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## Expansion of the Equal Protection Clause as a Constitutional Challenge to State Laws Disfranchising Felons.

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a desirable goal, because, despite the Act's laudable purposes, the time is ripe to change this legislation, for "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." <sup>48</sup>

*Charles E. Beck*

VOTING—CLASSES OF PERSONS NOT QUALIFIED TO VOTE—EXPANSION OF THE EQUAL PROTECTION CLAUSE AS A CONSTITUTIONAL CHALLENGE TO STATE LAWS DISFRANCHISING FELONS—TEX. CONST. ART. VI, § 1; TEX. ELECTION CODE ANN. Art. 5.01 (1963).

Four classes of persons are presently excluded from exercising the right to vote in Texas.<sup>1</sup> The first three classes are the young, the feeble-minded, and the paupers who are dependent on the county. The final category excludes "[a]ll persons convicted of any felony"<sup>2</sup> whose civil rights have not been restored.

From its inception as a republic, Texas has prevented certain of its citizens from voting. Today's disfranchisement statute is merely an abridged version of past enactments.<sup>3</sup> Philosophically, the state constitutional conventions have considered it unwise to allow all citizens to vote, especially those "convicted of certain crimes on the basis that . . . the polls should be guarded against unsafe elements."<sup>4</sup> At the most recent constitutional gathering, the

48. *Baggett v. Bullitt*, 377 U.S. 360, 367, 84 S. Ct. 1316, 1320, 12 L. Ed. 2d 377, 382 (1964).

1. The Texas constitutional and statutory provisions are practically identical. TEX. CONST. art. VI, § 1 provides:

The following classes of persons shall not be allowed to vote in this State, to-wit:

First: Persons under twenty-one (21) years of age.

Second: Idiots and lunatics.

Third: All paupers supported by any county.

Fourth: All persons convicted of any felony, subject to such exceptions as the Legislature may make.

TEX. ELECTION CODE ANN. art. 5.01 (1967) provides:

The following classes of persons shall not be allowed to vote in this state:

1. Persons under twenty-one years of age.

2. Idiots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

2. TEX. CONST. art. VI, § 1; TEX. ELECTION CODE ANN. art. 5.01 (1967).

3. The list of crimes which resulted in disfranchisement in Texas has included: bribery, perjury, forgery, high crimes and misdemeanors. Until 1954, military personnel were also excluded from voting where they were stationed in Texas. TEX. CONST. art. VI, § 1 (interpretive comment).

4. *Id.*

definition of "certain crimes" was limited to felonies.<sup>5</sup>

The history of the common law indicates that civil and corporal penalties often accompanied a criminal conviction. In England, the "attainder" procedure resulted in corruption of blood, forfeiture and the loss of all civil rights.<sup>6</sup> Indeed, disfranchisement would have been considered a minor hardship compared to the punishments that awaited some felons, such as branding, whipping and pillory. The "civil death" that accompanied the commission of a felony in England was intended as a further and continuing punishment for the perpetrator.<sup>7</sup> While the sanctions may not have been as severe, the early history of the United States shows an adoption of the notion that convicted felons have somehow forfeited (among other rights) the right to vote.<sup>8</sup>

In recent years, many of the traditional barriers to voting have fallen as both courts and Congress assumed a more active role in determining qualifications for voting.<sup>9</sup> The restrictions remaining in other states resemble those still existing in Texas. Generally, age, soundness of mind, and prior conviction for felony or serious crime endure as barriers to total enfranchisement.

Attacks on the constitutionality of disfranchisement of felons have been relatively infrequent. Traditionally, courts have upheld state disfranchising laws.<sup>10</sup> Until recently federal courts rarely allowed the constitutionality issue to be raised before a three-judge court as required by 28 U.S.C. § 2281.<sup>11</sup> The refusal usually rested on the court's determination that the plaintiff felon had failed to raise a sufficient federal question. This posi-

5. *Id.*

6. *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942-45 (1970).

