

HAND V. SCOTT: FLORIDA’S METHOD OF RESTORING FELON VOTING RIGHTS DECLARED UNCONSTITUTIONAL

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I. HAND V. SCOTT

In February, a federal court considered the method used by Florida executive officials to reinstate voting rights for convicted felons in *Hand v. Scott*.¹ First Amendment protections in the context of felony voting restoration was a matter of first impression for the court.² The court held the “unfettered discretion” the Clemency Board possessed over a felon’s voting right restoration and the lack of clear time limits in deciding clemency applications violated the First Amendment to the U.S. Constitution.³ The court also held the “unfettered official discretion” in Florida’s felony vote restoration process violated the Equal Protection Clause of the Fourteenth Amendment.⁴ The court has not yet determined the appropriate relief but made it clear that the current method of reinstating a former felon’s voting right is a violation of the United State Constitution.⁵

In Florida, any person who is convicted of a felony automatically loses the right to vote.⁶ In a majority of states, vote restoration, also known as re-enfranchisement, is automatically given to former felons upon completion of their sentence.⁷ In Florida, a former felon may restore their right to vote by receiving the approval of the Governor and at least two cabinet members.⁸ The Office of Executive Clemency was created to assist

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¹ *Hand v. Scott*, No. 4:17CV126-MW/CAS, 2018 U.S. Dist. LEXIS 16491 (N.D. Fla. Feb. 1, 2018).

² *Id.* at *10.

³ *Id.* at *4, *8–10.

⁴ *Id.* at *34.

⁵ *Id.* at *42.

⁶ FLA. CONST. art. VI, § 4(a) (Lexis Nexis 2016); FLA. STAT. ANN. § 97.041(2)(b) (LexisNexis 2017).

⁷ Florida is one of thirteen states that do not automatically restore a former felon’s right to vote upon sentence completion. The Sentencing Project, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, at 15-16 (October 2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

⁸ FLA. CONST. art. IV § 8(a) (LexisNexis 2016); FLA. STAT. ANN. § 944.292(1) (LexisNexis 2017).

in the vote restoration process and other clemency decisions.⁹ The Clemency Board created a set of rules for the clemency application process. However, the Board is not limited those rules and the Governor may, at his unfettered discretion, “deny clemency at any time, for any reason.”¹⁰

To have their civil rights restored, including the right to vote, a former felon must wait either five or seven years and send an application to the Office of Executive Clemency.¹¹ The application must include certain documents, such as a certified copy of the charging instrument, and may include other documents, such as letters of support.¹² An application may then be forwarded to the Florida Parole Commission (“FPC”), which may investigate the application and provide a recommendation to the Board.¹³ In certain cases, a former felon may have his or her civil rights restored without a hearing before the Board,¹⁴ while in other cases, a hearing may be required.¹⁵ The Board may consider the FPC’s recommendation, the former felon’s initial conviction, new criminal charges, and supporting or opposing statements made at the hearing, when applicable, in making its decision of whether or not to reinstate civil rights.¹⁶ If denied, a former felon must wait two years before reapplying for clemency.¹⁷

The plaintiffs in *Hand*, a group of nine former felons, challenged the reinstatement process on several Constitutional grounds. The defendants, members of Florida’s Executive Clemency Board, argued that when a former felon loses the right to vote, they also lose the Constitutional rights associated with the ability to vote.¹⁸ The court strongly disagreed, reasoning that “[i]f a state cannot disenfranchise for arbitrary reasons, a

⁹ Fla. R. Exec. Clemency 2(B), available at https://www.flgov.com/wp-content/uploads/2011/03/2011-Amended-Rules-for-Executive-Clemency.final_3-9.pdf.

¹⁰ Fla. R. Exec. Clemency 4.

¹¹ Fla. R. Exec. Clemency 6(A); see Fla. R. Exec. Clemency 9 (listing eligibility requirements for a five-year waiting period); see Fla. R. Exec. Clemency 10 (listing eligibility requirements for a seven-year waiting period).

¹² Fla. R. Exec. Clemency 6(B).

¹³ Fla. R. Exec. Clemency 7.

¹⁴ Fla. R. Exec. Clemency 9(B).

¹⁵ Fla. R. Exec. Clemency 10. The Board meets at least four times a year to hold clemency hearings. Fla. R. Exec. Clemency 12(A). Applicants are not required but are encouraged to attend the hearing, where the applicant and anyone speaking on their behalf has a speaking limit of five minutes, or ten minutes cumulatively. Fla. R. Exec. Clemency 12(B)–(C).

¹⁶ Fla. R. Exec. Clemency 7, 9(A), 12(B). The Rules do not provide a list of factors the Board *must* consider. See generally Fla. R. Exec. Clemency.

¹⁷ Fla. R. Exec. Clemency 14.

