Defective Democracy: The Faults of Felon Disenfranchisement

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Entering a presidential election, there are few issues that almost all states seem to agree on, but one practice is nearly unanimous, regardless of party leaning: felon disenfranchisement.1 Felon disenfranchisement laws restrict felons from voting while incarcerated and often some period of time following their release.2 These laws are in opposition to growing international norms protecting universal enfranchisement and are racially discriminatory in application though they have withstood numerous constitutional challenges. Despite their constitutionality, the policy justifications for felon disenfranchisement are no longer acceptable in modern society and actually cut against democracy as a whole.

Forty-eight states and the District of Columbia prohibit incarcerated felons from voting, and over thirty extend this prohibition to parolees and probationers.3 A dozen states enforce voting prohibitions even after a felon has completed his or her sentence.4 Many felons face a waiting period and often must take some affirmative action on their part in order to restore their voting rights.5

These restrictions are based on the states’ power to establish voter qualifications under the Fourteenth Amendment. The Fourteenth Amendment allows states to limit the right to vote in response to “participation in rebellion, or other crime, . . .”6 Though often implemented at a time when felonies were reserved for a limited number of extreme crimes, the reach of disenfranchisement laws has greatly expanded as non-violent offenses are more harshly enforced.7 Many states limit disenfranchisement to people convicted of crimes involving “moral turpitude.”8

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2 See generally Miss. Const. Art. 12, § 241 (prohibiting vote for someone who has “been convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy”).

3 Thirty-five states prohibit voting on parole; thirty-one states prohibit voting on probation. THE SENT’G PROJECT, supra note 1.


5 Id.

6 U.S. CONST. amend. XIV, § 2.

7 For example:

Minnesota has retained essentially the same disenfranchisement law adopted upon gaining statehood in 1857. However, since that time, Minnesota's criminal justice system has undergone massive changes, especially in its expansion in scope--resulting in one of the highest rates of correctional control in the country, and therefore one of the highest rates of felony disenfranchisement in the country and by far in the region.


8 See, e.g., ALA. CONST. art. VIII, § 177(b) (“No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.”).
However, some state courts interpret “moral turpitude” to include felonies ranging from murder or rape to the sale of marijuana or the transportation of a stolen vehicle across state lines. Thus many disenfranchised people are non-violent offenders. For example, roughly one-third of the total felon population is convicted of drug law violations, while only four percent is convicted of murder or rape. Long mandatory minimum drug sentences lead to similar sentences for drug possession and rape, and have more than quadrupled the number of disenfranchised felons in some states.

Felon disenfranchisement highlights America’s remarkably high levels of incarceration, as felons are prohibited from voting while in jail. The United States has the world’s highest rate of incarceration, with over seven million people in jail or on probation or parole. An estimated 5.85 million people, roughly one in every forty adults, have currently or permanently lost their right to vote. Two-thirds of this population has completed a prison term, but their voting rights have not been restored. Additionally, the United States is unique among democracies not only for the scope of its disenfranchised citizens, but also for its adherence to this practice.

I. United States Against International Trends

The United States adopted the practice of felon disenfranchisement after many European countries, but much of the world has since rejected the practice. Countries ranging from France to Zimbabwe allow prisoners to vote while they are in prison. The European Court of Human Rights has ruled that automatic disenfranchisement upon conviction is a violation of the European Declaration of Human rights.