7. *Id.* at 944.

8. Du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges": Beyond Green v. Board of Elections of New York City*, 19 DE PAUL L. REV. 112, 113 (1969).

9. See, e.g., Voting Rights Act of 1965, 42 U.S.C. § 1971 (1970); Dillenberg v. Kramer, — F.2d — (9th Cir. 1972); Hayes v. Williams, 341 F. Supp. 182 (S.D. Tex. 1972); Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970); Otsuka v. Hite, 51 Cal. Rptr. 284 (1966).

10. See, e.g., Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963); Trop v. Dulles, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); Davis v. Beason, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

11. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such state in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the constitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. 28 U.S.C. § 2281 (1970); see, e.g., Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); Hayes v. Williams, 341 F. Supp. 182 (S.D. Tex. 1972).

tion was not without precedent, for our judicial history is laden with cases supporting the idea that the power to set voter qualifications is reserved to the states.<sup>12</sup>

The theory that deprivation of voting rights is merely an additional punishment for the felon has necessarily been modified over the years. A policy of disfranchisement based on the punishment theory would no longer withstand a constitutional challenge alleging it to be a bill of attainder. A new justification was given birth in 1884 by the case of *Washington v. State*.<sup>13</sup> The Alabama Supreme Court held that the states are obliged to "preserve the purity of the ballot box" by excluding those who have become "unfit" to vote as a result of felony conviction.<sup>14</sup> The more recent case of *Trop v. Dulles*<sup>15</sup> expresses a similar opinion in holding that the exclusion of felons from voting is not punishment but a "nonpenal exercise of the power to regulate the franchise."<sup>16</sup> The test used by this line of cases places a much heavier burden on the plaintiff to justify his constitutional challenge than on the state to meet it: "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."<sup>17</sup> Even if a citizen were otherwise qualified to vote, the mere fact that he had been convicted of a felonious crime was sufficient to justify his exclusion from the franchise.<sup>18</sup> The United States Court of Appeals for the Second Circuit best expressed the feeling of those who would maintain present exclusions based on convictions when it held:

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of

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12. See, e.g., *Pope v. Williams*, 193 U.S. 621, 24 S. Ct. 573, 45 L. Ed. 817 (1904); *Pirtle v. Brown*, 118 F.2d 218 (6th Cir.), cert. denied, 314 U.S. 621 (1941); *Morgan v. Katzenbach*, 247 F. Supp. 196 (D.D.C. 1965), rev'd on other grounds, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966); *Stuard v. Thompson*, 251 S.W. 277 (Tex. Civ. App.—Fort Worth 1923, no writ); *Savage v. Umphries*, 118 S.W. 893 (Tex. Civ. App. 1909, no writ).

13. 75 Ala. 582 (1884).

14. The presumption is, that one rendered infamous by conviction of [a] felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the state with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the state itself, at least in close political contests.  
*Id.* at 585.

15. 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

16. *Id.* at 97, 78 S. Ct. at 596, 2 L. Ed. 2d at 640.

17. *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 584, 55 S. Ct. 538, 540, 79 L. Ed. 1070, 1072 (1935), cited in *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968).

18. *Beacham v. Braterman*, 300 F. Supp. 182, 183 (S.D. Fla.), aff'd mem., 396 U.S. 12, 90 S. Ct. 153, 24 L. Ed. 2d 11 (1969).

the heavy incidence of recidivism and the prevalence of organized crime. . . . 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.<sup>19</sup>

As a result of the traditional "hands-off" approach to state disfranchising laws, a multiplicity of standards has been set up by the various states.<sup>20</sup> Remarkable differences exist between states as to which crimes, if any, result in disfranchisement. The confusion is increased when it is realized that states must deal not only with their own definitions of disfranchising crimes, but, as regards out-of-state convictions, with those of other jurisdictions as well.

