FELONY DISENFRANCHISEMENT

Introduction

More than five million Americans are currently unable to vote because of felony disenfranchisement laws. Prisoners cannot vote in forty-eight states and the District of Columbia. Parolees cannot vote in thirty-six states; thirty-one states prohibit probationers from voting; and three states permanently deny the right to vote to all ex-offenders. Nationally, these disenfranchisement laws prohibit 1 in 41 Americans from exercising the right to vote.[1] The effect of these laws in loss of voting power has been significant. For example, in 2000, Florida's disenfranchisement laws kept over 600,000 non-incarcerated citizens from voting in a presidential election decided by 537 votes.[2] This program guide examines the history and racial impact of the felony disenfranchisement laws, challenges to such laws and the possibility of re-enfranchisement in various states.

History and Racial Impact of Disenfranchisement Laws

The history of disenfranchisement of criminals can be traced back prior to the nation's founding, but the course and tone of disenfranchisement law changed dramatically following the Civil War. During Reconstruction, southern states began using disenfranchisement laws – much like poll taxes, literacy tests, and grandfather clauses – as a way to minimize the black vote.[3] General disenfranchisement laws that had applied to all criminals were tailored to particularized crimes that were committed more frequently by blacks than crimes that were committed more often by whites. Thus, while today's felony disenfranchisement laws are facially neutral, many are inherited from an underlying legacy of racist voting restrictions.[4]

Disenfranchisement laws disproportionately affect minority populations, causing opponents of disenfranchisement to label it as one of the last vestiges of race-based discrimination at the voting booth. Nationwide, thirteen percent of African American men – 1.4 million – are disenfranchised, comprising over one third of the total disenfranchised population, and in a number of states that disenfranchisement rate is even higher.[5] Until recent state reforms, in six states – Alabama, Florida, Iowa, Mississippi, Virginia, and Wyoming – at least one in four black men had become permanently

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[1] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), *available at* http://www.sentencingproject.org/pdfs/1046.pdf. Maine and Vermont are the only states that allow prisoners to vote.

[2] STEVE CARBO ET AL., DEMOS, DEMOCRACY DENIED: THE RACIAL HISTORY AND IMPACT OF DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (Apr. 2003), *available at* http://www.demos.org/pubs/FD_-_Brief.pdf.

[3] *Id.* at 4.

[4] Southern States were not alone. In *Hayden v. Pataki*, challenges were brought to New York disenfranchisement laws alleging that state constitutional conventions beginning in 1821 adopted disenfranchisement provisions to residents convicted of "infamous crimes" in order to disqualify black voters. 449 F.3d 305 (2d Cir. 2006) (en banc).

[5] CARBO ET AL., *supra* note 2 at 2; see also THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (Oct. 1998), *available at* http://www.sentencingproject.org/pdfs/9080.pdf.

disenfranchised.[6] The result is that, while they make up only six percent of the general population, black men comprise thirty-six percent of the disenfranchised population.[7] Though felony disenfranchisement laws are not technically a part of criminal laws, disparities in the enforcement and prosecution of crimes and in sentencing contribute significantly to the disparate impact of disenfranchisement laws.[8]

Court Challenges to Disenfranchisement Statutes

Felony disenfranchisement laws have been challenged under the Constitution and Section 2 of the Voting Rights Act. These challenges to felony disenfranchisement laws have met with mixed results.

