Do felony disenfranchisement laws in California violate the Equal Protection Clause of the Fourteenth Amendment?

I. Introduction

Equal protection is once again the doctrine of the day. It figured prominently in the same-sex marriage cases: a losing argument in SCOCA, and the dispositive principle in SCOTUS. As Anne Gordon noted in her recent post entitled "Is SB 277 a denial of the right to education?," the pending litigation over school funding (which will be heard before the California Court of Appeal on January 27 and is likely to reach SCOCA) also largely turns on equal protection. And there is another issue on the horizon that might ultimately call for SCOCA resolution: felon disenfranchisement. This post explains why the argument that California's felon disenfranchisement policy violates equal protection is likely to fail.

We start with the principle that voting is a fundamental right that "shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." U.S. Const. amend. XV; *Reynolds v. Sims* (1964). Although states cannot enact legislation that reduces fundamental constitutional rights, state legislatures have considerable discretion to establish qualifications for suffrage. California, for example, bars individuals from voting if they are imprisoned or on parole. Cal. Const. art. II, § 4. Because this voting restriction disproportionately disenfranchises African Americans (who make up approximately thirteen percent of the population but comprise forty percent of the prison population), a number of civil rights groups have relied on equal protection principles to argue for abolishing felony disenfranchisement. Hartney, C. & Vuong, L., *Created Equal: Racial And Ethnic Disparities In The U.S. Criminal Justice System* (2009), Nat'l Council On Crime & Delinquency. This argument, however, is problematic because California's current felon disenfranchisement law is facially

race-neutral, and its modern history provides no support for a racial animus argument. Thus, it is unlikely that a court would find that California's felon disenfranchisement law violates equal protection.

II. Background and Current Status of Voting Rights for Felons in California

For over a century after the California constitution was written in 1849, all persons "convicted of any infamous crime" were permanently disenfranchised. Until 1966, "infamous crime" was judicially interpreted to include *any* felony. *Stephens v. Toomey* (1959). But in *Otsuka v. Hite* (1966), SCOCA limited the disqualifying language of "infamous crime" to only those crimes "involving moral corruption and dishonesty."

In *Otsuka,* the court reversed a judgment upholding the refusal to register plaintiffs to vote who pleaded guilty more than twenty years ago to a violation of the federal Selective Service Act. In limiting former article 2, section 1 (current article 2, section 4), the *Otsuka* decision applied strict scrutiny, as one would for an equal protection challenge for denial of a fundamental right. In doing so, the court construed voting *for all people* (felons and non-felons alike) as a fundamental right that could only be limited by a narrowly-tailored compelling state interest.

The *Otsuka* decision also stated that the compelling state interest served by denying ex-felons the right to vote was to deter election fraud, that is, "to protect 'the purity of the ballot box' against abuses by morally corrupt and dishonest voters operating to the detriment of the electorate as a whole." *Otsuka* at p. 611. But the court found that a voting restriction on all felons was not the least restrictive means of achieving that end. To save article 2, the court held that California could disenfranchise only those voters who had been convicted of certain offenses, and the court decided to "focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process." *Id*.

Efforts to implement the *Otsuka* rule by local election officials produced widely disparate results. As a result, the legislature enacted a series of amendments in 1969 to the Elections Code regarding felon eligibility. Under those statutes, local

election officials retained the authority to initially determine whether a felony conviction was disqualifying, with judicial review for a determination of ineligibility. Despite these judicial and legislative limits on disqualifying felonies, statutory law continued to disenfranchise those convicted of any felony while imprisoned or on parole in California. *Flood v. Riggs* (1978); former Pen. Code sections 2600, 3054.

In 1973, the provision was again challenged in court. SCOCA held in *Ramirez v. Brown* (1973) that, as applied to ex-felons whose terms of incarceration and parole had expired, the California law violated the federal equal protection clause. Reassessing its holding in *Otsuka*, the court stated that under contemporary equal protection standards, disenfranchisement solely by reason of conviction of crime was no longer constitutionally permissible. The court reasoned that, although preventing election fraud is a compelling state interest, outright disenfranchisement of persons convicted of crime is overly burdensome on the right of suffrage. The court reviewed the statutory scheme that had developed to minimize the potential for election fraud or tampering with the elective process (combined with a variety of penal sanctions to effectively deal with such misconduct), and determined that enforcement of such statutes rather than total disenfranchisement was the least-burdensome method in deterring election fraud.