¹⁸ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *7.

state cannot disenfranchise convicted felons in a manner repugnant to the First Amendment.”¹⁹ While a state does have the right to disenfranchise convicted felons,²⁰ it may not take away the right to vote if motivated by racial animus or for any arbitrary reason.²¹ If a state provides a way for convicted felons to restore their voting rights, the method of restoration cannot violate the Constitution.²²

Counts One and Three rested on a violation of a convicted felon’s First Amendment right of free association and right of expression.²³ The court first addressed the right of free association in the context of the ability to vote.²⁴ The right to freely associate is assured by the Due Process Clause of the Fourteenth Amendment and is closely related to the freedom of speech provided in the First Amendment.²⁵ Courts are particularly protective of this right in connection with political association, “recoil[ing] from anything that resembles a thumb on the scales of association and, by extension, the democratic process.”²⁶ The right of free expression guaranteed by the First Amendment restricts the government from suppressing an individual’s political expression when the suppression is based on the content.²⁷ While the Supreme Court has declined to characterize voting as a form of expression, the Court has not expressly severed the right to vote from the right of expression.²⁸ Because there is no binding precedent holding that the two rights are independent of each other, the *Hand* court found that voting is a method of expressing a political point of view, intertwined with the right to free expression.²⁹ In summary, the court explained that when a state violates a citizen’s right of free association and right of free expression, the state also violates the First Amendment of the United States Constitution.³⁰

In Count One, the court held that Florida officials’ “unfettered

¹⁹ *Id.* at *8.

²⁰ *Id.* at *8 (citing U.S. CONST. amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974)).

²¹ *Id.* at *8–9 (citing *Hunter v. Underwood*, 471 U.S. 222, 233 (1985); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978)).

²² *Id.* at *10.

²³ *Id.* at *18, *29–30.

²⁴ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *11–13.

²⁵ *Id.* at *11 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)).

²⁶ *Id.* at *13.

²⁷ *Id.* at *14.

²⁸ *Id.* at *14–15 (citing *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 664 (1966)).

²⁹ *Id.* at *17–18.

³⁰ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *10–18.

discretion” in restoring a convicted felon’s voting rights violated the First Amendment.³¹ A former felon may want to associate with a certain political party or express support for certain policies.³² Those desires associated with the right of free association and expression are seriously burdened by the Board’s unfettered executive discretion and the strenuous application process.³³ The court stated that Florida goes even further by requiring the Governor to assent to restoration and the former felon to comport with “mythical” standards.³⁴

The limitless power possessed by the Clemency Board was subject to strict scrutiny.³⁵ Although the defendants argued the vote restoration process furthers the state interest in “limiting the franchise to responsible voters,” the court held Florida did not use the least restrictive means to further this interest.³⁶ The vote restoration process and the Board’s ability to use its unfettered discretion failed under strict scrutiny because it risked “arbitrary and discriminatory vote-restoration” and allowed for the possibility of viewpoint discrimination.³⁷ There was a possibility that the applicant’s race, religion, or political views could influence the Board’s decision to restore voting rights.³⁸ It was the mere possibility that the Board could engage in viewpoint discrimination that troubled the court.³⁹ While the defendants argued individualized review of a former felon’s application was a credible part of the restoration process, the court stated the positive components⁴⁰ of individualized review “mean nothing,” since the language of the Clemency Rules state that the Governor has “unfettered discretion to deny clemency at any time, *for any reason.*”⁴¹

The defendants also argued the vote restoration process is a form of

³¹ *Id.* at *18.

³² *Id.* at *18–19.

³³ *Id.* at *18–19.

³⁴ *Id.* at *19.

³⁵ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *22. The vote restoration process and the Board’s “limitless power” was considered the means used to further the State’s end. *Id.* at *21.

³⁶ *Id.* at *21–22.

³⁷ *Id.* at *23–24.

³⁸ *Id.* at *24–26. Plaintiffs cited several occasions where the applicant political views or criticisms seemed to influence the Board’s decision. *Id.* Plaintiffs also cited occasions where similar conduct led to different results. *Id.*

³⁹ *Hand*, 2018 U.S. Dist. LEXIS 16491 at *26 (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992)). It was not relevant that the plaintiffs did not argue the defendants actually engaged in viewpoint discrimination. *Id.* at *25–26.

⁴⁰ These components include investigations, case analyses, and hearings. *Id.* at *26–27.

