

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

CHAMBERS OF
MIRIAM N. SPAN
PRESIDING JUDGE, CHANCERY
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COURT HOUSE
ELIZABETH, NEW JERSEY
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New Jersey State Conference – NAACP, et al.
v. Peter C. Harvey, Attorney General of New Jersey
Docket No. UNN-C-4-04

LETTER OPINION

Counsel:

The issue raised by this case is whether *N.J.S.A. 19:4-1*, which denies the vote to those "on parole or probation as the result of a conviction of any indictable offense", violates Article I Paragraph 1 of the New Jersey State Constitution with its implied right to Equal Protection of the Laws. Complicating the issue is that another clause of the New Jersey Constitution, Article II, Section 1, Paragraph 7 on its face explicitly authorizes the legislation challenged here, namely, a blanket deprivation of suffrage without racial or other distinction to those "convicted of such crimes" as the Legislature may designate.

I. Potentially Conflicting Constitutional Provisions (Article I v. Article II):

It is a general proposition of constitutional interpretation in New Jersey, as well as of statutory interpretation generally, that where a more specific and a more general provision seem to conflict, the more specific controls. *Behnke v. New Jersey Highway Authority*, 13 N.J. 14, 31 (1953). In other words, if a statute or policy is specifically and unambiguously authorized by a provision in the state constitution, then that is the end of the matter, regardless of the opinion of others, on the bench or off, with respect to what more general provisions might require. Of course, things are rarely so simple. A provision authorizing the denial of suffrage to convicts does not specifically authorize every conceivable statute implementing this policy. Clearly if a statute only denied the vote to convicts who voted Republican or who were of a particular race or ethnicity, it would be unconstitutional, on either freedom of speech or equal protection grounds, respectively. The key would be that the creators of the state constitution would not have intended to authorize such a statute when they promulgated the provision in question. It is not a question of immunity from the requirements of equal protection or constitutional review, generally. It is a question of what was intended by those who promulgated both Articles I and II.

Article II, Section 1, Paragraph 7 is relatively unambiguous. It states in relevant part that the Legislature "may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate...[until] pardoned or otherwise restored by law..." It is hard to see what this clause would authorize if it did not authorize a facially neutral law, absent invidious motive, depriving convicts of the suffrage, and which did not otherwise violate constitutional prohibitions on vagueness or fundamental irrationality. It should be kept in mind that almost all laws have a disproportionate impact in some way, so Article II could not have been passed with the notion that the laws implementing it would have a completely even effect on the population, e.g., male-female, black-white. It would be an incredible coincidence if they did so.

The plaintiffs argue that this litigation is analogous to that in *Mount Laurel - Southern Burlington County NAACP v. Mount Laurel*, 67 N.J. 151 (1975); *Southern Burlington County NAACP v. Mount Laurel*, 92 N.J. 158 (1983). There, some forms of municipal zoning were held to be unconstitutional even though municipal zoning in general is authorized by the state constitution. But the key in that litigation was that although the constitution delegates the authority to zone, it does not delegate the authority to zone in an exclusionary manner. The present litigation would be analogous if the statute being challenged denied the suffrage only to poor or minority felons or was intended to disproportionately disenfranchise poor or minority felons. The plaintiffs do not argue either proposition.

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Another canon of interpretation is that if two provisions seemingly conflict they should be interpreted in such a way, if possible, that neither is rendered a nullity, i.e., both should have some effect. This canon strongly favors upholding the law in question. On the one hand the plaintiffs' interpretation of the requirements of equal protection would largely render Article II, Section 1, Paragraph 7, a nullity. On the other, upholding a facially neutral, non-invidiously motivated voting provision would not render Article I, Paragraph 1 a nullity. The plaintiffs could argue that since they only seek to strike down the law as it applies to those on probation or parole, a law applying only to those in custody would still be constitutional, and hence Paragraph 7 would still have some effect. However, the plaintiffs' grounds for striking down the law as applied to probationers and parolees, namely, disparate impact on the minority community exacerbated by racism in law enforcement and the legal system, applies with equal force if not more so to the law as applied to the incarcerated. [Caucasians might be granted probation and parole at a greater rate than minorities.] Besides administrative convenience, which is not a justification for denial of equal protection, *see, e.g., Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 478 (1981), it is hard to see what purpose would be served by distinguishing between those in custody and those still serving their terms but not in custody. Problems of collusion in an institutional setting apply elsewhere as well, e.g., the military, but the secret ballot in addition to reasonable administrative measures are considered to be adequate to address this problem.

