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LEGAL ANALYSIS OF NEBRASKA LEGISLATIVE BILL 75

Brennan Center for Justice at NYU School of Law
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Question Presented

Nebraska Legislative Bill 75 would restore voting rights to citizens with past criminal convictions upon the completion of their sentence. Is this bill lawful under the Nebraska Constitution?

Short Answer

Yes. The Legislature has broad powers to legislate "upon any subject not inhibited by the Constitution." LB 75 deals with the restoration of voting rights. The Constitution does not inhibit legislation on that subject, nor does it assign the power to restore voting rights elsewhere in government.

The Legislature may enact any law unless expressly constrained by a higher constitutional authority. Nowhere does the Nebraska Constitution limit or deny the authority to legislate on the restoration of voting rights.

Nor does the Constitution assign the power to restore the right to vote to another governmental entity. Under the Constitution, the Board of Pardons is granted "pardon" and "commutation" powers. A 2002 Nebraska Supreme Court decision held that a statute would encroach on these powers only if it commuted a punishment or removed all of the legal consequences of a conviction. By restoring only the right to vote, LB 75 does neither. A series of Attorney General Opinions taking a broader view of the Board of Pardons' constitutionally-granted powers predates this 2002 Supreme Court decision, and is therefore inapposite.

Analysis

1. LB 75 modifies existing Nebraska law by eliminating the waiting period for restoring the right to vote

The Nebraska Constitution provides that "[n]o person shall be qualified to vote who . . . has been convicted of . . . [a] felony under the laws of the state or of the United States, unless restored to civil rights."[1] Under a law duly enacted by the Legislature in 2005, the state currently restores voting rights

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[1] NEB. CONST. art. VI, § 2; *see* Ways v. Shively, 264 Neb. 250, 255, 646 N.W.2d 621,626 (2002) ("the restoration referred to in NEB. CONST. art. VI, § 2, is the restoration of the right to vote.").

automatically two years after a citizen fully completes their felony sentence.[2] LB 75 would modify this statute to eliminate that two-year waiting period prior to restoration.[3]

2. **The Nebraska Legislature has broad power to legislate on any subject unless expressly restricted by the Constitution**

It is axiomatic that legislatures may legislate on any subject unless constrained through a higher power, such as the Constitution. This bedrock principle has been repeatedly reasserted by the Supreme Court, which has noted that "[u]nless restricted by some provision of the state or federal Constitution, the Legislature may enact laws and appropriate funds for the accomplishment of any public purpose,"[4] and that the "Nebraska Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature may legislate upon any subject not inhibited by the Constitution."[5]

The Constitution does not so restrict the ability to legislate on the restoration of voting rights. Restoration of voting rights in particular is not mentioned anywhere in the Constitution. As stated above, civil rights restoration is mentioned in article VI, § 2, which reads: "[n]o person shall be qualified to vote . . . who has been convicted of treason or felony under the laws of the state or of the United States, *unless restored to civil rights*."[6] This language contains no express restriction curtailing the legislature's ability to legislate on the subject nor does it assign the function to any particular branch of government.

Elsewhere, the Constitution contains limits on the ability of people with felony convictions to hold "any office of trust or profit,"[7] and on when public office holders may hold office again after violating their oaths.[8] The specificity of these restrictions lies in contrast to the lack of restrictions on the restoration of voting rights.

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[2] NEB. REV. STAT. §§ 29-112 (providing in part that "[a]ny person sentenced to be punished for any felony, when the sentence is not reversed or annulled, is not qualified to vote until two years after he or she has completed the sentence, including any parole term. The disqualification is automatically removed at such time."); 29-113 (providing for voting rights restoration for citizens convicted of felonies outside of Nebraska); 32-313 (providing in part that "[n]o person who has been convicted of a felony under the laws of this state or any other state is qualified to vote or to register to vote until two years after the sentence is completed, including any parole term.").

[3] Legis. B. 75, 105th Leg., 1st Sess. (Neb. 2017), *available at* http://nebraskalegislature.gov/FloorDocs/105/PDF/Intro/LB75.pdf.

[4] State *ex rel*. Stenberg v. Moore, 249 Neb. 589, 595, 544 N.W.2d 344, 349 (1996).

[5] Pony Lake Sch. Dist. 30 v. State Comm. for Reorganization of Sch. Dists., 271 Neb. 173, 181, 710 N.W.2d 609, 618 (2006). For example, in *City of N. Platte v. Tilgner*, the Court concluded that the Legislature had the power to enact a statute that gave voters the right to petition for municipal ballot measures. The Court concluded that because the state Constitution "does not restrict the right to petition for municipal ballot measures, the Legislature was free to grant these powers to municipal voters . . . ." 282 Neb. 328, 345, 803 N.W.2d 469, 484 (2011).

[6] NEB. CONST. art. VI, § 2 (emphasis added).

