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NOTES

Constitutional Law—Equal Protection—Denial of the Franchise to Individuals with Criminal Records

In 1961 Robert A. Stephens, a resident of New Jersey, was convicted of larceny of an automobile in the County Court of Essex County, New Jersey. He received a sentence of probation for three years. On May 27, 1968, Mr. Stephens registered as a voter with the Essex County Board of Elections and was thereafter notified that his name had been stricken from the voting lists because of his prior conviction for larceny. Election officials acted under a 1948 New Jersey statute¹ that provided for the automatic loss of voting rights of those convicted of various and sundry crimes.

Desiring to vote and otherwise qualified to vote in the November 3, 1970, general election for federal and state candidates, Stephens brought an action before a three-judge district court seeking an injunction restraining the Superintendent of Elections of New Jersey from enforcing the statute. He argued that his disenfranchisement deprived him of the equal protection of the laws.

In *Stephens v. Yeomans*² the three-judge court held that state voter qualification laws were indeed covered by the fourteenth amendment and that to pass muster under the equal protection clause all state laws disenfranchising resident citizens must bear a rational relationship to the achievement of a discernible and permissible state goal.³ The court determined that the purpose of the New Jersey Legislature in passing the statute was to insure and preserve the purity of the state electoral process. This determination was based on the facts that the New Jersey Legislature derived the power to pass this specific statute from language

¹N.J. STAT. ANN. § 19:4-1 (1964) provides: "No one shall have the right of suffrage—

(4) Who shall hereafter be convicted of the crime of larceny of the value of \$200.00 or more, unless pardoned or restored by law to the right of suffrage"

²327 F. Supp. 1182 (D.N.J. 1970).

³*Id.* at 1187. Although the court purported to be utilizing the rigorous equal protection test demanded when a fundamental right is involved, *see, e.g., Baker v. Carr*, 369 U.S. 186 (1962), it couched the standard in terms of the traditional and more lenient test, *see, e.g., McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Thus it required only a "rational relationship" between the avowed state purpose and the legislation instead of a showing of a "compelling state interest" in it. *See, e.g., Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). *See generally Cox, Foreword to The Supreme Court, 1966 Term*, 80 HARV. L. REV. 91, 94-95 (1967).

in the state constitutional article on suffrage⁴ and that the statute itself was located in the title on elections. Finding no rational relationship between the crimes conviction of which would disqualify and the state's purpose of protecting the ballot box, the court struck down the statute as unconstitutional for not meeting the "exacting standard of precision required by the equal protection clause for a selective distribution of the franchise."⁵ The Superintendent of Elections was then ordered to restore plaintiff's name to the voter list in time to vote in the next general election.

The *Stephens* court, in basing its holding on the fourteenth amendment, pointed out the disagreement among constitutional scholars as to the applicability of the equal protection clause to state voter qualification laws. The equal protection clause is contained in the first section of the fourteenth amendment and does not specifically mention voting rights.⁶ On the other hand, the second section of the fourteenth amendment speaks expressly to protection of voting rights.⁷ Since these two sections were obviously passed simultaneously, the argument exists that only the second section was intended to pertain to state voting laws.⁸ Justice Harlan has recently articulated this argument, and interpretations contemporaneous with the adoption of the fourteenth amendment lend strong support to his position.⁹

However, as the *Stephens* court noted, this view is not currently accepted by the Supreme Court.¹⁰ In fact, the Court has often used the equal protection clause in its attempts to eliminate voter discrimination

⁴Article 2, paragraph 7 of the New Jersey Constitution provides: "The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right."

⁵327 F. Supp. at 1188.

⁶U.S. CONST. amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁷U.S. CONST. amend. XIV, § 2:

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote . . . [in certain elections] is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, 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.

⁸See *Reynolds v. Sims*, 377 U.S. 533, 589 (1964) (Harlan, J., dissenting).

⁹*Id.* at 626-631.