Although the *Ramirez* court concluded that denying suffrage to ex-felons whose terms of incarceration and parole had expired violated the Fourteenth Amendment, it expressed no opinion on whether disenfranchisement of persons currently incarcerated or on parole was constitutionally permissible. Therefore, *Ramirez* only held that: (1) voting is a fundamental right and limitations imposed on suffrage must be analyzed under strict scrutiny; and (2) *permanent* disenfranchisement of *all* convicted felons violated the Fourteenth Amendment.

As a result, legislative proposals to comply with this decision narrowed disenfranchisement to persons imprisoned or on parole for the conviction of a felony, with the implied understanding (from the *Otsuka* decision) that only felonies of moral turpitude precluded suffrage. But without specific language in the legislative amendments regarding the types of felonies included in article 2, section 3, continued disagreement about the constitutionality of felon disenfranchisement resulted in disparate enforcement across the state.

Further confusion ensued after the U.S. Supreme Court abrogated the decision in *Ramirez*, holding in *Richardson v. Ramirez* (1974) that there was no constitutional restriction to state action in disenfranchising individuals convicted of a crime, even if they had completed their sentences and paroles. The Court implied that voting was *not* a fundamental right for convicted felons by interpreting section 2 of the Fourteenth Amendment as express permission for felon disenfranchisement.

Following the SCOTUS decision overturning *Ramirez*, the California legislature adopted Proposition 10 to amend article 2, section 3 to allow convicted felons to vote after completing their sentences. Because Ramirez's right to vote was restored, the case was considered moot on remand, and so the issue of discriminatory intent in California's revised constitutional provision was not considered. *Ramirez v. Brown* (1974).

The legislature simultaneously enacted Assembly Bill No. 1128, which directed county clerks to cancel the registration of all voters who were convicted of "any infamous crime." This revival of the "infamous crime" standard of felony disenfranchisement tended to confuse rather than clarify the constitutional purpose of article 2 of the California constitution, which on its face only disqualified electors while "imprisoned or on parole for the conviction of a felony." Stats.1974, res. ch. 89, p. 3736.

The distinction between "any felony" and "any infamous crime" is important because the U.S. Supreme Court has found instances of states restricting voting rights based on infamous crimes (or those of "moral turpitude") to violate the equal protection clause. *Hunter v. Underwood* (1985). Therefore, the "infamous crime" provision in Assembly Bill No. 1128 was vulnerable to a constitutional challenge. In 1978, the California Court of Appeal addressed that issue in *Flood v. Riggs*, and clarified that article 2, section 4 (formerly article 2, section 3) applied to *all* felons and was not limited to those convicted of "infamous" felonies. The *Flood* decision thus invalidated all provisions of the Election Code that singled out felons guilty of infamous crimes for disenfranchisement.

The *Flood* decision was the last judicial word on this subject in California. The current constitutional and statutory provisions regarding felon disenfranchisement

in California (now under article 2, section 4) have not been substantively changed. Currently, California law disenfranchises those convicted of any felony punishable by state prison, not just those convicted of an "infamous crime" or felony at common law. And after the decision in *League of Women Voters of California v. McPherson* (2006), section 4 does not disenfranchise persons confined in local jails as a condition of felony probation, nor does it disenfranchise persons "convicted" of a felony and thereafter sentenced to a term in county jail in connection with "wobbler" offenses.

In practice, this means that individuals incarcerated in prison or jail for a felony offense are unable to vote in California. Once released from custody, anyone still on parole, on post-release community supervision, or on mandatory supervision is also ineligible to vote. Only after completion of parole, post-release community supervision, or mandatory supervision are voting rights restored. Some civil rights groups have argued that this state of the law in California is an equal protection violation because it disproportionately impacts minorities, especially African American men—who are more than eight times as likely to be disenfranchised by imprisonment than Caucasian men. Pub. Pol. Inst. of Cal., *Just the Facts: California's Changing Prison Population* (2013). As discussed below, that argument is not likely to succeed.

III. Does Article 2, Section 4 of the California Constitution Violate the Federal Equal Protection Clause?

Strict scrutiny generally applies to laws restricting voting. *Dunn v. Blumstein* (1972); *Katzenbach v. Morgan* (1966). As discussed above in *Richardson*, limitations based on criminal status present a more complicated equal protection challenge because the standard of review for laws that restrict voting for convicts is unclear.

An equal protection challenge to felon voting restrictions requires showing a racial basis for the voting restriction. Discriminatory intent must also be shown. *Arlington Heights v. Metropolitan Hous. Corp.* (1977); *Hunter v. Underwood* (1985) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

The *Arlington Heights* decision used several factors to determine whether a discriminatory intent exists. In addition to the threshold factor of disproportionate impact, the *Arlington Heights* inquiry includes: (1) the historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes; (2) the specific sequences of events leading up to the decision challenged in the case, including departures from normal procedures in making decisions and substantive departures; and (3) the legislative or administrative history of the state action, "especially where there are contemporary [discriminatory] statements by members of the decision-making body." *Arlington Heights* at pp. 267-68.