One of the most recent cases following the majority view on the constitutionality of disfranchisement of felons is *Hayes v. Williams*<sup>21</sup> which specifically upholds the constitutionality of the Texas statutory and constitutional provisions. The *Hayes* case was a suit by a felon who sought to run for the Texas Legislature but was barred as candidates are required to be "qualified voters." His constitutional challenge of the Texas disfranchisement law was based, in part, upon the equal protection clause of the fourteenth amendment.

In denying the request for submission to a three-judge panel, the court made a direct analogy between the *Hayes* case and *Green v. Board of Elections*.<sup>22</sup> The court asserted that the rationale used by the *Green* court in supporting the statute was similar to that which motivated the writers of the Texas Constitution:

A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.<sup>23</sup>

This reasoning suggests how philosophically close the penalty theory is to the "purity of the ballot box" theory. When the *Hayes* court quotes from the *Green* decision a passage to the effect that the felon has abandoned his right to participate, it might just as well have said that a criminal conviction is punishable, not only by imprisonment or fine, but also by deprivation of one's civil rights. Inasmuch as the right to vote is widely recognized as the guarantor of all rights,<sup>24</sup> when a citizen is deprived of the franchise, has

19. *Green v. Board of Elections*, 380 F.2d 445, 451-52 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

20. See Note, *The Equal Protection Clause as a Limitation on the State's Power to Disfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297 (1967).

21. 341 F. Supp. 182 (S.D. Tex. 1972).

22. 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

23. *Id.* at 451, *cited in Hayes v. Williams*, 341 F. Supp. 182, 189 (S.D. Tex. 1972).

24. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 1071, 30 L. Ed. 220, 226 (1886).

he not become something less than a citizen with something less than full rights?

The *Hayes* court pursued the line of least resistance by taking the traditional approach to the equal protection clause. The court apparently did not feel it necessary to extend its constitutional justification of the Texas law much beyond the reasoning found in the *Green* opinion. In doing so, however, it ignored a series of decisions initiated within the last decade suggesting a trend toward more successful attacks on the disfranchisement statutes.

One jurist who did take serious note of the new trend toward greater judicial intervention in voting qualification laws was Justice Harlan. On several occasions he expressed his disfavor with the new trend through lengthy dissenting opinions.<sup>25</sup> It was his contention that those who framed and ratified the fourteenth amendment had no intention of allowing its use as a guarantor of voting rights.<sup>26</sup>

Attacks on disfranchisement laws have been made using a variety of constitutional provisions, but were generally unsuccessful<sup>27</sup> until the Supreme Court began expanding the role of the fourteenth amendment into the voting area. In *Harper v. Virginia Board of Elections*,<sup>28</sup> the Court cited *Reynolds v. Sims*<sup>29</sup> in holding that the states' prerogative in the voting area is limited to the setting of nondiscriminatory standards:

[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially 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.<sup>30</sup>

The most important part of the opinion is that dealing with the historical flexibility of the equal protection clause:

[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue

25. See Justice Harlan's dissenting opinions in: *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S. Ct. 1079, 1089, 16 L. Ed. 2d 169, 180 (1966); *Carrington v. Rash*, 280 U.S. 89, 97, 85 S. Ct. 775, 781, 13 L. Ed. 2d 675, 681 (1965); *Reynolds v. Sims*, 377 U.S. 533, 589, 84 S. Ct. 1362, 1395, 12 L. Ed. 2d 506, 543 (1964).

26. *Reynolds v. Sims*, 377 U.S. 533, 607, 84 S. Ct. 1362, 1405, 12 L. Ed. 2d 506, 553 (1964).

27. *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 983-84 (1970).

28. 383 U.S. 663, 86 S. Ct. 1079, 16 L. Ed. 2d 169 (1966).

29. 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964).