Plaintiffs argue that although denial of the suffrage might be appropriate as a punitive measure in the custodial context because punishment is a primary purpose of incarceration, it is irrational in the parole or probation context because their primary purposes are remedial or protective and not punitive. But if punishment is part of the rationale for the denial of suffrage, [and I am skeptical that it is], it applies equally whether those being punished are in custody or on probation or parole, regardless of one's views regarding the purposes otherwise generally served by incarceration, probation and parole. The primary purposes of probation or parole might be rehabilitation and protection of the public rather than punishment, but the purpose of the denial of the suffrage aspect of probation and parole might still rationally be punishment. If punishment is a rational purpose for the denial of suffrage, then combining it with a larger, primarily rehabilitative or protective purpose would be no less so. Punishment and other purposes can be combined. Even if one believes that the denial of suffrage interferes with the accomplishment of other purposes, one might still rationally believe that the furtherance of the purpose of punishment is worth the cost. In short, if the denial of suffrage as punishment is irrational, it is as much irrational in the custodial context as in the context of probation or parole.

That the creators of Article II and the New Jersey Constitution in all likelihood specifically intended the exact sort of statute that is being challenged here is probably determinative of the statute's constitutionality. At the very least, it creates a very strong presumption in favor of its constitutionality. *See, e.g., N.J. Sports and Exposition Authority v. McCrane*, 61 N.J. 1 (1972). One could argue, however, that if the drafters had known disenfranchisement laws would come to be seen as violating equal protection principles, either because theories of equal protection had changed or because the facts were different than they knew them, e.g., if racism existed in the criminal justice system of which they were unaware, then they would have not intended to authorize such laws. If one holds this view, one might also plausibly believe it is necessary to investigate the requirements of equal protection despite the existence of Article II.

II. Equal Protection:

A. The Test:

The focus of the complaint is not that *N.J.S.A.* 19:4-1 discriminates against felons relative to non-felons, as of course it does, or even that it discriminates against African-American and Hispanic felons relative to non-African-American and non-Hispanic felons. Instead, the complaint is that by disproportionately reducing their percentage of the voting-eligible community, *N.J.S.A.* 19:4-1 dilutes the minority community's voting power. This disparate impact, furthermore, is claimed not to be the result of members of the minority community committing more indictable offenses, but of racism in the criminal justice system. Given the existence of Article II and given the requirements of an Equal Protection claim in the state of New Jersey, even when taken in the best light, the plaintiffs' argument fails to state a legal claim and hence cannot survive a motion to dismiss.

In New Jersey, a balancing test exists for judging equal protection challenges, the relevant factors of which are: "[1] the nature of the right; [2] the extent to which the government restriction intrudes upon it; and, [3] the public need for the restriction." *Greenberg v. Kimmelman*, 99 N.J. 552, 567 (1985). The Court in that case explicitly stated that this sliding-scale analysis differs from the more rigid three-tier analysis (strict, intermediate or heightened, and rational-basis) under the United States Constitution. *Id.* Elsewhere, the Court has stated that the application of equal protection analysis under the state constitution in some circumstances might be broader than under the federal constitution. *See, e.g., Barone v. Dep't of Human Servs.*, 107 N.J. 355, 368 (1987). However, the Court also held in *Greenberg* that when a statute is facially neutral, as here, even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only

