

Felon Disenfranchisement in California

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City of Mobile, Ala. v. Bolden, 446 U.S. 55, 103, 100 S. Ct. 1490, 1518, 64 L. Ed. 2d 47 (1980)
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Shelby County, Ala. v. Holder, 570 U.S. 529, 594, 133 S. Ct. 2612 (2013)
Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948)

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Hayden v. Paterson, 594 F.3d 150, 171 (2d Cir. 2010)

Ninth Circuit

Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972)

Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010)

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Washington v. State, 75 Ala. 582, 1884 WL 489 (1884)

California

Cal.Const. Art. 2, § 4

Flood v. Riggs, 80 Cal. App. 3d 138, 145 Cal. Rptr. 573 (Ct. App. 1978)

Hedlund v. Davis (1956) 47 Cal.2d 75, 81, 301 P.2d 843

League of Women Voters of California v. McPherson, 145 Cal. App. 4th 1469, 1479, 52 Cal. Rptr. 3d 585, 592 (2006)

McMillan v. Siemon (1940) 36 Cal.App.2d 721, 726, 98 P.2d 790

Otsuka v. Hite (1966) 64 Cal.2d 596, 607-608, 51 Cal.Rptr. 284, 414 P.2d 412

I. Scope

This article outlines the extension of California's felony disenfranchisement rule, Article 2 Section 4 of the California Constitution, and the current constitutional standing of the rule. Throughout this article, cases will be presented to describe who this rule applies to, in what circumstances, and how the law passes possible 14th amendment and Voting Rights Act violations.

II. Introduction

Voting is one of the most fundamental rights of a US citizen. This right has been clarified and supported by multiple amendments to the federal constitution. Our right to vote is protected under the 1st, 14th, 15th, and 19th Amendments. The extension of this right has evolved over the history of the United States. Since the 14th Amendment was passed in 1868, the judicial system has been tasked with protecting the right to vote equally among all populations. In the landmark

case *Reynolds v. Sims* (1964) 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506, the Warren court outlined the fundamental nature of the right to vote: “The 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 strikes at the heart of representative government.”.

Many amendments and court cases have made it clear that voting is a right which should be indiscriminately afforded to all citizens. However, states have some discretion in who they allow to cast a vote. States have jurisdiction over the “time, place and manner of elections” (U.S. Const. Art. I, § 4, Cl 1.). This discretion includes the right to determine who is qualified to vote (*Gray v. Sanders* (1963), 372 U.S. 368, 390, 83 S. Ct. 801, 813, 9 L. Ed. 2d 821). State laws restricting who can vote are still subject to judicial review; they must meet the equality requirements set forth by the 14th Amendment and Voting Rights Act of 1965. Despite being subject strict scrutiny, some state laws disenfranchise up to 10% of their citizens (Felon).

Forty eight of the fifty states have long standing laws that disenfranchise citizens who have been convicted of a crime (Criminal). California is one of these states. California’s first constitution denied felons suffrage in Article 2, Section 2. This rule has changed since 1859, but its effect has remained the same: citizens who are convicted of a felony are barred from voting in all elections.

How can California disenfranchise certain citizens who would otherwise be qualified electors? At face value, these disenfranchisement rules seem to violate the 14th amendment by denying citizens equal protection. And looking deeper into this issue, it would seem that these rules also violate section 2 of the Voting Rights Act by disenfranchising a disproportionate amount of minorities.

This article will answer these questions. But first, an outline of the extension of Article 2, Section 4, California's felon disenfranchisement rule, is necessary to understand how this rule has been applied.

II. Extension

The current rule guiding felon disenfranchisement in California states, "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony" (Cal.Const. Art. 2, § 4). The main section we will be focusing on is the latter half of Article 2, Section 4. This portion contains elements of who the law pertains to, and the under what circumstances it covers these felons. Although the law may seem straightforward, both the wording and intent behind the law can be interpreted in many ways, and have evolved over the years.