¹⁰See *Reynolds v. Sims*, 377 U.S. 533 (1964).

based upon race,¹¹ wealth,¹² or place of residence.¹³ The main purpose of the second section is to sanction states' engaging in voter discrimination by reducing their representation in Congress. Thus, if the second section were the sole touchstone in the realm of voting rights, then reduction in representation would be the only possible remedy for deprivation of such rights. This unduly restrictive interpretation of remedies was implicitly rejected by the Supreme Court when it approved a damages action against Texas election commissioners for violation of the fourteenth amendment in denying the right to vote because of race.¹⁴ The *Stephens* court considered this an overwhelming rejection of the Harlan argument that the second section completely precludes the protection of voting rights from any other source.¹⁵

Anticipating this reaction, the New Jersey Superintendent of Elections argued, as have several state attorneys-general while defending statutes denying the vote to those convicted of certain crimes, that even if the first section of the fourteenth amendment applies to state voter laws, it is nonetheless limited to some extent by the language of the second section.¹⁶ The sanction outlined in the second section specifically exempts the situation in which the franchise is denied participants "in rebellion or other crime." Since the second section seemingly approves of this particular discrimination, such discrimination must be beyond the reach of the equal protection clause as well. The Court of Appeals for the Second Circuit found this argument persuasive in *Green v. Board of Elections*,¹⁷ in which a New York statute disenfranchising all felons was upheld.¹⁸ Judge Friendly, writing for the court, found that the rejection of Harlan's position by the Supreme Court in no way precluded this interpretation, "especially in the light of the Justices' frequent and consistent statements approving voting disqualification for felony."¹⁹ How-

¹¹*E.g.*, *Smith v. Allwright*, 321 U.S. 649 (1944).

¹²*E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

¹³*E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁴*Nixon v. Herndon*, 273 U.S. 536 (1927).

¹⁵327 F. Supp. at 1185.

¹⁶*See, e.g.*, *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla.), *aff'd per curiam*, 396 U.S. 12 (1969).

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

¹⁸*See generally* W. Crumpler, Research Paper on Administration of Criminal Justice, May, 1971 (unpublished paper in possession of author).

¹⁹*Id.* at 452. The *Green* court, in approving the disqualification of felons, stated, "The framers of the Amendment . . . could hardly have intended the general language of § 1 to outlaw a discrimination which § 2 expressly allowed without the penalty of reduced representation." *Id.* However, the court earlier in the opinion had admitted that "[t]here may . . . be crimes . . . which

ever, the *Stephens* court also rejected this argument, concluding that since it was "clear that the entire section imposes no limitation on section 1, it can hardly be argued that the exception or proviso relied on in *Green* in section 2 was intended to impose such a limitation."²⁰ The court felt that the express exception to the second section in no way permeated other parts of the Constitution. The framers of the fourteenth amendment apparently thought the remedy of reduced representation inappropriate if states denied criminals the right to vote.²¹ To apply the exception across the board would distort the framers' words beyond their true meaning.

After so artfully construing the fourteenth amendment, the court sought the rational link²² between the legislation and its avowedly permissible purpose. In examining the reasons the state might have in disenfranchising convicted criminals, the court ignored the oft-cited one of additional punishment;²³ instead the court concentrated on the protection of the electoral process, since the actions of the New Jersey legislature clearly were directed towards this purpose. The preservation of the purity of the ballot box was first recognized in a frequently quoted Alabama case, *Washington v. State*,²⁴ and has been recognized by many courts as being a valid state consideration.²⁵ However, the *Stephens* court determined that the New Jersey statute did nothing to enhance the purity of the process because of a "remarkable contrast in treatment"²⁶ of different classes of crime. For example, embezzlers and most defrauders, including persons convicted of income tax fraud, remained eligible to vote; however, those convicted of larceny were ineligible. Thieves were disenfranchised but receivers of stolen property were not.²⁷ Such randomness of disqualification seemed totally "irrational and inconsis-

are of such minor significance that exclusion for their commission might raise . . . a substantial constitutional question at least if we looked at § 1 of the Fourteenth Amendment alone." *Id.* Thus, *Green* can fairly be read as holding only that the disqualification of felons does not deny equal protection and not that the qualification is exempt from the penumbra of equal protection.