The Supreme Court first considered the constitutionality of felony disenfranchisement laws in *Richardson v. Ramirez.* There, the Court held that Section Two of the Fourteenth Amendment granted states an "affirmative sanction" to disenfranchise those convicted of criminal offenses.[9] The Court narrowed this ruling in 1985 in *Hunter v. Underwood*, when it unanimously declared that Section Two did not protect state disenfranchisement provisions that reflected "purposeful racial discrimination" that otherwise violated the Equal Protection Clause. In so doing, the Court held unconstitutional a provision of the Alabama constitution that disenfranchised offenders guilty of misdemeanors of "moral turpitude," after finding that the intent of the provision had been to prevent blacks from voting and that it continued to have a racially disproportionate impact.[10]

More recently, several federal courts have considered challenges to disenfranchisement laws. In 2003, the Ninth Circuit in *Farrakhan v. Washington* held that racial bias in the criminal justice system was relevant to determining whether the state felony disenfranchisement law violated Section Two of the Voting Rights Act.[11] On remand, however, the district court dismissed plaintiff's challenge, concluding that while it is "compelled to find that there is discrimination in Washington's criminal justice system on account of race" and that this discrimination "clearly hinders the ability of racial minorities to participate effectively in the political process," dismissal was

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[6] JEFF MANZA AND CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 251-253 (Oxford University Press) (2006).

[7] CARBO ET AL., *supra* note 2 at 3.

[8] Given current rates of incarceration, three in ten of the next generation of African American men will lose the right to vote at some point in their lifetimes. See THE SENTENCING PROJECT, LOSING THE VOTE, *supra* note 5 at 6. Professor David Cole has stated that "together, the drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax." CARBO ET AL., *supra* note 2 at 2.

[9] 418 U.S. 24 (1974). Section 2 states in relevant part, "[W] hen the right to vote . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

[10] Hunter v. Underwood, 471 U.S. 222 (1985).

[11] 338 F.3d 1009 (9th Cir. 2003).

appropriate because a "remarkable absence of any history of official discrimination" in Washington's electoral process and felony disenfranchisement provisions.[12]

In *Johnson v. Bush*, plaintiffs filed a class action suit against the state of Florida, claiming that the discriminatory intent and effect of Florida's permanent disenfranchisement of people with felony convictions violated both the Constitution and the Voting Rights Act. The Eleventh Circuit *en banc* held that despite the racist intent of the disenfranchisement law when it was first enacted, Florida's last revision to its constitution in 1968 was free of such intent and therefore "cleansed" Florida's felon disenfranchisement scheme of any invidious discriminatory purpose.[13] In dissent, Judge Barkett stated that "[w]here the state has not demonstrated any race-neutral basis for re-enactment, there can be no "break" in the chain of invidious intent," and that the majority's disregard of the statutory text of the Voting Rights Act "eviscerates Congress's intent to give Section 2 'the broadest possible scope."[14]

In *Hayden v. Pataki*, the Second Circuit *en banc* considered a New York election law that strips citizens with felony convictions of their voting rights while they are incarcerated or on parole. The complaint alleged that, overall, Blacks and Latinos (who lose their right to vote at ten times that of Whites) received harsher sentences and were less likely to receive probation (which does not result in disenfranchisement) on account of their race. (More than 80% of those affected by the law are Blacks or Latinos.) After noting historical and contemporary approval of felony disenfranchisement provisions, the Second Circuit concluded that Congress did not intend such laws to fall within the Voting Rights Act's scope: "We deem this one of the 'rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[15] The dissent criticized the majority for ignoring the text of the statute, noting that plaintiffs had stated a "paradigmatic claim of discriminatory disenfranchisement."[16]

Felony disenfranchisement schemes are also being challenged under state law. For example, in Washington, indigent ex-offenders successfully challenged the state's requirement that former felons pay all legal financial obligations before being eligible for re-enfranchisement. The court found that there was no rational basis for granting the right to vote to ex-felons who are able to pay their fees immediately, while denying the right to those, who by indigency, need a period of time to pay them.[17]

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[12] Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273 (July 7, 2006 E.D.Wash.).
[13] 405 F.3d 1214 (11th Cir. 2005), *cert. denied* 126 S.Ct. 650 (2005).
[14] *Id*. at 1245, 1250 (Barkett, J., dissenting).
[15] 449 F.3d 305 (2d Cir. 2006) (en banc) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989)).
[16] *Id*. at 343 (Parker, J., dissenting).
[17] Madison v. Gregoire, No. 04-2-33414-4 SEA (Wash. Super. Ct. King County Mar. 27, 2006).