30. *Id.* at 561-62, 84 S. Ct. at 1381, 12 L. Ed. 2d at 506, cited in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667, 86 S. Ct. 1079, 1082, 16 L. Ed. 2d 169, 173 (1966).

of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.<sup>31</sup>

Less than 2 months after the *Harper* decision, the California Supreme Court handed down an opinion that applied the newly-widened scope of the equal protection clause to that state's disfranchisement statute.<sup>32</sup> The law excluded those who had been convicted of "infamous crimes." The test applied was that the state must have a "compelling interest in abridging the right [of voting], and that in any event such restrictions must be drawn with narrow specificity."<sup>33</sup> The court did not deny that grounds might conceivably be found to exclude felons. It required, however, that in determining who will be excluded, the nature of the crime should be determinative.<sup>34</sup> The significance of this standard is that it marks a turning away from the easily applied, but less defensible, process of excluding all members of a class (felons) *per se*. By looking beyond the mere existence of a criminal record, there is a judicial recognition that felons deserve to be treated as individuals much as their "clean" fellow citizens. The case of *Otsuka v. Hite*<sup>35</sup> marks the first time this idea, expressed previously by the Supreme Court,<sup>36</sup> was applied to the disfranchisement of felons controversy.

In 1970, a three-judge federal court found the New Jersey disfranchisement statute unconstitutional as a violation of the equal protection clause.<sup>37</sup> In doing so, the court used the reasoning of the Supreme Court case of *Evans v. Cornman*<sup>38</sup> that held unconstitutional a Maryland law excluding residents of federal reservations from voting:

While disfranchising classifications may be permissible, they are, under the fourteenth amendment, decidedly suspect. They may only be justified if they bear a rational relationship to the achievement of a discernable and permissible state goal.<sup>39</sup>

By the time of the *Stephens v. Yeomans*<sup>40</sup> decision, the new trend of broadly interpreting the fourteenth amendment had become so widely accepted that

31. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669, 86 S. Ct. 1079, 1083, 16 L. Ed. 2d 169, 174 (1966) (court's emphasis) (citations omitted).

32. *Otsuka v. Hite*, 51 Cal. Rptr. 284 (1966).

33. *Id.* at 288.

34. [T]he inquiry must 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.* at 294.

35. 51 Cal. Rptr. 284 (1966).

36. *See, e.g., Carrington v. Rush*, 380 U.S. 89, 85 S. Ct. 775, 13 L. Ed. 2d 675 (1965).

37. *Stephens v. Yeomans*, 327 F. Supp. 1182 (D.N.J. 1970).

38. 398 U.S. 419, 90 S. Ct. 1752, 26 L. Ed. 2d 370 (1970).

39. *Stephens v. Yeomans*, 327 F. Supp. 1182, 1186 (D.N.J. 1970).

40. 327 F. Supp. 1182 (D.N.J. 1970).

the court could easily excuse Justice Harlan's vigorous dissents as merely historical dicta.<sup>41</sup>

When the Supreme Court spoke on the subject of disfranchisement last year, it became apparent that the new composition of the Court had not slowed the trend toward expansion of the equal protection clause. The Court's test recites the most stringent standards yet for the states in defending equal protection challenges:

To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification; the individual interests affected by the classification; and the governmental interests asserted in support of the classification.<sup>42</sup>

As pointed out in *Dillenburg v. Kramer*,<sup>43</sup> the new standards are more than ever concerned with protecting the rights of the individual. It is no longer sufficient that a disfranchisement classification is somehow rationally connected with a legitimate goal of government:

[I]t is certainly clear now that a more exacting test is required for any statute that places a condition on the exercise of the "right to vote." . . . 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.<sup>44</sup>

The *Dillenburg* opinion refers favorably to the *Stephens* and *Otsuka* cases as two cases which achieved the rare distinction of dealing with the real issue in the disfranchisement debate, that is, whether the classifications have anything to do with preserving the integrity of the election process or if there is any genuine distinction between offenses which disfranchise and those which do not.<sup>45</sup>

A logical extension of the current trend is the implication that, in the near future, the courts will determine that the "constitutionally valid distinction" has ceased to exist. As more emphasis is placed on protecting individual rights, the burden of showing an overriding state interest will become increasingly difficult to meet. An evaluation of the current state of the case law suggests that the courts have started to ask the right questions.