In *Reynolds v. Sims*, the U.S. Supreme Court stated that "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized". Cases regarding Article 2, Section 4 of the California Constitution, as well as other felon disenfranchisement laws in the country, carefully dissect the law to ensure that the voting franchise is not taken away from citizens that are rightfully able to vote, assuming that once citizens are given the right to vote, it becomes a natural right. (*Hedlund v. Davis* (1956) 47 Cal.2d 75, 81, 301 P.2d 843., *McMillan v. Siemon* (1940) 36 Cal.App.2d 721, 726, 98 P.2d 790). To dissect the disenfranchisement law at hand, courts use a balancing test to reach a verdict. The standard balancing test applied to state disenfranchisement laws says, "the Court must determine

whether the exclusions are necessary to promote a compelling state interest” (*Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627, 89 S. Ct. 1886, 1890, 23 L. Ed. 2d 583 (1969)). The Supreme Court, as well as states courts, has applied these standards to many state cases before to determine if the law is constitutional, and whether or not it unrightfully removes rights from citizens (*Carrington v. Rash*, 380 U.S., at 96, 85 S.Ct., at 780, *Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972)).

Otsuka v. Hite (1966) 64 Cal.2d 596, 607-608, 51 Cal.Rptr. 284, 414 P.2d 412 was one of the first cases in California that explored the state’s intent in creating its felon disenfranchisement law, and set the expectation that the state must have an express interest in order to disenfranchise citizens . It also emphasized the importance of maintaining the voting franchise for Americans. For Article 2, Section 4 of the California Constitution, the underlying state interest lies within the purity of the ballot box. The framers of the California Constitution, and the legislative sessions that have amended Article 2 of the Constitution since then, have argued that felons are more likely to commit voter fraud and contribute to the overall impurity of the voting system than the common voter. Therefore, it is reasonable to remove their voting rights and disenfranchise them while they are serving out a sentence as a felon. This argument is the basis on which many cases regarding the constitutionality of Article 2, Section 4 and its felon disenfranchisement have been deemed acceptable.

§ 1 Who does Article 2, Section 4 apply to, and in what circumstances?

One controversial and ambiguous element within Article 2, Section 4 of the California Constitution is the phrase “imprisoned or on parole for the conviction of a felony.” the language

of the felon disenfranchisement law has changed over time to adhere to Constitution and social norms, but it is important to know the law's history to understand who the law extends to today.

Originally, before the law was amended, the law disenfranchised anyone who had been “convicted of an infamous crime” under Article 2, Section 1. In *Otsuka v. Hite*, the California Supreme Court was tasked with defining and applying important elements within the state's felon disenfranchisement law, like the definitions of “infamous” and “convicted”. Otsuka, a Quaker, refused to participate in any activities that would help military efforts during World War II due to his religious and moral beliefs. He served three years in a penitentiary as punishment for for violating the Selective Service and Training Act of 1940, and then lived out his life as an upstanding citizen. However, twenty years later, he was denied voter registration because of his time served in the penitentiary. Otsuka claimed that the crime he committed should not be considered an “infamous” crime, and that he should be allowed to register to vote. The definition of “infamous” that California relied on extended to any felony committed, which could include illogical crimes like “conspiring to operate a motor vehicle without a muffler,” a crime that was considered a felony because the criminal was conspiring to commit a misdemeanor. The judges of the *Otsuka* court did not have any state precedent to look to for answers, so they relied on the Alabama Supreme Court case, *Washington v. State*, 75 Ala. 582, 1884 WL 489 (1884), to provide a more fair and comprehensible definition of the term “infamous”. The Alabama Supreme Court reasoned that “one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage.” An infamous crime, by this definition, is a crime of “moral corruption and dishonesty.” Using this definition of infamous, the *Otsuka* court decided that the crime Otsuka committed was not morally corrupt, and therefore did not constitute an infamous crime. This definition became the

new precedent set in California, used by other courts until amendments were made to clarify the language.