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if the Legislature intended to discriminate against the class. 99 N.J. at 580; *Rutgers Council v. Rutgers*, 298 N.J. Super. 442, 452 (App. Div. 1997). In *Greenberg*, because the Court found that the Legislature did not intend to discriminate against women when enacting a casino ethics amendment that prohibited spouses of judges, most of whom were women, from working in the casino industry, it affirmed the lower court's summary judgment upholding the amendment's constitutionality. 99 N.J. at 579-580. In reaching this conclusion, the Court positively cited and partially relied on *Washington v. Davis*, 426 U.S. 229, 241-42 (1976) which held that absent "invidious discriminatory purpose" a requirement that prospective police recruits take a written exam, which negatively affected blacks four times more heavily than whites, did not violate equal protection. 99 N.J. 580. Surely, a disparate impact on the racial composition of the police force negatively affected not only the actual African-American candidates but also the African-American community at large, and the latter at least as much as a rule forbidding convicted felons from voting until they have served their time.

A preliminary issue concerns the relationship between the "*Greenberg* rule" that if a law is facially neutral "an equal protection claim c[an] succeed only if that statute had an invidious purpose" *id.* and the *Greenberg* three-factor equal protection balancing test. Namely, if the rule is determinative then is there any point to applying the test? Just as the statute contested in *Greenberg* did not facially distinguish between the sexes, the statute contested in this litigation does not distinguish between the races. Just as the statute in *Greenberg* was not claimed to have an invidious purpose, by which the Court meant discriminatory intent, neither is the statute here. Before deciding this issue, a closer examination of the key terms of the *Greenberg* rule – facial neutrality and invidious purpose is warranted.

Just as practically all laws have some disparate impact among some groups, practically all laws are meant to "discriminate" in the sense of to treat differently between certain groups. Likewise, there are few laws that are facially neutral in all senses. The statute in *Greenberg* was not facially neutral between the spouses of judges and non-spouses of judges. Likewise, the statute at issue in this case is not facially neutral between those convicted of indictable offenses and those who have not been. The *Greenberg* court focused on facial neutrality between the sexes and we are focusing on facial neutrality between the races because such classifications are "suspect". They are suspect because we believe that unlike other classifications, such as felon and non-felon, statutes that incorporate them are unlikely to be based on reasonable beliefs and legitimate state goals. Instead, the use of such classifications is likely to be based on racial animus, prejudice or stereotyping. The same is true for laws that do not explicitly use suspect classifications but whose intent is to discriminate on the basis of such classifications. In common usage the term "discrimination" is often reserved for such unfounded difference in treatment

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rather than for difference in treatment as such. Because laws whose intent is to discriminate (i.e., in the morally neutral sense) on the basis of a suspect class are more likely to have an "invidious motive" such as animus or prejudice (i.e., to "discriminate" in the morally negative sense), we are more concerned about them and subject them to higher scrutiny to find out whether they are so motivated. If no good reason is found for the suspect classification or discriminatory intent, or the costs seem to outweigh the legitimate benefits, then our suspicions are deemed satisfied and the law is struck down as a violation of equal protection. If a good enough reason is found and the legitimate benefits arguably outweigh the costs, e.g., with some affirmative action laws, then the discriminatory law is upheld. In other words, the point of New Jersey's sliding scale balancing test and the United States' three-tier test is not for judges to second guess the wisdom of legislation but for judges to strike down laws that are invidiously motivated and hence unreasonably treat differently those who should not be treated differently. It is not surprising that laws based on a suspect classification are usually found to violate equal protection while those based on a non-suspect classification are usually held valid. The former are much less likely to have a non-invidious motive than the latter.

The above analysis strongly suggests that *Greenberg* balancing test applies whenever a law treats or intends to treat two or more groups of people differently whether or not the classification is suspect. The degree of suspectness of the classification is in fact part of the second step of the test – the extent of the governmental restriction. However, the above analysis also demonstrates how different the purpose of equal protection analysis is from the analysis called for under New Jersey's Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, or the federal Voting Rights Act, 42 *U.S.C.* Section 1973. The purpose of the equal protection clause is to constitutionally protect against the results of the democratic process when the invidious motive behind legislation shows that the process has broken down. The latter statutory schemes are the result of the democratic process and were passed in order to achieve social goals. The Law Against Discrimination (LAD) delegates to the courts the authority to strike down in some circumstances societal practices that have a disparate negative impact on minorities if the benefit of such societal practices do not outweigh their costs. The Voting Rights Act (VRA) delegates to the courts the authority to prevent in some circumstances the perpetuation and reproduction of societal and historical discrimination in voting rights even if the particular voting rights restrictions in question were not invidiously motivated or cannot be proved to have been so. No such delegation was meant in either the federal or state constitutions. *Contra* the plaintiffs' argument, judges striking down the considered judgment of the People (Article II, Section 1, Paragraph 7) or of the Legislature (*N.J.S.A.* 19:4-1) because they believe it is unwise does *not* "send a strong signal that democracy is alive and well in New Jersey" or elsewhere. If the