State Disenfranchisement and Re-enfranchisement Provisions

Felony disenfranchisement schemes vary by state. As noted above, all states except Vermont and Maine have some form of felony disenfranchisement.[18] Thirty-six states prohibit felons from voting while they are on parole and thirty-one of these states exclude felony probationers as well. Nine states disenfranchise certain classes of ex-offenders even after they have fully completed their sentences, while three states permanently deny the right to vote to all ex-offenders.[19]

In recent years, however, considerable attention has been given to encouraging the re-enfranchisement of ex-offenders. For example, the National Commission on Federal Election Reform, co-chaired by Presidents Ford and Carter, has recommended that all states restore voting rights to citizens who have fully served their sentences, and the American Bar Association recommends that jurisdictions do not deprive convicted persons of their right to vote "except during actual confinement."[20]

This increased awareness has lead to significant changes at the state level. Since 1996, 12 states have reformed their disenfranchisement laws.[21] Four state legislatures – Delaware, Maryland, Nebraska and New Mexico – that had previously implemented some form of lifetime voting ban, now have limited bans in some form. Nebraska for instance, repealed the lifetime ban and replaced it with a two-year post-sentence ban. Other states have also made significant changes to their disenfranchisement laws. Iowa Governor Tom Vilsack, for example, issued an executive order in 2005 automatically restoring the voting rights of all ex-felons, and in 2001 Connecticut passed legislation that permits an estimated 36,000 felons to apply for a certificate of eligibility to register to vote after completing their sentence.[22]

While a number of states allow for re-enfranchisement of ex-offenders, the administrative burdens of re-enfranchisement can be daunting and as varied as disenfranchisement laws themselves. For example, Alabama requires some ex-prisoners to submit DNA samples to regain voting rights.[23] Mississippi requires a gubernatorial

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[18] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 1; MANZA AND UGGEN, *supra* note 6 at 248-250.
[19] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 1.
[20] THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM; TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (Aug. 2001) 44-45; ABA CRIMINAL JUSTICE STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-2.6(a) (3d ed. 2003).
[21] According to The Sentencing Project, Connecticut recently restored the vote to 36,000 citizens by extending voting rights to citizens on probation. Iowa, Nebraska and New Mexico eliminated their lifetime voting bans for persons with felony convictions. Pennsylvania restored the right to vote to thousands of people who have completed their sentences. Policy changes that have lowered barriers to voting have also been enacted in Alabama, Delaware, Maryland, Nevada, Texas, Virginia, Washington and Wyoming. Legislation removing barriers to voting has been introduced in many states including Florida, Georgia, Indiana, Mississippi, Nebraska, New York, Rhode Island, Tennessee, Virginia, and Wisconsin.
[22] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 1.
[23] THE SENTENCING PROJECT, REGAINING THE VOTE: AN ASSESSMENT OF ACTIVITY RELATING TO FELON DISENFRANCHISEMENT LAWS 4-5 (Jan. 2000), *available at* http://www.sentencingproject.org/pdfs/9085.pdf.

decree or two-thirds supermajority of the state legislature for a pardon.[24] Advocates believe these practical hurdles exacerbate the effects of disenfranchisement laws.[25]

Conclusion

As awareness increases about the history and effect of felon disenfranchisement law and the possibility of re-enfranchisement, there has been a greater push to change the legal landscape though court challenges, legislation and education. These changes may have a significant effect on broadening participation in the political process.

[24] See THE SENTENCING PROJECT, LOSING THE VOTE, *supra* note 5 at 6. In 2002, Florida's Board of Clemency estimated that it had a backlog of at least 35,000 ex-prisoners who had applied for restoration of their voting rights.
[25] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, *supra* note 1 .