[7] NEB. CONST. art. XV, § 2 (providing that "[n]o person convicted of a felony shall be eligible [to serve in any 'office of trust or profit'] unless he shall have been restored to civil rights.").

[8] NEB. CONST. art. XV, § 1 (providing that "any person who shall be convicted of having sworn falsely to, or of violating his said oath shall forfeit his office, and thereafter be disqualified from holding any office of profit or trust in this state unless he shall have been restored to civil rights").

As the Supreme Court has previously acknowledged, voting rights restoration has long been implemented via statute.[9] This is because nothing in the Constitution curtails the Legislature's otherwise broad power to legislate on the subject.

3. The Nebraska Legislature has broad power to legislate so long as it does not encroach on the powers of another branch

The Legislature likewise has broad ability to legislate so long as it does not encroach on another branch's authority.

The Constitution bars any one branch of government "from exercis[ing] any power properly belonging to either of the others except as expressly directed or permitted" within the Constitution itself.[10] The state Supreme Court interprets this as preventing a branch "from encroaching on the duties and prerogatives of the other[] [branches] or from improperly delegating its own duties and prerogatives . . . ."[11] Nowhere does the Constitution refer to a specific entity that specifically restores civil rights or a particular process for specifically restoring civil rights.

4. The Constitution expressly limits the relevant powers of the Board of Pardons and controlling Supreme Court precedent narrowly construes these powers

The Constitution expressly delineates the relevant powers of the Board of Pardons, an executive branch entity tasked with "grant[ing] respites, reprieves, pardons, or commutations."[12]

The Nebraska Supreme Court has narrowly construed these powers in a line of cases establishing standards to determine whether another branch has encroached on the Board of Pardons' commutation and pardon powers.

A. A law encroaches when it commutes a "punishment"

The legislature encroaches on the Board of Pardons' powers when it passes a law commuting a punishment or permitting the judiciary to do so. In *State v. Bainbridge*,[13] the state Supreme Court invalidated a statute that gave courts the authority to reduce the length of a driver's license revocation imposed with a DWI conviction.[14] The decision held that exercising this authority would constitute the "commutation of a sentence… [as in] the substitution of a milder punishment," a power that belonged exclusively to the Board of Pardons.[15] The court examined the law's plain language to assess its purpose, and determined that the revocation at issue was a "punishment" alongside incarceration and/or fines.

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[9] Ways v. Shively, 264 Neb. 250, 255, 646 N.W.2d 621, 626 (noting that "[r]estoration of the right to vote is implemented through statute" while elsewhere interpreting Nebraska statute at issue not to have restored voting rights to individual who had completed sentence, and also declining to address constitutional issues not raised below).

[10] NEB. CONST. art. II, § 1.

[11] State v. Philipps, 246 Neb. 610, 614, 521 N.W. 2d 913, 916 (1994).

[12] NEB. CONST. art. IV, § 13.

[13] 249 Neb. 260, 543 N.W.2d 154 (1996).

[14] Prior to *Bainbridge*, the Nebraska Supreme Court enforced the separation of powers provision against statutes that would have allowed courts to reduce sentences, but did not articulate the analysis applied in *Bainbridge*. *See* State v. Jones, 248 Neb. 117, 532 N.W.2d 293 (1995) (invalidating a statute that would have allowed courts to reduce the prison sentences of certain sex offenders); *Philipps*, 246 Neb. at 616, 521 N.W.2d at 917 (invalidating a statute that would have allowed a court to reduce a criminal sentence it had previously imposed).

[15] *Bainbridge*, 249 Neb. at 265, 543 N.W.2d at 158.

The court reached this conclusion because the underlying statute stated that it "punished" a defendant and also expressly provided that the revocation was to be "part of the judgment of the conviction."[16] It contrasted this statute with another license revocation law in a different case that it found to be "remedial." There, the fact that the law acted as a deterrent did not necessarily make it "punishment"— the statute's underlying "character is not defeated by the fact that [it] also play[s] a role in deterring others" from criminal behavior.[17]

B. A law encroaches when it issues a pardon, but the Nebraska Supreme Court has defined "pardon" narrowly for these purposes

The legislature encroaches when it passes a law that issues a pardon or permits the judiciary to do so. In *State v. Spady*,[18] the state Supreme Court upheld a statute that allowed courts to set aside convictions and restore particular civil rights – but not all – to certain individuals who completed their sentences. The court reasoned that while the Board of Pardons held the exclusive power to "nullify [a] conviction and remove all civil disabilities imposed," the statute did not encroach on that power because it "[did] not nullify *all* of the legal consequences of the crime committed… as occurs when a pardon is granted"[19] (emphasis added).

