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Opinion No. 06-148

Constitutionality of Felon Restoration Statute

QUESTION

2006 Tenn. Pub. Act No. 860 provides new guidelines for the restoration of the voting franchise to citizens convicted of a felony. The statute contains an exception, which excludes from eligibility those convicted felons who are not current in their child support obligations. Does this exception violate the Equal Protection Clause of the United States or Tennessee constitutions?

OPINION

It is the opinion of this office that the exception is constitutional, because felons do not have a fundamental right to vote, the statute in question does not discriminate against a suspect class, and the state has a legitimate interest in protecting the ballot.

ANALYSIS

I. Statute in Question:

2006 Tenn. Pub. Act No. 860, enacted by the 104th General Assembly and becoming effective on July 1, 2006, sets forth guidelines governing the restoration of the elective franchise to persons convicted of an infamous crime (hereinafter, "felons"). Under the new guidelines, the following categories of felons are eligible to have their elective franchise restored: (1) those who have received a pardon that does not contain restrictive conditions relating to the right of suffrage; (2) those who have been discharged from custody after serving the maximum sentence imposed by the sentencing court for the infamous crime committed; and (3) those who have been granted a final discharge by the applicable county, state, or federal authority. Pub. Ch. No. 860, 2006 Tenn. Leg. Serv. Vol. 2 p. 291-92 (to be codified at Tenn. Code Ann.§ 40-29-202(a)). 2006 Tenn. Pub. Act No. 860, (hereinafter, the "Statute"), however, provides an exception to this eligibility, stating, "Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored unless such person is current in all child support obligations."[1] *Id.*

[1]There is also a second exception, which excludes felons who have not "paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence." Pub. Ch. No. 860, 2006 Tenn. Leg. Serv. Vol. 2 p. 291 (to be codified at Tenn. Code Ann. § 40-29-202(b)).

II. Equal Protection Analysis

Any claim challenging the Statute's constitutionality would most likely be made pursuant to the Equal Protection Clauses of the United States and Tennessee Constitutions, asserting that the Statute treats similarly situated individuals differently.[2] In *Dunn v. Blumstien*, the United States Supreme Court stated, "[i]n considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interest affected or the classification involved." 405 U.S. 330, 335, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972).[3] Thus, the two questions relevant to this opinion are whether the Statute implicates a fundamental right and whether the Statute discriminates against a suspect class.

A. The Right to Vote is Not a Fundamental Right for Felons

While the right to vote is protected by the United States Constitution, the framers left to the individual states the power to initially set the qualification to exercise the right. *See* U.S. Const. art. I, § 1, cl. 1; U.S. Const. amend. XVII; *Katzenbach v. Morgan*, 384 U.S. 641, 647, 86 S.Ct. 1717, 1721, 16 L.Ed.2d 828 (1966). Like all other state powers, however, these qualifications are subject to the United States Constitution and federal statutes. *See* U.S. Const. art. VI, para. 2.

Since the ratification of the United States Constitution, four Amendments have been added that limit the power of the states to set the qualifications of voters. *See* U.S. Const. amend. XV (ratified in 1870, forbidding the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude); U.S. Const. amend. XIX (ratified in 1920, forbidding the denial or abridgement of the right to vote on account of sex); U.S. Const. amend. XXIV (ratified in 1964, forbidding the abridgement or denial of the right to vote on account of failure to pay any tax); U.S. Const. amend. XXVI (ratified in 1971, forbidding the denial or abridgement on account of age for citizens eighteen years of age or older). In addition to these Amendments, the Voting Rights Act

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[2]The Tennessee Supreme Court has held that the Equal Protection Clause contained in the Tennessee Constitution affords the same protections as its federal counterpart. *See Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993). The Court has also held that the framework developed by the United States Supreme Court for analyzing the federal Equal Protection Clause is followed in analyzing claims made pursuant to Tennessee counterpart. *See Doe v. Norris*, 751 S.W.2d 834, 840-42 (Tenn. 1988). For these reasons, this opinion will primarily cite to federal case law.