relevant lawmakers do not like the results of the policies incorporated by the LAD or the VRA, they can tinker with the statues until they achieve the results they desire. The same is not true of a constitution , which is only cautiously amended, and with great difficulty.

B. Application of the Test:

Although the plaintiffs do not claim that invidious motives lie behind *N.J.S.A. 19:4-1*, it is worth applying the balancing test for two reasons. The first is thoroughness. Perhaps an analysis of the nature of the right in question and the extent of the government restriction when weighed against the public need served will suggest that an illegitimate motive is likely behind the law. The second is that although the plaintiffs do not claim an illegitimate purpose motivates the existence of *N.J.S.A. 19:4-1*, the law nevertheless serves to reproduce the illegitimate discrimination that is purported to exist in the criminal justice system. In other words, the invidious racist motivations that are said to corrupt the functioning of the criminal justice system result in a disproportionate number of minorities being disenfranchised by *N.J.S.A. 19:4-1*. If this is true, it could be said that *N.J.S.A. 19:4-1* "borrows" the invidious racism of the system it is parasitic on.

I. The Nature of the Right:

Starting with the first factor, the nature of the right in question, it is exactly when rights to participate in the democratic process are at issue that it is least justified to defer to the results of the democratic process because it is democratic. It is the democratic nature of the process that is the subject of the challenge. Because the New Jersey test is a balancing test and not the rigid three-tier test, it does not really matter whether the nature of the right is defined as voting rights and "the extent to which the government restriction intrudes upon it", or is defined separately as the denial of those rights to certain convicts, or whether the nature of the right is defined as the right of certain convicts to vote, the latter of which has the effect of collapsing the first two prongs of the test. The nature and impact of *N.J.S.A. 19:4-1* is the same either way. If the fact that voting is a fundamental right automatically requiring the application of federal-style "strict scrutiny" analysis regardless of the nature of the restriction, the argument that *N.J.S.A. 19:4-1* has a disparate impact on the minority community would be superfluous because simply the restriction on those convicted of indictable offenses would be a denial of their fundamental right to vote and would itself require strict scrutiny.

It is important to note that for the same reason that voting rights are due special protection, the presence or absence of invidious intent is crucial. With respect to rights to participate in the political process such as voting, speech and assembly, the concern is that if the

denial of the right to participate is based on animus, prejudice, or naked self-interest, then the denial itself destroys the possibility of correcting the injustice. Appeal to the democratic process is futile because the process incorporates the injustice and those who dominate it are motivated by ill will. Oppression becomes self-perpetuating. But if invidious motive is absent and those supporting the policy are simply honestly mistaken with respect to its benefits and costs, its moral and factual basis, then the proper appeal is to the electorate and their representatives.

2. The Extent of the Restriction:

N.J.S.A. 19:4-1 denies the right to vote to those convicted of an indictable offense until they have served their sentences regardless of whether they are in custody, on parole, or on probation. Plaintiffs argue that this not only negatively impacts those whose right to vote is suspended, but also the minority community as a whole because a disproportionate number of minorities are convicted of indictable offenses, and this is at least partially the result of racism in the functioning of the criminal justice system.