Another important element within Article 2, Section 4 is the definition of the phrase “imprisoned or on parole,” and how it applies to citizens wishing to register to vote in California. Although this phrase is not as ambiguous as “convicted of an infamous crime,” its definition is still contested in the Legislature and in courts. Does it pertain to all criminals who have been convicted of a felony? Or is there a limit to type of conviction or sentence it applies to? The *League of Women Voters of California v. McPherson*, 145 Cal. App. 4th 1469, 1479, 52 Cal. Rptr. 3d 585, 592 (2006) through the California Court of Appeals, First District, challenged a new definition of “imprisoned” set forth by Attorney General in 2005. The generally accepted definition of “imprisoned” in the California Constitution solely encompassed people serving their time for a felony in a state facility and those who were still serving a term of parole as a condition of their sentence. The Secretary of State requested an opinion from the State Attorney General asking whether “a person who is incarcerated in a local detention facility, such as a county jail, for the conviction of a felony [is] eligible to vote?” (88 Ops.Cal.Atty.Gen. 207 (2005)). The Attorney General, breaking from the definition that had been long accepted, said that all people committed of a felony, no matter what level of a sentence they have been given, should be disenfranchised. The Secretary of State used this opinion to issue an order to all voting registrants to bar all felons from voting, no matter what system they were placed in. The League of Women Voters filed a petition for a writ of mandate on behalf of the over 145,000 newly disenfranchised felons, which the court granted when they declared that the Attorney General had misinterpreted the intent of the Legislature that had amended Article 2, Section 4.

The common definition of “imprisoned,” which is commonly used by courts, refers to anyone in prison as a condition of their sentence. A prison, a state or federal facility where criminals are held for longer sentences, is differentiated from a jail, which is usually a locally-operated facility that holds criminals for short-term sentences. In addition, the court reasoned that the term “parole” generally refers to someone serving an additional part of their sentence following time in a state prison. Coupled together, the phrase “imprisoned or on parole,” solely refers to people convicted of a felony who are wards of the state prison system. The court in the *League of Women Voters* case used these common definitions to interpret the true intent behind Article 2, Section 4, and overturned the Attorney General’s opinion, and thus granted all of the newly disenfranchised felons the ability to vote again.

Whereas *League of Women Voters v. McPherson* looked at the scope of convicted felons within the state of California, *Flood v. Riggs*, 80 Cal. App. 3d 138, 145 Cal. Rptr. 573 (Ct. App. 1978) found that Article 2, Section 4 of the California Constitution is a blanket rule that applies to people convicted in any state who are trying to register to vote within California. Flood, a formerly convicted felon, tried to register to vote within Alameda County, but was refused registration due to an incomplete parole sentence in Mississippi. The state’s intent when disenfranchising felons, as discussed earlier, is to preserve the purity of the ballot box and keep those who are “morally corrupt and dishonest” from disturbing the sanctity of the voting system. The court used this plain and intended meaning of “imprisoned or on parole” to survey Flood’s situation. They came to the conclusion that the felon disenfranchisement law applies to anyone who has been convicted of a felony and is serving out their sentence, regardless of which state they are from, because they are a danger to the purity of the ballot box.

In summary, Article 2, Section 4 applies to people convicted of a felony who are serving out their sentence in a state-run prison or are on parole following time in a state-run prison. The term “state-run prison” refers to prisons in all states, not just California. When deciding cases, the courts heavily scrutinize each situation, as well as the felon disenfranchisement law itself, to make sure that as many citizens retain their voting rights as possible. To do this, they apply a test that looks at the plain and intended meaning behind the rule to ensure it does not violate the federal Constitution and the Voting Rights Act.

III. Justifications of Article 2, Section 4

§ 1 Justifications under the 14th Amendment

The 14th Amendment was ratified in 1868, in the wake of the Civil War and Emancipation. This amendment was born out of the tumultuous decades that preceded it. The framers sought to protect the newly freed slaves and reestablish the power of the federal government. The amendment clarified who is afforded the rights endowed in the constitution, and the extent to which those rights should be protected. Section 1 granted citizenship, and the rights that accompany citizenship, to all people “born or naturalized in the United States”. Section 1 also protected those rights from being abridged by the states: “...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,” (U.S. Const. amend. XIV). The last element in section 1 has been called the Equal Protection Clause. This clause establishes the federal government’s power to review the equality of the actions and laws of the states. The Equal Protection Clause has been the cornerstone of many movements, including civil rights, gender rights, reproductive rights, and election reform.

