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**TRANSNATIONAL JUDICIAL DISCOURSE AND FELON
DISENFRANCHISEMENT: RE-EXAMINING
*RICHARDSON v. RAMIREZ***

Jason Morgan-Foster[†]

I. INTRODUCTION

In representative democracies, the right to vote can be considered “the most fundamental right.”¹ In the words of the United States Supreme Court, it “is preservative of other basic civil and political rights, [and thus] any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”² As articulated by the Supreme Court of Canada, “[t]he right to vote is synonymous with democracy.”³ Indeed, voting is not only a right, but it is a civic duty.⁴ Nevertheless, approximately 4.7 million people in the United States, “or one in forty-three adults, have currently or permanently lost their voting rights as a

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1. COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1316 (Dorsen et al., eds. 2003).

2. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

3. Reference re Provincial Electoral Boundaries [1991] S.C.R. 158.

4. See, e.g., William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968).

result of” the widespread practice of felon disenfranchisement.⁵ Over 1.4 million of these are African American men, or 13% of the African American men in the United States.⁶ More than 1.7 million disenfranchised persons are ex-offenders who have completed their sentences.⁷

Ever since *Richardson v. Ramirez* [hereinafter *Ramirez*], the constitutionality of felon disenfranchisement in the United States has differed markedly from other “first generation” voting rights issues. Whereas the Supreme Court’s seminal cases concerning the denial of the vote based on literacy,⁸ property,⁹ and wealth¹⁰ involved the classic means-end constitutional scrutiny we have come to expect from equal protection decisions, the Supreme Court in *Ramirez* relied on a decidedly different textual argument, that Section 2 of the Fourteenth Amendment provides an “affirmative sanction” for felon disenfranchisement.¹¹ It has been generally accepted that the *Ramirez* decision was so inclusive, and its textual conclusion so unforgiving, that the exception for purposeful discriminatory intent enunciated in *Hunter v. Underwood*¹² was the only

5. The Sentencing Project notes that “48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense 36 states prohibit felons from voting while they are on parole and 31 of these states exclude felony probationers Three states deny the right to vote to all ex-offenders who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders.” The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited Mar. 26, 2006). For an exhaustive review of felon disenfranchisement statutes and decisions, see Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th 31 (2006).

6. *Id.*

7. *Id.* (noting that many states have complicated processes for restoring voting rights to ex-offenders, often “so cumbersome that few ex-offenders are able to take advantage of them”).

8. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding literacy tests as a requirement for the franchise).

9. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down a law on equal protection grounds that denied the right to vote in school board elections to persons living in the voting area who did not own property there, nor have children in the school system).

10. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax as a requirement for voting in state and local elections).

11. *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974). See *infra* notes 34-35 and accompanying text (discussing the opinion).

12. 471 U.S. 222, 231-33 (1985) (striking down Alabama’s felon disenfranchisement regime because “its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect.”).

possible modification of *Ramirez's* bright line.¹³ For this reason, voting rights advocates have preferred statutory rather than constitutional challenges in the courts, or have left the courtroom altogether, attempting to change the practice through legislative efforts.

Concerning statutory challenges to felon disenfranchisement, the debate over whether the practice is consistent with Section 2 of the Voting Rights Act [hereinafter VRA] is now stronger than ever, including recent decisions by federal appeals courts in three separate circuits. First, in *Farrakhan v. Washington*, the Ninth Circuit reversed a district court's grant of summary judgment for the State, holding that "when felon disenfranchisement results in denial of the right to vote or vote dilution on account of race or color, Section 2 [of the VRA] affords disenfranchised felons the means to seek redress."¹⁴ Second, in *Johnson v. Bush*, the Eleventh Circuit sitting *en banc* came to the opposite conclusion, reversing a previous circuit court decision and finding no clear statement from Congress that the VRA should be interpreted differently from Section 2 of the Fourteenth Amendment.¹⁵ Third, the Second Circuit has for the past

13. See, e.g., *Johnson v. Bush*, 405 F.3d 1214, 1217-18 (11th Cir. 2005) (*en banc*) (reaffirming that *Ramirez* foreclosed any facial challenge to a state criminal disenfranchisement statute and therefore limited the equal protection inquiry to intentional discrimination under *Hunter v. Underwood*), *cert. denied*, 126 S. Ct. 650 (2005).

14. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), rehearing *en banc* denied, 359 F.3d 1116 (2004), *cert. denied*, 543 U.S. 984 (2004). Although the district court "characterized Plaintiffs' evidence of discrimination in Washington's criminal justice system and the resulting disproportionate impact on minority voting power as 'compelling,'" it granted summary judgment for the State because the discrimination in question originated in the criminal justice system, external to the voting qualification itself. The court thus reasoned that the voting qualification furthered, but did not cause the disproportionate impact. *Id.* at 1014, 1017. In reversing the district court, the Ninth Circuit held under the "totality of the circumstances" test that, even if "the cause of [the] disparate impact on [minorities'] right to vote was external to the felon disenfranchisement provision *itself*, . . . [the felon disenfranchisement scheme] could not provide the requisite causal link between the voting qualification and the prohibited discriminatory result." *Id.* at 1011 (emphasis in original).

15. *Johnson*, 405 F.3d at 1232. The *Johnson* panel also concluded that the Florida disenfranchisement provision, revised in 1968, was not motivated by racial animus, and thus did not violate the equal protection clause. The *en banc* ruling reversed the previous 11th Circuit decision in *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003), vacated pending rehearing *en banc* by *Johnson v. Bush*, 377 F.3d 1163 (2004). The district court had granted summary judgment for the State, establishing a presumption that "the re-enactment of the felon disenfranchisement provision in [Florida's] 1968 [Constitution] cleansed Florida's felon disenfranchisement scheme of any invidious discriminatory purpose that may have prompted its inception in Florida's 1868 Constitution." *Johnson v. Bush*, 214 F. Supp.2d 1333, 1339 (S.D. Fla. 2002). The Eleventh Circuit had reversed, refocusing the burden on the State to prove the 1968 constitution was free of discriminatory intent, and finding no

decade been considering the narrower question of whether currently imprisoned felons have a claim under Section 2 of the VRA. In *Baker v. Pataki*, an *en banc* panel split 5-5 over the question.¹⁶ More recently in *Muntaqim v. Coombe*, a three-judge panel held that Section 2 of the VRA was inapplicable to the state disenfranchisement statute because such an application would “alter the constitutional balance between the States and the Federal Government” and Congress had not given a “clear statement” of such intent.¹⁷ This did not end discussion on the issue; it was reborn in December 2004, when the Second Circuit granted a rehearing *en banc*.¹⁸

The debate over felon disenfranchisement is definitely no less alive in legislative halls. In Alabama, a conservative governor “signed legislation making it easier for ex-offenders to regain their voting rights.”¹⁹ Legislatures in “Delaware and Maryland both altered their laws to automatically restore rights after a post-sentence wait . . . , Nevada eliminated its five-year wait to apply for restoration of rights . . . [while] New Mexico no longer disfranchised ex-felons and Connecticut enfranchised probationers.”²⁰ Nebraska repealed the lifetime ban on all felons and replaced it with a two-year post-sentence ban.²¹ The only exception to this trend was Massachusetts, which voted to disenfranchise inmates.²² A bill was also introduced in the U.S. Congress which would guarantee the right to vote in federal elections to all former felons, i.e. those who, at the time of the election, are no longer “serving a felony sentence in a correctional institution or facility, or . . . on parole or

non-discriminatory reason in the record for retaining the felon-disenfranchisement provisions in the Constitution. *Id.* at 1301-02.

16. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

17. *Muntaqim v. Coombe*, 366 F.3d 102, 130 (2d Cir. 2004), *cert. denied*, *Muntaqim v. Coombe*, 543 U.S. 978 (2004); rehearing *en banc* granted, *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004) (amending and superseding order of 385 F.3d 793 (2d Cir. 2004)).

18. *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004). On February 24, 2005, the Second Circuit ordered that the case be consolidated with *Hayden v. Pataki*. 2004 U.S. Dist. LEXIS 10863 (June 14, 2004), available at http://www.naacpldf.org/content/pdf/muntaqim/Second_Circuit_Order_Consolidating_Hayden_and_Muntaqim.pdf.

19. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement* 1 (Stanford Law School Working Paper No. 75), available at http://www.sentencingproject.org/pubs_05.cfm (last accessed March 9, 2006).

20. Christopher Uggen & Jeff Manza, *Summary of Changes to State Disenfranchisement Laws, 1865-2003*, Apr. 2003, http://www.sentencingproject.org/pubs_05.cfm (last visited Mar. 9, 2006).