The U.S. Supreme Court first applied the discriminatory intent inquiry to a criminal disenfranchisement challenge in *Hunter*, which involved a challenge to article 8, section 182 of the Alabama Constitution. That section required the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude." The Court held that Section 182 was unconstitutional because discriminating against African Americans was a substantial motive behind enacting the legislation. The Court relied on the legislative history and explicit statements made by congressional members. For example, John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." Official Proceedings of the Constitutional Convention of the State of Alabama, May 22, 1901, p. 8. The Court stated, "that §182 may have been adopted to discriminate against poor whites as well as against blacks would not render nugatory the purpose to discriminate against blacks, it being clear that the latter was a 'but-for' motivation for adopting § 182." *Hunter* at p. 222.

Hunter's holding has been limited in its application. In *Cotton v. Fordice* (5th Cir. 1998), the court held that, although Mississippi's felon disenfranchisement statute was motivated by a desire to discriminate against African Americans, "each amendment [to the statute] superseded the previous provision and removed the discriminatory taint associated with the original version." In *Cotton*, the state defendants did not dispute that the Mississippi constitutional provision (Section 241) was originally enacted to disenfranchise convicts for crimes that, it was thought, were committed primarily by African Americans. Mississippi's complicity in this

practice was recognized by its supreme court six years after the original adoption of Section 241. See *McLaughlin v. City of Canton* (S.D. Miss. 1995).

But the *Cotton* court went on to state that *Hunter* left open the possibility that by amendment, "a facially neutral provision like § 241 might overcome its odious origin." Section 241, as enacted in 1890, was amended in 1950, removing "burglary" from the list of disenfranchising crimes and then, in 1968, the state broadened the provision by adding "murder" and "rape"—crimes historically excluded from the list because they were not considered "black crimes." *McLaughlin* at p. 977. In turn, the *Cotton* court found this deliberative process of amending Section 241 to remove the initial discriminatory intent.

Given this analysis, a successful equal protection challenge to article 2, section 4 of the California constitution would depend not only on the original drafters' intent, but also on legislative intent in subsequent amendments to the provision. Determining the intent of official action is always difficult, and it has been nearly impossible in the past twenty years to prove that legislation was enacted with purposeful discrimination. Even if overt discrimination motivated the original enactment, subsequent amendments that supersede and cleanse the original discriminatory intent would essentially ruin an equal protection challenge.

It is true that the legislative history of the original voting restrictions in California contains some evidence discriminatory intent (for example, prohibitions against African Americans and "any native of China"). Cal. Const., 1879. But given the restrictive application of *Hunter*, an equal protection challenge to article 2, section 4 is unlikely to succeed because later neutral amendments purged any original discriminatory intent. Similar to Mississippi's felon disenfranchisement statute in *Cotton*, California's constitutional preclusion of suffrage from minorities and other voting restrictions have been amended out of existence. For example, explicit references to minority groups were removed in 1926, and article 2, section 4 was revised in 1976 to limit disenfranchisement to felons who have not completed their sentences. Although the 1926 floor debate notes do not describe the discussion behind removing those sections, there is no evidence of race discussion. Indeed, the fact that the legislature took action to *remove* discriminatory provisions is good evidence of a neutral legislative intent. And that later action negates any

discriminatory motivation present in the original provisions. As in *Cotton,* a court would likely find that subsequent amendments to the California statute removed any discriminatory taint associated with the original version. Moreover, given that California uniformly restricts voting for all felons (unlike the Alabama provision in *Hunter*), a finding of discriminatory motive is even more unlikely.

In sum, although courts have never explicitly addressed the issue of whether discriminatory intent exists in California's felony disenfranchisement provision, based on the historical backdrop of its enactment it is unlikely that article 2, section 4 of the California constitution violates the Equal Protection Clause. In general, equal protection challenges to state laws limiting voting rights for felons have failed because felon disenfranchisement is presumptively constitutional. As a result, voting restrictions for convicted felons are not subject to strict scrutiny. It is a truism in constitutional litigation that the level of scrutiny is frequently outcome determinative. Given that strict scrutiny does not apply to questions of felon disenfranchisement, even if empirical data shows that article 2, section 4 of the California constitution disproportionately impacts minorities, an equal protection challenge will be a tough sell absent modern evidence of discriminatory intent. Therefore, any meaningful reform to expand voting rights for convicted criminals must come from the legislature, and not from the courts.

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