⁴¹ *Id.* (emphasis in original).

executive clemency, protecting the scheme from judicial review.⁴² The court dismissed this argument because the court was evaluating the structure of the vote restoration process and the unfettered discretion element, not a specific decision of the Clemency Board.⁴³ Additionally, the court noted that even if a judicial entity were to evaluate any particular decision of the Clemency Board, a decision that violated the Constitution would not be immune from judicial review.⁴⁴

In Count Three, the court held the lack of clear time limits for the Board to process and decide clemency applications violated the First Amendment.⁴⁵ While “*some time*” may advance Florida’s interest in limiting the voting franchise to responsible voters, the absence of a time limit “creates the risk of arbitrary delays and arbitrary continued disenfranchisement.”⁴⁶ Unconstitutional viewpoint discrimination may be hidden by the combination of the absence of time constraints and the Governor’s unfettered discretion in denying clemency.⁴⁷ The court noted that under the current method, defendants were able to “kick the can down the road” for years, possibly forever, violating a former felon’s right of free association and right of expression.⁴⁸ Because the vote restoration process did not provide a time limit for the Board to process and decide vote restoration applications, the process risked viewpoint discrimination and was declared unconstitutional.⁴⁹

In Count Two, the court held the vote restoration process was also a violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁰ *Bush v. Gore* established the government may not by “arbitrary and disparate treatment, value one person’s vote over that of another.”⁵¹ The process granting the right to vote cannot be arbitrary.⁵² Because there were no constraints or guidelines on the Board’s discretion, the Board was permitted to make arbitrary distinctions between felons, making the process

⁴² *Id.* at *27.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *29. “Even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty.” *Id.* at *22 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973)).

⁴⁶ *Id.* at *29–30.

⁴⁷ *Id.* at *30.

⁴⁸ *Id.* at *31. “Indefinite can-kicking is not some Floridian fairytale like a line-less Space Mountain.” *Id.*

⁴⁹ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *32–33.

⁵⁰ *Id.* at *34.

⁵¹ *Id.* at *34 (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

⁵² *Id.* at *34–35.

“arbitrary and disparate,” and possibly even outright discriminatory.⁵³

The defendants based their equal protection argument on *Beacham v. Braterman* and *Shepherd v. Trevino*.⁵⁴ In *Beacham*, a former felon sought to have his right to vote restored, but his application was denied.⁵⁵ When he brought a suit challenging the governor’s ability to pardon certain convicted felons and not others, the Southern District of Florida held Florida did not deny the plaintiff his equal protection and due process rights since discretionary pardon power was not subject to judicial control.⁵⁶ The United States Supreme Court summarily affirmed.⁵⁷ The *Hand* court stated it was not bound by the Southern District of Florida’s rationale since a summary affirmance is an affirmance of the *judgment only*.⁵⁸ In *Shepherd*, the plaintiffs challenged the selective re-enfranchisement of convicted felons in Texas.⁵⁹ The court determined the re-enfranchisement process that made a distinction between state and federal felons received rational basis review.⁶⁰ Because Texas had a legitimate interest in limiting the voting franchise to “responsible voters” and the classification had a rational relationship to that interest, the court held the voting restoration process did not violate the Equal Protection Clause.⁶¹ The *Hand* court agreed that Florida may have a legitimate interest in limiting voting to “responsible voters,” but found it impermissible that the process allowed partisan officials to use their unfettered discretion to “cull ‘responsible voters’ to include only those voters that might benefit their political party.”⁶² The court found the process “arbitrary and disparate” and held that the scheme violated the Fourteenth Amendment.⁶³

Lastly, in Count Four, the plaintiffs challenged the five and seven-year periods that felons must wait before becoming eligible to apply for re-

⁵³ *Id.* *39.

⁵⁴ *Id.* at *35 (citing *Shepherd v. Trevino*, 575 F.2d 1110 (5th Cir. 1978); *Beacham v. Braterman*, 300 F. Supp. 182 (S.D. Fla. 1969), *aff’d*, 396 U.S. 12 (1969)).

⁵⁵ *Beacham*, 300 F. Supp. at 183.

⁵⁶ *Beacham*, 300 F. Supp. at 184.

⁵⁷ *Beacham v. Braterman*, 396 U.S. 12, 12 (1969).

⁵⁸ *Hand*, 2018 U.S. Dist. LEXIS 16491 at *36 (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added)). The Court also noted Justice O’Connor’s observance that the Due Process Clause does impose some limitations on clemency proceedings. *Id.*; *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280–90 (1998) (O’Connor, J., concurring).

⁵⁹ *Shepherd*, 575 F.2d at 1111. In Texas, there was a mechanism for convicted state felons to restore their voting rights, but no such mechanism for federal probationers. *Id.*

⁶⁰ *Id.* at 1115.

⁶¹ *Id.*

⁶² *Hand*, 2018 U.S. Dist. LEXIS 16491, at *39.