The right to vote has been deemed a fundamental right and laws that affect this right are subject to strict scrutiny (*Dunn v. Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972)). Strict scrutiny is a standard that requires the state to have a compelling interest to impose limits on the right, and the limitation must be the least restrictive means of achieving that end. In *Otsuka v Hite*, the state established its interest in barring felons from voting by reasoning that it was to maintain ‘the purity of the ballot box.’ Although the felon disenfranchisement rules are founded on a compelling state interest, they cannot explicitly violate the constitution. The state’s interest in maintaining the purity of the ballot box is constitutionally legitimate, but the rule the state uses to fulfill that interest may not pass constitutional muster. By stripping convicted felons of their right to vote, Article 2 Section 4 of the California Constitution denies a certain class of individuals equal protection. This seems to violate the 14th Amendment equal protection clause. This issue was addressed in *Richardson v Ramirez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551, 72 O.O.2d 232. Richardson and two other convicted felons sued their respective county election clerks, asking for a writ of mandate to require the county election clerks to register them as voters. The California Supreme Court heard the case and found Article 2, Section 4 of the California Constitution violated the Equal Protection Clause. The election clerks appealed to the US Supreme Court. The majority opinion reversed with the lower court’s ruling. The majority looked to the framers’ intent of the 14th Amendment and found this law was justified. There is a provision in Section 2 of the amendment that explicitly exempted citizens who participated “in rebellion, or other crime,” from equal representation (*U.S. Const. amend. XIV*). In the court’s eyes, if the framers of the amendment exempted criminals from equal representation, then a law restricting a criminal’s right to vote would also be justified. Felon disenfranchisement was found to be justified in intent of this section.

The justifications in *Richardson* and *Otsuka* have not saved the law from all 14th Amendment questions. Although voting is a fundamental right, the court has deemed the state's interest in barring felons is legitimate (*Otsuka v Hite*) and their means of fulfilling that interest is also legitimate (*Richardson v Ramirez*). However, laws disenfranchising felons may violate the 14th Amendment on other grounds. There are racial disparities in the effect of these laws. 1 in 13 African Americans have lost their right to vote because of these laws, while only 1 in 56 non-black voters have lost their rights at some point (Felon). Race is a suspect classification under the 14th amendment. Cases involving the broad issue of racial discrimination are subject to strict scrutiny; however, the court rarely finds the state's interest to discriminate based on race to be legitimate. Racial disenfranchisement has been deemed unconstitutional (*Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), *Brown v Board of Education* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)).

At face value, felony disenfranchisement laws seem to be racially neutral; but they may have been founded with the intent to disenfranchise a racial group. The test for whether a law violates the EPC was established in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, S.Ct. 555, 566 (1977) and *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 103, 100 S. Ct. 1490, 1518, 64 L. Ed. 2d 47 (1980). The law must be founded with a racially discriminatory intent and have a racially disparate effect. Proving that felony disenfranchisement laws are founded with a racially discriminatory intent is a difficult burden to meet. Many cases challenging these rules on 14th amendment grounds have failed to prove intent (*Hayden v. Paterson*, 594 F.3d 150, 171 (2d Cir. 2010), *City of Mobile, Ala. v. Bolden*). For felon disenfranchisement laws this burden has only been met once, in the case of *Hunter v. Underwood*, 471 U.S. 222, 229, 105 S. Ct. 1916, 1920, 85 L. Ed. 2d 222 (1985). Three Alabama

residents were convicted of presenting a worthless check, a crime of ‘moral turpitude,’ and were subsequently barred from voting in accordance to the Alabama Constitution. This provision, written in a 1901 constitutional convention, barred individuals convicted of crimes of ‘moral turpitude’ along with several other offenses. The convicts sued the board of registrars in their respective counties on grounds that this law was founded to disenfranchise African American citizens and therefore violated the Equal Protection Clause. The court investigated the debate during the 1901 constitutional convention and found some very compelling language:

“And what is it that we want to do? Why it is within the limits imposed by the Federal, to establish white supremacy in this State.” Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901 (quoting from *Hunter v. Underwood*.)