5. Under the Nebraska Supreme Court's standards, LB 75 does not encroach on the Board of Pardons' power, as it neither commutes a punishment nor constitutes a pardon

LB 75 does not encroach on the Board of Pardons' powers because, under the above controlling Supreme Court precedent, it would neither commute a punishment nor constitute a pardon. A series of opinion letters issued by the Nebraska Attorney General adopting a broad view of the Board of Pardons' pardon powers were issued *before* the Supreme Court's 2002 decision in *Spady*, and are abrogated by its reasoning.[20]

A. LB 75 does not commute a sentence because disenfranchisement is not a "punishment" in the way the Nebraska Supreme Court found problematic in Bainbridge

LB 75 is not a commutation because its (and existing law's) restoration of voting rights addresses a consequence of a criminal conviction but not, under the Nebraska Supreme Court's ruling in *Bainbridge*, a punishment in itself. The statute at issue in *Bainbridge* was unlawful because it allowed courts to substitute a punishment that was written into a penal statute and expressly part of a criminal judgment. LB 75 and the law it would be replacing are housed primarily in the state's election law statutes.[21] The state's criminal procedure statutes separately note that a person already "sentenced to be *punished* for any felony… is not qualified to vote."[22] (emphasis added). Under the rule espoused in *Bainbridge*, the underlying nature of Nebraska's disenfranchisement law is explicitly not punishment.

Further, Nebraska's criminal disenfranchisement regime is not enshrined in the state's crime and punishment statutes, but instead in the constitutional provision governing suffrage,[23] the state's election

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[16] *Id*. at 265-66, 543 N.W.2d at 159.
[17] *Id*. at 267, 543 N.W.2d at 160 (citing State v. Hansen, 249 Neb. 177, 189, 542 N.W.2d 424, 433 (1996)).
[18] 264 Neb. 99, 645 N.W.2d 539 (2002).
[19] *Id.* at 103-05, 645 N.W.2d at 542-43.
[20] *See* Section 5.B below, regarding *Spady*, 264 Neb. 99, 645 N.W.2d 539.
[21] NEB. REV. STAT. § 32-313.
[22] NEB. REV. STAT §§ 29-112, 29-113.
[23] NEB. CONST. art. VI, § 2.

statutes,[24] the law governing criminal procedure,[25] and the section of the code concerning state institutions.[26] Like the "remedial" revocation statutes that the *Bainbridge* court noted, Nebraska's laws on this issue serve purposes other than punishment.

B. LB 75 is not a pardon because it does not address all of the consequences of a felony conviction

LB 75 does not constitute a pardon because, like the statute at issue in *Spady*, it "does not nullify *all*" of a crime's legal consequences. Unlike a pardon, the bill would address only the right to vote. Persons restored to their voting rights under LB 75 would still face the other consequences of their conviction, such as the inability to serve on a jury—a fact addressed in one of the very statutes being modified.[27]

The Nebraska Attorney General took the position that restoration of civil rights could only be done via the pardon power, and not by statute.[28] But these opinion letters were issued before the state Supreme Court in *Spady* narrowly defined "pardon" for these purposes.[29]

Conclusion

The Legislature's broad general lawmaking power gives it the authority to enact a voting rights restoration statute, such as LB 75. This power is not curtailed by any constitutional restriction.

Further, under controlling Supreme Court precedent, LB 75 does not unlawfully encroach on any of the powers assigned exclusively to the state Board of Pardons. The state Supreme Court has strictly construed the Board of Pardons' powers, noting that legislation encroaches upon it only when it commutes a punishment, or when it relieves *all* of the consequences of a criminal conviction. LB 75 does neither of these things.

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[24] NEB. REV. STAT. §§ 32-312 (regarding the contents of the state voter registration form); 32-313 (regarding qualifications for elections); 32-1530 (establishing a felony for voting while disenfranchised for a felony conviction).

[25] NEB REV. STAT. §§ 29-112, 29-113, 29-2264 (regarding notice of voting rights restoration for individuals two years after completing probation)

[26] NEB. REV. STAT. § 83-1,118 (mandating that corrections and parole agencies notify discharged persons that their voting rights will be restored two years after their sentence is completed).

[27] NEB. REV. STAT. § 29-112 (Providing in the part that "[a]ny person sentenced to be punished for any felony, when the sentence is not reversed or annulled, is incompetent to be a juror or to hold any office of honor, trust, or profit within this state, unless such person receives from the Board of Pardons of this state a warrant of discharge, in which case such person shall be restored to such civil rights and privileges as enumerated or limited by the Board of Pardons.")

[28] Neb. Op. Atty. Gen. No. 1011 (2001) (stating that the pardon power "cannot be modified by the legislative branch."); Neb. Op. Atty. Gen. No. 96023 (1996) (stating that "the Legislature cannot legislate the restoration of civil rights" because that "is part of the pardoning power vested in the Board of Pardons."); s*ee also* Neb. Op. Atty. Gen. No. 99025 (1999) ("the framers of our Constitution gave the sole authority to grant reprieves to the Board of Pardons").

[29] *See* Section 4.B above, regarding State v. Spady, 264 Neb. 99, 645 N.W.2d 539 (2002).