Despite the world generally disfavoring disenfranchisement as a punishment, many states recently shifted towards harsher policies. In 2011, Iowa rescinded an executive order that automatically restored voting rights for all felons upon completion of their sentences, and Kentucky followed suit in December 2015. Florida, the home of some of the most restrictive disenfranchisement laws, provides an exceptional example of these laws’ many effects. Floridian

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11 Haase, supra note 10, at 1922 (“A person selling $1200 worth of cocaine receives . . . the same sentence as a person who approaches a stranger at gunpoint and commits a rape.”).
12 Id. (“In 1974, the percentage of Minnesota’s voting age population disenfranchised was 0.35% percent. It more than quadrupled by 2011, when it had increased to 1.5%.”).
13 THE SENT’G PROJECT, supra note 1.
15 THE SENT’G PROJECT, supra note 1.
16 Weeks, supra note 13.
17 Haase, supra note 10, at 1916.
18 Id.
felons are permanently disenfranchised unless they successfully petition the governor’s office for a restoration of civil rights.\textsuperscript{22} Felons must wait at least five years before they can file this petition.\textsuperscript{23} However, simply filing does not guarantee re-enfranchisement. Since 2011, 100,000 petitions have been reviewed by the governor’s office and fewer than 2,000 ex-felons have had their rights restored.\textsuperscript{24} As a result of this process and its backlog, ten percent of Floridians over the age of eighteen are denied their right to vote due to a felony conviction.\textsuperscript{25} Further examination of these stringent restrictions reveals how inequitable they are in practice.

II. Discriminatory Implementation

The scope of these laws has had a great impact on minorities as minorities are disproportionately represented in America’s prison system. From 1988 to 1998 alone, the rate of incarceration for African American and Hispanic men increased ten and five times more than whites, respectively.\textsuperscript{26} Of the entire disenfranchised population, roughly 2.2 million are black, and, if the current rate of incarceration continues, three out of ten of the next generation of black men can expect to lose their voting rights at some point in their lives.\textsuperscript{27} One in every thirteen African Americans of voting age is currently disenfranchised—four times more than non-African Americans.\textsuperscript{28} Three states—Florida, Kentucky and Virginia—disenfranchise African Americans at rates as high as twenty percent of their total African American populations.\textsuperscript{29} The situations in Florida, Kentucky and Virginia are not unique to those states. Across the country, African Americans are disenfranchised at rates disproportionate to their white counterparts.\textsuperscript{30} Since African Americans make up only fifteen percent of the national population, there is a significant racially disparate impact from felon disenfranchisements laws.\textsuperscript{31} Nevertheless, disenfranchisement laws have withstood all Constitutional challenges to date.

III. Constitutional Challenges

In Richardson v. Ramirez, the Court set the precedent that disenfranchisement laws are generally not susceptible to challenges under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{32} The Court upheld felon disenfranchisement since, unlike other disenfranchisement laws that have been struck down under equal protection, the Fourteenth Amendment explicitly

\begin{itemize}
\item \textsuperscript{23} FLA. PRACTICE SERIES TM § 12:28 (West 2015); Riggs, supra note 25, at 111.
\item \textsuperscript{24} Renata Sago, \textit{Ex-Felons Fight to Restore Their Right to Vote}, NATIONAL PUBLIC RADIO (Dec. 11, 2015), http://www.npr.org/2015/12/11/459365215/ex-felons-fight-to-restore-their-right-to-vote.
\item \textsuperscript{25} Riggs, supra note 25, at 112.
\item \textsuperscript{26} Haner, supra note 17, at 915.
\item \textsuperscript{27} THE SENT’G PROJECT, supra note 1.
\item \textsuperscript{29} \textit{Id.} at 237.
\item \textsuperscript{30} Haner, supra note 17, at 915.
\item \textsuperscript{31} Centers for Disease Control and Prevention, \textit{Black or African American Populations}, CDC, http://www.cdc.gov/minorityhealth/populations/REMP/black.html (last updated July 31, 2015).
\item \textsuperscript{32} Richardson v. Ramirez, 418 U.S. 24, 56 (1974).
\end{itemize}
provides for disenfranchisement for crimes.\textsuperscript{33} Contentions that this mode of punishment is outdated are policy arguments the Court found to be best suited for the legislature, not the judiciary.\textsuperscript{34} However, the Court struck down a disenfranchisement law on Equal Protection Clause grounds in \textit{Hunter v. Underwood} because “its original enactment was motivated by a desire to discriminate against blacks on account of race and [this law] continues to this day to have that effect.”\textsuperscript{35} Barring persuasive evidence of a law’s racist motivations at the time of its passage, the Equal Protection Clause likely does not provide a legal route to address this situation.

