trend will continue and increase as the momentum to reintegrate former black voters into the political system builds. There are clear political gains to be had for the Democratic party, and especially for minority interests. The longer someone is out of prison, the harder it is to justify their exclusion from the registration rolls. The combination of politics and principles seem favorable to the building of a more inclusive franchise through a combination of legal and legislative changes. The public’s distrust and impatience with criminals complicates the issue, as do the clear theoretical and political reasons for Republican resistance.

Legal challenges to felon disenfranchisement under the Fourteenth Amendment and the Voting Rights Act have been largely unsuccessful. The current makeup of the Supreme Court is unfavorable to renewed challenges, and is likely to continue to be so for the foreseeable future. The greatest hope for legal challenges, then, remains in two realms: (1) the challenging of irrational distinctions between different types of felons, as in Pennsylvania, and (2) renewed challenges under the Voting Rights Act. So far, the first approach has been the most successful, although legislative changes have proven the most effective of all. Legal changes have been more sudden and sweeping, but can be reversed by higher court rulings, as in New Hampshire, or by changes in the state constitution. Legislative changes are more piecemeal and gradual, but perhaps more lasting.

The denial of voting rights to one in every seven black men is a serious and damaging blow to the democratic process in this country. The lack of persuasive justification for felon disenfranchisement laws, and the fact that the promise of legal recourse provided both in the

constitution and in the Voting Rights Act has remained unfulfilled by the judiciary, further adds to the weight of its injustice. Federal reformation seems unlikely in the near future, leaving states to continue their inconsistent and piecemeal approach to the regulation of the franchise.

Appendix A:

State	Current Law (when felons can vote)	Recent Change	Process	Was race an issue in the public debate?
Alabama	Pardon from the governor	Proposed change: Allow felons to petition courts	Legislature	Yes
Connecticut	Upon release from prison	Ended required fulfillment of parole/probation	Legislature	Yes
Delaware	5 years after release from prison	Ended petition requirement	Legislature	Yes
Maine	No restriction	Proposed change: Eliminate right of prisoners to vote	Legislature (constitutional amendment)	No
Massachusetts	Upon release from prison	Eliminated right of prisoners to vote	Legislature (constitutional amendment)	Yes
New Hampshire	Upon release from prison	Prisoners first granted right to vote, then stripped of right to vote upon successful appeal by the state	The courts	*
Pennsylvania	Upon release from prison	Elimination of five year waiting period	The courts	*
Utah	Upon release from prison	Eliminated right of prisoners to vote	Legislature (constitutional amendment)	No
Vermont	No restriction	Proposed change: Eliminate right of prisoners to vote	Legislature (constitutional amendment)	*
Virginia	Pardon from the governor (but processed through circuit courts)	Allow felons to petition courts, though final authority still rests with the governor	Legislature	Yes

Most states included all eight arguments:

1. Fairness
2. Felonious influence
3. "Other states"
4. Punishment
5. Rehabilitation
6. Rationality
7. Democratic process
8. Race

* Not included due to lack of information

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