²⁰327 F. Supp. at 1187.

²¹*Id.* at 1185.

²²*Id.* at 1187; see note 3 *supra*.

²³See *Trop v. Dulles*, 356 U.S. 86 (1958); *State ex rel. Barrett v. Sartorius*, 351 Mo. 1237, 175 S.W.2d 787 (1943).

²⁴75 Ala. 582 (1884).

²⁵See *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966); *State ex rel. Barrett v. Sartorius*, 351 Mo. 1237, 175 S.W.2d 787 (1943).

²⁶327 F. Supp. at 1188.

²⁷*Id.*

ent" to the court and could not be explained. Though possibly designed to protect a permissible state purpose, the statute had no rational relation to the accomplishment of this purpose.²⁸

As mentioned earlier, a second general reason often given for disenfranchising those convicted of crime is additional punishment for the crime. The punishment argument is open to attack on two grounds. First, most state constitutions do not provide for disfranchisement as part of permissible state punishment;²⁹ therefore, such an argument could be attacked as being repugnant to the state constitution. Secondly, such additional punishment could be attacked as "cruel and unusual" under the eighth amendment. In *Trop v. Dulles*,³⁰ the Supreme Court, though finding citizenship not subject to the general powers of the national government and therefore not susceptible to divestment under these powers, said that the eighth amendment would preclude a *penal* divestment of citizenship. In dictum, however, the Court dealt the punishment argument a blow by stating that voter disqualification for conviction of crime was nonpenal³¹ in nature because its purpose was to designate a reasonable ground of eligibility for voting.³² Notwithstanding this dictum, an analogy might be constructed between citizenship and the right to vote that would place the removal of voting rights in the realm of cruel and unusual punishment if states proceed on the punishment theory.

The *Stephens* court seemed to recognize the possible existence of a legal justification for restriction of the franchise; it did not propose the outright enfranchisement of all persons with past criminal records. However, no workable criteria to aid legislatures in drafting statutes that do not violate the equal protection clause were set forth. If a standard had been enunciated, perhaps the *Stephens* court would have adopted the criteria proposed by the California Supreme Court when it proclaimed a California statute impermissibly broad if it were interpreted as disenfranchising all felons. In *Otsuka v. Hite*³³ the California court said that if a state's purpose is in fact to protect the purity of the

²⁸*Id.*

²⁹*Contra*, DEL. CONST. art. V, § 2.

³⁰356 U.S. 86 (1958).

³¹Statutes have been considered nonpenal if they impose a disability not to punish, but to accomplish some other legitimate purpose. *Id.* at 96.

³²*But see* DEL. CONST. art. V, § 2, which specifically provides that the legislature may deprive a convicted criminal of the right to vote as further punishment.

³³64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966).

ballot box, in drafting a statute that will survive close equal protection scrutiny, a legislature should focus on the nature of the crime itself; it must determine whether the particular crime is such that one who has committed it may reasonably be considered a threat to the integrity of the elective process, and whether disqualification of the convicted person can reasonably be said to assure that he will not defile the electoral process. In short, disqualifying classifications must focus primarily on crimes involving a threat to the electoral process. The court concluded that it would uphold a California constitutional provision³⁴ only if it were interpreted as disqualifying as voters those convicted of crimes involving moral corruption and dishonesty.³⁵ While Judge Friendly in *Green* had placed great weight on the frequent references³⁶ by the Supreme Court to disenfranchisement of felons,³⁷ the *Otsuka* court dismissed this as "mere illustrative dicta."³⁸

As desirable as the *Otsuka* result might appear, the limitation to crimes involving dishonesty and moral corruption considers only the state's interest and not the interest of the disenfranchised. The Supreme Court, in *Williams v. Rhodes*,³⁹ felt that "in determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."⁴⁰

In applying this balancing formula to state laws disenfranchising criminals, it is important to examine the validity of the state's reasoning

³⁴CAL. CONST. art. II, § 1.