⁶³ *Id.*

enfranchisement.⁶⁴ After applying the *Anderson-Burdick* balancing test,⁶⁵ the court found the waiting periods were a reasonable restriction under the Constitution and held the waiting periods do not violate the First and Fourteenth Amendments.⁶⁶ Although the court expressed concern over the potential for Constitutional problems to arise, the court stated that because Florida uniformly applies the waiting period, there was “little risk of viewpoint discrimination”⁶⁷

After declaring Florida’s vote restoration process unconstitutional, the court did not issue a remedy, instead requiring the parties to submit additional briefing on an appropriate injunctive remedy.⁶⁸ The court would likely prefer a system in which former felons are immediately re-granted the right to vote upon completing their sentence, or at least a system that provides former felons with some clear guidelines about timing and factors relevant to the Board’s decision.⁶⁹

II. POTENTIAL REMEDIES:

The parties in *Hand v. Scott* were expected to provide the court with additional briefing on appropriate remedies on February 12, 2018.⁷⁰ There are several paths the court may take in constructing appropriate injunctive relief. The plaintiffs’ desired result is an automatic restoration of convicted felons’ right to vote upon completion of their full sentence.⁷¹ This may be difficult since it is still permissible for a state to disenfranchise convicted

⁶⁴ *Id.* at *39–40.

⁶⁵ If a regulation is a burden on the right to vote, “the regulation must be narrowly draw to advance a state interest of compelling importance.” *Id.* at *40 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotations omitted)). However, if a regulation “imposes only reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment right of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* at *40 (quoting *Anderson v. Calabrezze*, 460 U.S. 780, 788 (1982)).

⁶⁶ *Id.* at *40–41.

⁶⁷ *Hand*, 2018 U.S. Dist. LEXIS 16491 at *40.

⁶⁸ *Id.* at *42.

⁶⁹ *See id.* at *33–34. “Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process.’ By downgrading *all* former felons into second-class citizens long after serving out their sentences, where escape is only possible through running through a maze of potential viewpoint discrimination, bias, and arbitrary conduct, Florida’s scheme does just the opposite.” *Id.* (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (internal citations omitted)).

⁷⁰ *Id.* at *42.

⁷¹ *Hand v. Scott: Lawsuit to Restore Former Felons’ Voting Rights in Florida*, FAIR ELECTIONS LEGAL NETWORK, <http://fairelectionsnetwork.com/hand-v-scott/>, (last visited Mar. 18, 2018).

felons.⁷² Because the court took particular issue with the “unfettered discretion” aspect of the Clemency Rules, a change to the Clemency Rules may be the most likely resolution.⁷³ Such a change would have to remove any hint of arbitrary decision making and remove the ability of the Board to “do whatever [they] want.”⁷⁴ If Florida wants to “limit[] the [voting] franchise to responsible voters” it will need to provide a less restrictive method that does not offend the United States Constitution.⁷⁵

III. IMPACT OF DECISION:

The *Hand* court noted that over one-tenth of Florida’s voting population is not eligible to vote.⁷⁶ The decision removes the requirement to “plod through a gauntlet of constitutionally infirm hurdles” in order for felons to restore their right to vote.⁷⁷ Since the decision was released, many have commented on the unconstitutionality of Florida’s vote restoration process. Attorney and Cumberland School of Law graduate Theodore Leopold, who represented the plaintiffs, stated: “no longer can politicians arbitrarily deny fundamental rights to citizens of the state of Florida.”⁷⁸ Former Governor Charlie Christ posted “[w]e’ve known this policy was unjust, and today a federal judge confirmed it’s also a violation of constitutional rights. Justice will prevail!”⁷⁹ While the remedy is uncertain until the court makes its final ruling on appropriate relief, it seems apparent that the Board will at least need to implement some time frame for decision making and use less subjective standards in making its decision.⁸⁰ *Hand v. Scott* is a step in a positive direction for rights of convicted felons.

⁷² Richardson v. Ramirez, 418 U.S. 24, 56 (1974); *Hand*, 2018 U.S. Dist. LEXIS 16491, at *10 (“A particularly punitive state might even disenfranchise convicted felons permanently.”)

⁷³ *Hand*, 2018 U.S. Dist. LEXIS 16491, at *18–20.

⁷⁴ *Id.* at *4, *9.

⁷⁵ *Id.* at *21.

⁷⁶ *Id.* at *44

⁷⁷ *Id.*

⁷⁸ Steve Bousquet, *Judge Strikes Down Florida’s System for Restoring Felons’ Voting Rights*, TAMPA BAY TIMES (Feb. 1, 2018), <http://www.tampabay.com/florida-politics/buzz/2018/02/01/federal-judge-strikes-down-floridas-system-for-restoring-felon-voting-rights/>.

⁷⁹ Charlie Christ, FACEBOOK (Feb 1, 2017), <https://www.facebook.com/charliecrist/posts/10157514797133312>.

⁸⁰ *See Hand*, at *19, *29–30.