[3]If the interest affected involves a fundamental right or the classification discriminates against a suspect class, then a statute is subject to strict scrutiny, and only a compelling or substantial state interest will save it from being declared unconstitutional. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457, 108 S.Ct. 2481, 2487, 101 L.Ed.2d 399 (1988). If neither the interest affected implicates a fundamental right nor the classification discriminates against a suspect class, then a statute is subject to a rational basis standard, which only requires a rational or legitimate state interest to be constitutionally sound. *See Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 1627, 134 L.Ed.2d 855 (1996). Finally, if a statute does not implicate a fundamental right and does not, on its face, discriminate against a suspect class, but the statute does have a disparate impact on a suspect class and was enacted with animus toward that class, then the statute is subject to strict scrutiny. *See Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977).

of 1965 also provides several limitations on the power of the states to distribute the voting franchise. *See* 42 U.S.C. §§ 1971—73.

While these limitations act as a check on the power of the states, they stop short of eliminating the states' power to set the qualifications. Evidence of this constraint can be found in the text of the Amendments and the Voting Rights Act. Each of the Amendments forbids the denial or abridgement of the right to vote "by the United States *or by any State*" when speaking to the power to set qualifications for the voting franchise. *See* U.S. Const. amend. XV; U.S. Const. amend. XIX; U.S. Const. amend. XXIV*;* U.S. Const. amend. XXVI. (emphasis added). The Voting Rights Act also speaks in terms of limiting the power of the states. *See* 42 U.S.C. § 1971(a)(1). While limiting the criteria a State may use in denying the right to vote and actually setting the qualifications of voters may produce the same results, that the framers chose one over the other textually demonstrates the desire of the framers to leave the power to set the qualifications of voters to the states.

Given that the United States Constitution only grants the right to vote to qualified citizens and leaves the determination of qualifications to the individual states, constitutional challenges to state statutes setting voting qualifications are initiated primarily pursuant to the Equal Protection Clause of the United State Constitution. *See* U.S. Const. amend. XIV, § 1. In ruling on these challenges, the United States Supreme Court has held that the right to vote is a fundamental right. *See Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (stating, "the right of suffrage is a fundamental matter in a free and democratic society."); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (holding that the right to vote is a fundamental political right that is preservative of all other rights). In light of its fundamental nature, the Court has held that any abridgement of the right must serve a substantial or compelling state interest to avoid violating the Equal Protection Clause. *See Blumstien*, 405 U.S. at 335, 92 S.Ct. at 999 (striking down residency duration requirements).[4]

The Supreme Court and several lower courts have declined, however, to subject voting qualifications envisioned by the United States Constitution itself to any Equal Protection scrutiny. *See Richardson v. Ramirez*, 418 U.S. 24, 54, 94 S.Ct. 2655, 2671, 41 L.Ed.2d 551 (1974).[5] The most

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[4]*See also Bullock v. Carter*, 405 U.S. 134, 142, 92 S.Ct. 849, 855-56, 31 L.Ed.2d 92 (1972) (striking down a primary filing fee system for candidates); *Kramer v. Union Free School District*, 395 U.S. 621, 626, 89 S.Ct. 1886, 1889, 23 L.Ed.2d 583 (1969) (striking down statute that limits participation in school district elections to those who own property in the district and have children attending public schools); *Cipriano v. City of Houma*, 395 U.S. 701, 704, 89 S.Ct. 1897, 1899, 23 L.Ed.2d 647 (1969) (striking down statute that limited participation in elections to decide bond issues to property taxpayers); *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169 (1966) (striking down a poll tax); *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964) (striking down apportionment of legislative seats).