³⁵The plaintiff in *Otsuka* had been convicted during World War II of violating the Selective Service Act, and the court considered this crime not indicative of the fact that its perpetrator would be likely to injure the elective process if he were given his suffrage. 64 Cal. 2d at 605, 414 P.2d at 418, 51 Cal. Rptr. at 290.

³⁶See, e.g., *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959); *Trop v. Dulles*, 356 U.S. 86, 96 (1958).

³⁷For two cases in which the Supreme Court upheld the disenfranchisement of lawbreakers, see *Davis v. Beason*, 133 U.S. 339 (1890) and *Murphy v. Ramsey*, 114 U.S. 15 (1885). The *Otsuka* court distinguished these cases from those denying the right to vote because of a prior conviction. In *Murphy* and *Davis* the plaintiffs had been disenfranchised because they were currently practicing polygamy in violation of statutes forbidding those who did so to vote. The Supreme Court in *Murphy* also recognizes this distinction: "The disfranchisement operates upon the existing state and condition of the person and not upon a past offence . . . He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or a polygamist, or is then actually cohabiting with more than one woman." *Id.* at 43.

³⁸64 Cal. 2d at 605, 414 P.2d at 419, 51 Cal. Rptr. at 291.

³⁹393 U.S. 23 (1968).

⁴⁰*Id.* at 30.

in drafting the classification. If a convicted criminal is upon completion of sentence denied the right to vote it is obviously because the legislature feels he will be likely to sell his vote or cast it in some dishonest manner. If such a likelihood is realistic, then it must also be strongly possible that a convicted criminal will commit other types of election crimes that have nothing to do with the actual casting of the ballot. Thus even if it is accepted that an ex-convict is more likely than other voters to vote dishonestly, denial of the vote makes a very small contribution to the overall purpose of protecting the ballot box. When balanced against the fundamental right of each citizen to vote, the conclusion should be in favor of giving the franchise back to those persons who are returning to society after having paid their debt.⁴¹

Under this balancing formula it is likely that both New York's "felony" disqualification and California's limitation to crimes involving dishonesty and moral corruption might be struck down under the equal protection clause. It also raises the question of whether any state statute that disqualifies ex-convicts can pass equal protection muster. One other possible standard that would disenfranchise only those convicted to election law violations has been proposed.⁴² Again, such a standard might make a small contribution toward preserving the purity of the process,⁴³ but this should be outweighed by a desire of the state to release its prisoners to society on terms of reasonable trust and confidence.⁴⁴

In addition to an interest in the purity of the election process and an interest in punishing criminals, a state has an interest in rehabilitating criminals and assimilating them back into society upon their release from prison. It is doubtful that the state is injured by allowing ex-convicts to vote, and the restoration of voting rights upon release would support the rehabilitation of the ex-offender by giving him a greater feeling of restoration as a full-fledged citizen.⁴⁵ Assimilation into society

⁴¹F. WINES, PUNISHMENT AND REFORMATION 354 (1923).

⁴²See Note, *The Equal Protection Clause as a Limitation on States' Power to Disfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297, 315 (1967).

⁴³To disenfranchise only those convicted of election crimes in order to preserve the purity of the ballot box carries the stigma of additional punishment in that it smacks of the eye for an eye, tooth for a tooth penalties generally attributed to Old Testament penology. See also Note, *Constitutional Law—Disenfranchisement of Felons—Felon's Challenge to State Law Disfranchising Felons Held Not to Raise Substantial Federal Question*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 423, 425 (1968).

⁴⁴F. WINES, *supra* note 43, at 354.

⁴⁵S. RUBIN, THE LAW OF CRIMINAL CORRECTION 622 (1963).

is not promoted by a device for maintaining social and political distance. If the prisoner is worthy of being released to the community he should be made to feel that he is ready to rejoin society as a participant and not as an outsider.⁴⁶

Though most states do not automatically restore a prisoner's civil rights upon release, statutes provide for this restoration upon pardon or completion of a probationary period. The concept of pardoning and procedures for obtaining it vary from state to state,⁴⁷ but in any event unless voting rights and other civil liberties are restored automatically upon completion of sentence, the convict faces the degradation of being without his civil rights at least for a time after having paid his debt to society.⁴⁸

Decisions like *Stephens* go a long way toward extending full equal

⁴⁶E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 651-52 (7th ed. 1966).