Plaintiffs argue that the voting rights of members of the minority community at large are harmed or diluted by denying the suffrage to those who have been convicted of indictable crimes and are currently serving their sentences. In other words, allowing drug dealers and other felons to vote is said to strengthen the voting power of the minority community. The possibility exists, however, that the views, values and interests of those convicted of indictable offenses, many of whom have victimized other members of the minority community, are different than those of the minority community who are not currently serving criminal sentences, many of whom have been the victims of the former. Not all those convicted of indictable offenses are guilty of so called victimless crimes. Many are violent felons or sellers of illegal and harmful narcotics. Even those whose only crime is to use narcotics might have harmed the minority community by providing a market and hence an existence to organizations that sell drugs and use violence to protect their markets and to terrorize the community in which they exist.

If racism exists in the criminal justice system, a much greater and more direct harm to the minority community than the denial of voting rights would seem to be incarceration. It does not seem to make much sense for a court to hold that someone cannot be denied his or her right to vote because of the existence of racism in the criminal justice system, but that he or she can be incarcerated, perhaps for the rest of his or her life. If racism infects the criminal justice system the remedy is to reform the criminal justice system, not to strike down a voting law that does not discriminate on the basis of race. Such reform can be done either through political action or through the courts. Every convict has a right to challenge the enforcement and the

adjudication of the law as racially discriminatory and citizen's groups have the right to participate in such challenges. Even striking down the laws that are being discriminatorily enforced would be a more direct remedy than the remedy being asked for here, the striking down of an ancillary law restricting the voting rights of those convicted.

3. The Public Need for the Restriction:

Plaintiffs argue that the law does not rationally serve a legitimate public goal. If this were true, *N.J.S.A. 19:4-1* could rightfully be suspected of actually serving or having the purpose of serving an illegitimate goal, such as racial oppression.

The claim that the denial of the right to vote serves as a punishment, although possible, frankly strikes this court as somewhat optimistic. This court also admits that it is hard to see how denying someone the right to vote would further their rehabilitation. Perhaps it gives felons an incentive to successfully complete parole or probation, but the same reasons that cause skepticism for thinking that the denial of voting rights is much of a punishment, also provide reason for thinking that the regaining of voting rights is not much of an incentive. Another possibility is that individuals can be better trusted to exercise their votes in a public serving manner once they have completed their sentences. If the purpose of probation and parole is rehabilitation as the plaintiffs argue, then this rationale for requiring convicts to wait until they have completed their terms of parole or probation before regaining the right to vote is in fact rational.

Furthermore, no court of which this Court is aware has held that the denial of the vote to convicts is irrational. In fact, many have directly upheld its rationality. For example, the Second Circuit in *Green v. Board of Elections*, 380 F.2d 445 (2d. Cir. 1967) stated:

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. On a less theoretical plane, it 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

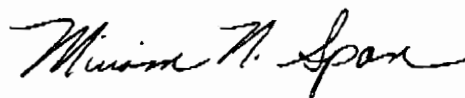
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these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. [*Id.* at 451-52 (citing *The Challenge of Crime in a Free Society*, A Report by the President's Commission on Law Enforcement and Administration of Justice, 45-47, 187-196 (1967))].

In addition to suggesting that it is rational not to trust lawbreakers to participate in the making of the law, the excerpt above also suggests a social compact rationale for denying those who are currently serving sentences for breaking the law from full participation in the political community. A person who has shown disrespect for the law by violating it should not be allowed to participate in the creation of the law. Until one has repaid one's debt to society by serving one's sentence one is on probation from the political community. In other words, *N.J.S.A. 19:4-1* serves an important expressive function that reaffirms the importance of respect for the law and the community of law-abiding citizens that is the source of the law. By violating the law, one has renounced full membership in the political community and must fully serve one's sentence in order to regain full membership, i.e., the right to participate in the creation of the laws that help govern society. Serving this function of expressing community values and power of self-constitution can hardly be considered irrational. As such, there are no grounds presented by the plaintiffs for believing that *N.J.S.A. 19:4-1* serves an illegitimate or invidious purpose. Hence, plaintiffs' complaint must be dismissed for failure to state a claim upon which relief may be granted pursuant to *R. 4:6-2(e)*.

Counsel for the defendant shall submit a Judgment for my signature in conformity with this Opinion.

Very truly yours,



MIRIAMN. SPAN, P.J.Ch.