[5]Lower courts considering the question in relation to selective felon disenfranchisement have assumed that felon disenfranchisement is constitutional but have applied a rational basis standard in determining whether disenfranchising some but not all felons is permissible. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (holding that convicted felons do not a fundamental right to vote); *Owens v. Barnes*, 711 F.2d 25, 27 (3rd Cir. 1983), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341(1983) (upholding a Pennsylvania statute barring incarcerated

prevalent example of this restraint is in the arena of felon disenfranchisement. *See id.* When explaining why felon disenfranchisement did not violate the Equal Protection Clause, the Court, after engaging in an exhaustive discussion of the legislative history of the Fourteenth Amendment, focused on the following language of s 2 of the Amendment, "[b]ut when the right to vote at any election ... 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[.]" *See id.* at 42-43. The Court stated:

> As we have seen, however, the exclusion of felons from the vote has an affirmative sanction in s 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of s 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.

Id. at 54.

In reaching its conclusion, the Court did not subject felon disenfranchisement to any level of scrutiny to determine whether it violated the Equal Protection Clause. Instead, the Court stated,

> we may rest on the demonstrably sound proposition that s 1 [the Equal Protection Clause], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which s 2 imposed for other forms of disenfranchisement.

Id.

The reasoning in *Ramirez* and its progeny, read in conjunction with the holdings in *Blumstein* and its progeny, compel the conclusion that, while the majority of voting qualifications are subject to a strict scrutiny standard pursuant to the Equal Protection Clause, qualifications envisioned by

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felons from voting but allowing unincarcerated felons to vote); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047. 59 L.Ed.2d 90 (1979) (upholding a Texas statute granting reenfranchisement to felons convicted in state court who successfully completed parole provisions while not granting reenfranchisement to similarly situation felons convicted in federal court).

the framers and embodied in the United States Constitution,[6] are not subject to any Equal Protection analysis.[7]

Because courts have avoided subjecting complete felon disenfranchisement to any Equal Protection analysis, the logical conclusion is that felons do not have a fundamental right to the franchise. *See Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) (holding that convicted felons do not a fundamental right to vote); *Owens v. Barnes*, 711 F.2d 25, 27 (3rd Cir. 1983), *cert. denied*, 464 U.S. 963, 104 S.Ct. 400, 78 L.Ed.2d 341(1983) (upholding a Pennsylvania statute barring incarcerated felons from voting but allowing unincarcerated felons to vote); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1047. 59 L.Ed.2d 90 (1979) (upholding a Texas statute granting reenfranchisement to felons convicted in state court who successfully completed parole provisions while not granting reenfranchisement to similarly situation felons convicted in federal court).

Here, the Tennessee Constitution gives the Tennessee General Assembly the right to pass laws excluding persons convicted of infamous crimes from the elective franchise. Tenn. Const. art. 4, § 2. In exercising this authority, the Tennessee General Assembly enacted Tenn. Code Ann. § 40-20-112, which states, "[u]pon conviction for any felony, it shall be the judgment of the court that the defendant be infamous and be immediately disqualified from exercising the right of suffrage." Closely related to this disqualification statute is the statute at issue here, which grants otherwise unqualified felons the opportunity to participate in the elective franchise. *See* Pub. Ch. No. 860, 2006 Tenn. Leg. Serv. Vol. 2 p. 291 (to be codified at Tenn. Code Ann. §§ 40-29-201-05). These statutes are a proper exercise of the authority left to the individual states by the United States Constitution and expressly envisioned in § 2 of the Fourteenth Amendment.

B. The Statute Does Not Discriminate Against a Suspect Class

The Statute burdens the ability of felons who are not current in their child support obligations to participate in the elective franchise. The United States Supreme Court has never found felons

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[6]An example of another such qualification is the age requirement. That the Twenty-Sixth Amendment to the United States Constitution requires states to allow all otherwise qualified individuals over the age of eighteen to vote is a tacit recognition that states may deny the franchise to all those under the age of eighteen. *See* U.S. Const. amend. 26. This does not bar the states from distributing the franchise to individuals less than eighteen years of age, but any decision by the states not to do so would not be subject to any level of scrutiny per the reasoning in *Ramirez*. *See Ramirez*, 418 U.S. at 24, 94 S.Ct. at 2655.