Society has long given lip service to the goal of rehabilitating its criminals as well as punishing them. Were the courts to take judicial notice of this

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41. Justice Harlan's view has not prevailed, and it is now established that a state voter classification disfranchising resident citizens must pass equal protection muster under the equal protection clause of the fourteenth amendment. *Id.* at 1185.

42. *Dunn v. Blumstein*, — U.S. —, —, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274, 280 (1972).

43. — F.2d — (9th Cir. 1972). The court granted a hearing before a three-judge panel in accordance with 28 U.S.C. § 2281.

44. *Dunn v. Blumstein*, — U.S. —, —, 92 S. Ct. 995, 999, 31 L. Ed. 2d 274, 281 (1972) (court's emphasis), *cited in Dillenburg v. Kramer*, — F.2d — (9th Cir. 1972).

45. *Dillenburg v. Kramer*, — F.2d — (9th Cir. 1972).



goal, a new standard might be called for in the constitutional determination of disfranchisement laws. As a prerequisite to being upheld, it might be asked concerning the law: Can this statute be justified in light of the national goal of rehabilitation and readmission of the felon into society?

Ideally, the criminal offender, through rehabilitation, is prepared for re-entry into society. Having the necessary tools and emotional state of mind that rehabilitation allegedly provides him, the ex-con is supposed to make a smooth adjustment to the outside world. Realizing that he has "paid his debt to society," the rehabilitated criminal should encounter few problems in being accepted. That this ideal transition back to the "world" is not the standard pattern is a matter of common knowledge. Even after release, a felon's fellow citizens are often only too willing to remind him of his special status.<sup>46</sup> The last thing the felon needs or wants is to be treated differently. By being singled out as not deserving of the vote, the offender is reminded again of his second-class citizenship. It is probably too much to expect that he will begin following the standards of a society that has deprived him of an effective legal voice, the vote.

The irony of this situation is compounded by the knowledge that some states allow a felon to vote as soon as he is released from prison.<sup>47</sup> In most states, the felon is required to apply for restoration of his civil rights in order to regain the vote.<sup>48</sup> The fact that the power to pardon is discretionary tends to discourage applications. Respect for the system is not enhanced when violators of the same laws are treated differently by the pardoning authority.

Isn't the felon, by seeking the vote, showing his intention to complete rehabilitation and assume the obligations of citizenship? Yet it seems that states which deny automatic reenfranchisement leave little alternative to fel-

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46. Once the offender is released from custody, civil disabilities discourage him from participating in normal community life by preventing him from engaging in activities that other members of the community routinely perform. These disabilities pervade his post-release life, inhibiting his conduct and according him special treatment in each area regulated. As a consequence, the offender is segregated from society and cannot pursue an ordinary life. The offender's life style, for example, is radically changed by many occupational and professional disabilities that frequently prevent him from practicing his former profession and force him to accept demeaning employment. Moreover, typical requirements that ex-convicts must register with local authorities may impede some individuals from travel, even to a nearby town. *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1226 (1970).

47. West Virginia allows its released felons to vote, at least by the end of their terms of conviction. Pennsylvania, New Hampshire and Utah allow most of their released felons to vote except for a minimum number usually limited to those convicted of election offenses or treason. *Id.* at 976-78. As yet there is no evidence that this policy has, in any way, had a detrimental effect on the citizens of these states.

48. All states except Rhode Island provide a formalized pardoning procedure of some type. In Rhode Island, the felon must appeal to the legislature on an individual basis. *Id.* at 1143-44.