⁴⁷Tappan, *Loss and Restoration of Civil Rights of Offenders*, 1952 NAT'L PROBATION & PAROLE ASS'N YEARBOOK 86, 97.

⁴⁸North Carolina provides for disenfranchisement in N.C. GEN. STAT. § 163-55 (1972):

The following classes of persons shall not be allowed to register or vote in this State:

. . . .
. . . .

(3) Persons who have been convicted, or who have confessed their guilt in open court, upon indictment, of any crime the punishment for which is now or may hereafter be imprisonment in the State's prison, unless he shall have had his rights of citizenship restored in the manner prescribed by law.

North Carolina statutes dealing with restoration of citizenship are found in N.C. GEN. STAT. § 13-1 to -3 (1972):

§ 13-1. Restoration of citizenship.—Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon compliance with one of the following conditions:

- (1) The Department of Correction at the time of release recommends restoration of citizenship;
- (2) Two years have elapsed since release by the Department of Correction, including probation or parole, during which time the individual has not been convicted of a criminal offense of any state or of the federal government;
- (3) Or upon receiving an unconditional pardon.

§ 13-2. Procedure for restoration.—The restoration procedure shall consist of the taking of an oath by such person before any judge of the General Court of Justice in Wake County or in the county where he resides or in which he was last convicted, to the effect that said person has complied with the provisions of § 13-1, and that he will support and abide by the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith.

§ 13-3. Assistance by appropriate government personnel. The Department of Correction, the Department of Juvenile Correction, the Probation Commission, the Board of Paroles and other appropriate State and county officials shall cooperate with and assist such person in securing any information required by any judge prior to administering the oath required by this section.

protection of the law to those members of society who are stigmatized by a past criminal convictions. Although the case stopped short of declaring that all convicted criminals have a right to the franchise after release and offered no workable standard for legislatures to follow, standards might be fashioned from the law available in the area. However, a state can best serve its own interest and at the same time be free from any possible violation of equal protection by restoring suffrage to all prisoners upon completion of sentence. The state, of all institutions, should not let a citizen's conviction of a crime be prima facie evidence of his electoral dishonesty.

CHARLES H. CRANFORD

Constitutional Law—School Law—Restrictions on the Infliction of Corporal Punishment: Spoiling the Rod

In the past decade courts have begun to recognize the substantive and procedural constitutional rights of students who attend public schools¹ and to attempt to balance those rights against the effective maintenance of control and discipline in the educational context. Formerly courts had vested broad discretion in school authorities to control and discipline students,² but with the application of constitutional rights in the school context³ it has become necessary to examine the disciplinary procedures of schools, including possible constitutional limitations upon the infliction of corporal punishment.⁴

¹See generally Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. & B.A.J. 619 (1970); Comment, *Procedural Due Process in Secondary Schools*, 54 MARQ. L. REV. 358 (1971); Note, *Emerging Rights of High School Students: The Law Comes of Age*, 23 U. FLA. L. REV. 549 (1971).

²See, e.g., *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 516, 102 So. 637, 640 (1924):

[C]ollege authorities stand *in loco parentis* and in their discretion may make any regulation . . . which a parent could make . . . and . . . courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.

³See *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). In *Tinker* the Supreme Court held that in the absence of substantial interference with school activities, the wearing of armbands by students was protected by the first amendment. In the landmark case of *Dixon*, the Fifth Circuit held that due process requires notice and some opportunity for a hearing before students can be expelled for misconduct.

⁴For the purposes of this note, corporal punishment is defined as the intentional infliction of physical pain subsequent to misbehavior for the purpose of deterring future misbehavior. It does not refer to the use of reasonable force as a means of self-defense or for the protection of other children.