[7]The assertion that voting qualifications embodied in the United States Constitution are not subject to any scrutiny does not relieve a state from any Equal Protection analysis related thereto. *See infra. n. 3*. The state would only be relieved of showing any state interest in relation to the exclusion of all members of a constitutionally envisioned group (such as all felons). If, however, the state were to create a class of individuals by excluding some but not all members of an envisioned group, then the state would have to show an interest justifying the different treatment - the level of the state interest would depend upon the classification. *See id.*

who owe child support to be a suspect class.[8]

C. There Is No Proof of Disparate Impact or Animus

There is no evidence that the Statute will have a disparate impact on a suspect class. Even if, however, a disparate impact could be proven, there is no evidence that the statute was passed with animus toward any suspect class.

D. The Statute is Subject to Rational Basis Test and, per that Test is Constitutional

Given that no fundamental right is implicated, the statute does not discriminate against any suspect class, and it has not been shown that the statute will have a disparate impact and was passed with animus toward a suspect class, the state must only demonstrate a rational basis for the classification. *See Romer v. Evans*, 517 U.S. at 631, 116 S.Ct. at 1627; *Collins*, 791 F.2d at 1261; *Barnes*, 711 F.2d at 27; *Trevino*, 575 F.2d at 1114.

The rational basis test is very deferential to the state. *See F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313-14, 113 S.Ct. 2096, 2101, 124 L.Ed.2d 211 (1993). In *Beach Communications*, the Court stated,

> a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end. This standard of review is a paradigm of judicial restraint."

Id. (citations omitted). In addition, the burden is not on the state to show a rational basis, but rather lies with the challenger to prove that there is no rational basis. *See Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 367, 121 S.Ct. 955, 964, 148 L.Ed.2d 866 (2001).

Here, to successfully challenge the Statute, a challenger would have to show that the state has no rational basis for asking felons to be current in their child support before being allowed to exercise the elective franchise. It is the opinion of this office that a court of competent jurisdiction would find that the state does have a rational basis for this requirement. One rational basis could

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[8]An argument could be made that the classification here is wealth dependent and, as such, discriminates against the poor. The poor, however, are also not a suspect class. *See Papasan v. Allain*, 478 U.S. 265, 283-84, 106 S.Ct. 2932, 2943, 92 L.Ed.2d 209 (1986) (holding that wealth classification in relation to educational spending was not subject to heightened scrutiny). While wealth classifications in relation to qualified voters have generally been disfavored, those cases have involved the fundamental right to vote and do not rely upon the wealth classification to invoke strict scrutiny. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668, 86 S.Ct. 1079, 1082, 16 L.Ed.2d 169 (1966) (striking down Virginia Poll tax of $1.50 levied against voters for access to the polls).

be the state's interest in protecting the ballot box from people who do not abide by enforceable court orders. Another basis could be that, in light of the overriding state policy assigning great significance to child support,[9] the state has an interest in protecting the ballot box from people who subvert this policy and neglect their own children. Finally, the classification could provide an incentive to felons to keep current on their child support obligations. In light of these rational and legitimate state interests, it is the opinion of this office that the Statute would survive Equal Protection review by a court of competent jurisdiction.[10]

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[9]*See Berryhill v. Rhodes*, 21 S.W.3d 188, 192 (Tenn. 2000) (finding that Tennessee's child support laws indicate a public policy favoring payment of support so that children can become healthy, contributing members of society).

[10]A party challenging the Statute could also choose to bring a claim pursuant to the Voting Rights Act alleging disparate impact. *See* 42 U.S.C. §§ 1971—73. This opinion does not address any such claims, as the question was limited to the constitutionality of the Statute. In addition, this office has no evidence that there will be a disparate impact. In addition, the challenger would have to prove the disparate impact as well as show that the statute should be invalidated under the totatality of the circumstances surrounding the enactment and enforcement of the statute. *See Collins*, 791 F.2d at 1259.