The court found this quote to embody the sentiments of the body that enacted this law. They determined the felony disenfranchisement rule in the Alabama constitution was founded with the purpose of racial discrimination, and the law had a racially discriminate effect, so it therefore violated the EPC of the 14th amendment. The court acknowledged section 2 of the amendment and the justification used in *Richardson v Ramirez*. But they determined that the framers of the amendment did not intend section 4 to exempt racially discriminate laws from the EPC.

§ 2 Justification Under the Voting Rights Act

The Voting Rights Act of 1965 is one of the most effective pieces of federal civil rights legislation in US history. It was passed to protect minority voting rights. Since the Civil War and the passage of the 14th and 15th Amendments, many Southern states employed poll taxes and literacy tests, which were all passed to effectively disenfranchise African Americans. The law

included general provisions that applied to all states, and specific provisions that applied only to jurisdictions with histories of racial discrimination. Section 2 of Title 1 is a general provision outlawing any practice that may disenfranchise a racial group:

“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” (52 U.S.C. § 10301 (West))

Other provisions require specific jurisdictions to submit any law affecting the voting process to the District Court of DC or the US Department of Justice for review. These requirements were recently deemed outdated and unconstitutional in the case of *Shelby County, Ala. v. Holder*, 570 U.S. 529, 594, 133 S. Ct. 2612 (2013). However, precedent still allows a private plaintiff to sue the state to enforce these standards.

In felon disenfranchisement cases, the same test used for possible 14th amendment discrimination violations, the *Mobile v. Bolden* test, is used in VRA cases. The challengers of the law must prove that the law was created to discriminate on account of race, and the law must also have a racially discriminate effect. This standard was reinterpreted in *Farrakhan v Gregoire* 623 F.3d 990 (9th Cir. 2010), a case challenging Washington’s felony disenfranchisement laws.

The plaintiffs, who were convicted felons, sued the State of Washington, claiming the felony disenfranchisement law violated the VRA by denying them the right to vote on account of race.

The 9th Circuit Court took a slightly different approach when it weighed the facts in the *Mobile* test. They recognized it is very difficult to prove an explicit racial intent. So, instead of solely looking for intent in the drafting of the law, they also decided to accept evidence on racial discrimination in the criminal justice system. If the criminal justice system discriminates on

account of race, then the state would effectively be taking away their right to vote on account of race. However, the plaintiffs did not present any evidence the criminal justice system was racially discriminate, so the law was upheld. This new test may insight a massive shift in the way felon disenfranchisement laws are handled by the courts.

IV. Where is the law going?

Through our discussion of California's evolving felon disenfranchisement law, as well as federal actions to protect the voting franchise, it is clear that by current standards the California law is legitimate. However, in the words of 9th Circuit Court Justice Hufstедler: "constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber; rather, notions of what constitutes equal treatment for purposes of the equal protection clause do change" (*Dillenburg v. Kramer*, 469 F.2d 1222 (9th Cir. 1972)). The concepts these courts have previously ruled on can change. The change to the *Mobile* test in *Farrahkan* may open up the floodgates for felon disenfranchisement cases claiming a VRA infringement. In these theoretical cases, the court would need to not only scrutinize the intent of the disenfranchisement law, but also the intent of the criminal justice system, which affects who gets convicted in the first place. If they find that the California criminal justice system has indeed been laced with racially discriminatory intent, then the court may be able to overturn Article 2, Section 4, and replace it with language that broadens the franchise fairly to more citizens.

Bibliography:

"Criminal Disenfranchisement Laws Across the United States." Brennan Center for Justice. Accessed March 22, 2018. <http://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states>.

Felony Disenfranchisement. (n.d.). Retrieved March 22, 2018, from <https://www.sentencingproject.org/issues/felony-disenfranchisement/>

SAMPLE