

Ending Felon Disenfranchisement in the United States: Litigation or Legislation?

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Australia is not the only democratic country to [debate](#) the question of continued felon disenfranchisement. The Australian Parliament recently [tightened](#) section 93 of the Commonwealth Electoral Act to provide that a person serving a sentence of three years or more may not vote in national elections. Voting rights in practice are [restored](#) when the sentence of imprisonment ends.

The situation in the United States is much different. Each of the 50 states gets to set its own rules for felon disenfranchisement (even for national elections). A recent [compilation](#) by the Sentencing Project notes that all but two US states bar inmates convicted of a felony from voting, that seven states impose a *lifetime* ban on ex-offenders, and that another seven states either impose a lifetime ban on some classes of ex-felons and/or allow an ex-offender to apply to have his or her voting rights restored after some waiting period.

In total, more than 4.6 million otherwise eligible U.S. voters are disenfranchised because of their felon or ex-offender status. The Sentencing Project also notes a racial dimension to these statistics: they include 1.4 million African-American adult men, 13 per cent of all men in that category and seven times the national average.

A 2002 study by Uggen and Manza found that given the voting preferences of African-Americans, Democrat Al Gore likely would have beat George Bush in the state of Florida (and therefore won the national vote) in the 2000 U.S. Presidential election by more than 31,000 votes had Florida not disenfranchised ex-offenders.

Voting rights scholars both in [Australia](#) and the [United States](#) have characterized felon disenfranchisement as inconsistent with democratic values and essentially punitive. The question for these scholars is not so much *whether* felon disenfranchisement laws should be changed but *how*.

One model is the litigation model. This model had recent success in Canada, where the Supreme Court of Canada [ruled](#) that denying the right to vote to *current* inmates violates the Canadian Charter of Rights and Freedoms. The government had defended the measure as a means of enhancing civic responsibility and as an appropriate criminal sanction. The high court rejected both rationales:

With respect to the first objective of promoting civic responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility....

With respect to the second objective of imposing appropriate punishment, the government offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. Denying the right to vote does not comply with the requirements for legitimate punishment -- namely, that punishment must not be arbitrary and must serve a valid criminal law purpose.

The possibility of following the litigation model to end felon disenfranchisement in the United States is uncertain. In 1974, the US Supreme Court squarely [rejected](#) the argument that a lifetime ban on voting by ex-offenders violated the U.S. Constitution's guarantee that no state shall deny 'equal protection' of the laws. Some scholars have [argued](#) that the 1974 case has been undermined by recent precedent, and that the Court should rethink its position. Though this outcome is possible, it seems unlikely, and it would not necessarily help to restore voting rights to those currently incarcerated.

Scholars have also suggested other constitutional provisions as potential bases for judicial challenge, including the Eighth Amendment's prohibition on cruel and unusual punishment and the [Fifteenth Amendment's](#) prohibition on discrimination in voting on the basis of race. Whether these challenges will ultimately bear fruit in the US courts, and if so, whether they would ultimately lead to voting rights even for those currently behind bars, is uncertain at best.

More recent litigation in the United States has relied upon [Section 2 of the Voting Rights Act](#), a Congressional statute barring practices in voting that discriminate on the

basis of race. Two appellate courts have ruled that felon disenfranchisement laws, because of their racially discriminatory effect, can violate the law. A third appellate court reached a contrary conclusion, and the US Supreme Court could rule as early as October whether it will hear the cases. I believe it is likely that the Court will agree to hear one of the cases finding a statutory violation, and reverse that determination given the history of section 2, as well as the Court's current view of Congress's limited power vis-à-vis the states.

Thus, many avenues remain open in the United States for a litigation strategy to end felon disenfranchisement, though it is far from clear that any of these efforts ultimately will be successful.

A second model for eliminating felon disenfranchisement laws is the political or legislative model. The Sentencing Project [reports](#) that since 1975 many more states have voted to expand voting rights for ex-offenders than restricted such rights. At first blush, this is somewhat of a surprise given that legislators might be expected to curry favor with voters by being 'tough on crime,' and against anything that might be seen as giving felons more rights.

I see two reasons why states have begun softening their felon disenfranchisement laws. First, given the racial impact of the laws, those supporting a softening have turned felon disenfranchisement from being seen as a criminal issue to more of a 'civil rights' issue. Some [recent public opinion work](#) finds increased support in the American public for reenfranchisement, particularly for those felons who have completed their sentences.

The second explanation for legislative change is political. The issue has become mired in partisan politics. Recent events in Florida have focused Democratic and African-American anger on the means by which felon disenfranchisement lists are being administered.

In the 2000 election, Florida sought to purge its voter rolls of those ineligible to vote because of their ex-felon status, but the work was done badly, leading to the disenfranchisement of many voters with similar names to those of felons. Florida elections officials promised to do a better job for the 2004 election, but things got

[worse](#): the new list excluded a large number of African-American ex-felons, but almost no Hispanics. Many Hispanics in Florida are of Cuban descent and tend to vote Republican, while about 90 per cent of African-Americans tend to vote Democratic.

Although elections officials blamed the problem on a [computer glitch](#), the incident has served to reinforce the notion that felon disenfranchisement laws might be subject to political manipulation.

The fact that the issue is [mired](#) in partisan politics ironically could stall efforts for legislative change. Civil rights issues tend to gain bipartisan support; but frame this as a Democratic/Republican issue, and success is much less assured.

As hard as political change might be, it appears likely to be more effective than litigation. State-by-state, laborious legislative change seems the most realistic hope for those who want to see more felons and ex-felons regain the right to vote in the United States.

References

Christopher Uggen and Jeff Manza. 2002. 'Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States.' [American Sociological Review](#) 67: 777-803.