The circuits that have seen disenfranchisement cases under the Voting Rights Act (“VRA”) have all ruled that the law does not prohibit this practice. The Second Circuit held in \textit{Hayden v. Pataki} that the VRA’s prohibition of race based voting barriers did not reach disenfranchisement statutes, even though they acknowledged historic racial discrimination in the criminal justice system.\textsuperscript{36} \textit{Hayden} represents the majority view, but some circuit judges seem willing to stretch the law further. Prior to being overturned \textit{en banc}, the Ninth Circuit held that the VRA would apply where “the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances.”\textsuperscript{37} Since the opinion was overturned, the Supreme Court has not ruled on the VRA’s applicability to disenfranchisement. The fact that some circuit judges hold this minority opinion suggests that the question may soon reach the Supreme Court.

\textbf{IV. Underlying Policy}

Constitutional questions aside, the justification for felon disenfranchisement rests on a tenuous policy foundation. Proponents suggest that the practice is a valid punishment that states can levy on those who break the law.\textsuperscript{38} They argue that disenfranchisement is the natural result of criminal activity: “[S]omeone ‘who breaks the laws’ may ‘fairly have been thought to have abandoned the right to participate’ in making them.”\textsuperscript{39} Furthermore, abandoning the practice could create a voting block opposed to strong law enforcement that would shift focus away from crime prevention and deterrence.\textsuperscript{40}

None of these points are sufficient to justify the current practice of disenfranchising Americans. Scholarship shows no evidence that disenfranchisement has any impact on deterrence or rehabilitation, and incapacitation is only applicable to the small number of felons convicted of election related crimes.\textsuperscript{41} Voting felons are actually less likely to reoffend than their

\textsuperscript{33} Id. at 54–55.

\textsuperscript{34} Id. at 55–56.


\textsuperscript{36} Hayden v. Pataki, 449 F.3d 305, 315–316 (2d Cir. 2006).

\textsuperscript{37} Farrakhan v. Gregoire, 590 F.3d 989, 1009 (9th Cir. 2010), overruled by Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (determining their initial ruling swept too broadly in the light of three other circuits’ conclusion that “felon disenfranchisement laws are categorically exempt from challenges brought under section 2 of the VRA”).


\textsuperscript{39} Id. at 17 (quoting Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967)).

\textsuperscript{40} Id. at 18.

\textsuperscript{41} Haase, \textit{supra} note 10, at 1925; Haner, \textit{supra} note 17, at 930.
disenfranchised counterparts,\textsuperscript{42} so ending this practice would likely lessen recidivism as, “[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”\textsuperscript{43} Moreover, automatically disenfranchising this broad class of people poses a more basic threat to America’s democracy. Denying the fundamental right to vote for fear that people might have lenient opinions on law enforcement is dangerously close to policing political minority opinions from the ballot box. Particularly for those felons who have completed their sentence and are subject to all the benefits and burdens of the law, disallowing the right to influence their community by voting undermines the legitimacy of the government.

Though felon disenfranchisement is constitutionally sound despite it’s discriminatory impact, states should reassess whether this practice serves any justifications of punishment or provides any societal benefit whatsoever. If not, as seems to be the case, then it is time to discard this outdated penalty.

\textsuperscript{42} Zaman, \textit{supra} note 31, at 239. “A 2011 report by the Florida Parole Commission found that ex-prisoners who had their voting rights restored had recidivism rates of eleven percent compared to thirty-three percent for those who did not have their rights restored.” Haase, \textit{supra} note 10, at 1927.

\textsuperscript{43} Zaman, \textit{supra} note 31, at 239.