21. The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, *supra* note 5.

22. *Id.*

probation for a felony offense.”²³ Moreover, support for felon disenfranchisement in the public is falling. One recent survey found that “over eighty percent of Americans believe that ex-offenders should regain their right to vote at some point, and more than forty percent would allow offenders on probation or parole to vote.”²⁴

There are many good reasons for this skepticism of felon disenfranchisement. First, the Circuit Court decisions cited above raise an important question regarding the potential role of felon disenfranchisement in race-based voting discrimination. Second, some argue that felon disenfranchisement should be revisited because small margins of victory in recent elections make prison populations a potential swing vote.²⁵ Third, many commentators maintain that felon disenfranchisement frustrates fair redistricting principles by counting prisoners for redistricting purposes, but not counting their vote.²⁶ None of these reasons is the focus of this article. Rather than add one more voice to all of those arguing in various ways that felon disenfranchisement is wrong because of its functional outcomes, this article returns to the

23. S. 450, Count Every Vote Act of 2005, § 701(d)(1)(2) (109th Congress, 1st Sess., Feb. 17, 2005). See also H.R. 259, Civic Participation and Rehabilitation Act of 2003, § 3 (108th Congress, 1st Sess., Jan. 8, 2003).

24. Karlan, *supra* note 19, at 1.

25. See, e.g., Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement Laws in the United States*, 67 AM. SOCIO. REV. 777, 792, 794 (2002) (using empirical evidence to prove that the 2000 presidential election “would almost certainly have been reversed had voting rights been extended to any category of disenfranchised felons,” and that felon disenfranchisement altered the outcome of as many as seven recent Senate races, and that Democrats would likely have gained and kept majority control of the Senate from 1986 to the present in the absence of felon disenfranchisement).

26. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* 189-90, 265 (2002) (“The strategic placement of prisons in predominantly white rural districts often means that these districts gain more political representation based on the disenfranchised people in prison, while the inner-city communities these prisoners come from suffer a proportionate loss of political power and representation.”); Rosanna M. Taormina, *Defying One-Person, One-Vote: Prisoners and the “Usual Residence” Principle*, 152 U. PA. L. REV. 431 (2003) (arguing that the “usual residence” principle, as applied to disenfranchised prisoners and former prisoners, cannot be squared with the Supreme Court’s one-person, one-vote jurisprudence”); Brief *Amicus Curiae* in Support of Plaintiff-Appellant Jalil Abdul Muntaqim, aka Anthony Bottom, Urging Reversal of the District Court, on Behalf of National Voting Rights Institute and Prison Policy Initiative, 01-7260, submitted to the United States Court of Appeals for the Second Circuit, available at http://www.nvri.org/about/muntaqim_amicus_brief_020405.pdf (last visited Mar. 9, 2006) (arguing that the Court should consider the redistricting implications of disenfranchisement as part of the “totality of circumstances” that must be examined in addressing the plaintiff’s Voting Rights Act claim).

forgotten argument that felon disenfranchisement is inherently wrong in itself. As a constitutional matter, this argument has been foreclosed by the textual holding in *Ramirez* that the Fourteenth Amendment of United States Constitution affirmatively sanctioned the practice. This article argues that a reconsideration of that premise should occur. It does so by approaching the key phrase “or other crime” in section 2 of the Fourteenth Amendment, and re-examining whether the Framers intended that phrase to create the blanket disenfranchisement that it has come to support.

Courts in South Africa, Canada, and Europe have all recently examined prisoner disenfranchisement,²⁷ and have concluded in their respective jurisdictions that the practice, if appropriate at all, is only appropriate for the most serious crimes, and never once the prison term has been completed. By engaging this international jurisprudence, this article follows the increasingly popular model of the “transnational legal discourse”²⁸ to make use of ideas raised by foreign and international courts, without importing their constitutional tests. Although some have attempted to reopen the constitutional inquiry after *Ramirez*,²⁹ no commentator has done so by a reinterpretation of the word “crime” in Section 2 of the Fourteenth Amendment. Similarly, although a voluminous body of literature exists that criticizes felon disenfranchisement,³⁰ and although some scholars have compared the U.S. situation to one other country,³¹ no commentator has yet attempted to

27. The foreign and international courts discussed in this study refer to “prisoner disenfranchisement,” rather than “felon disenfranchisement.” I retain the distinction for clarity to help distinguish whether I am speaking of U.S. domestic practice (“felon disenfranchisement”) or foreign and international practice (“prisoner disenfranchisement”). The term “prisoner disenfranchisement” used in the foreign and international jurisdictions is also narrower and more appropriate to those jurisdictions, because it does not contemplate any possibility of disenfranchising *former* prisoners who have fully completed their sentences.

28. For use of this term, see, e.g., Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 INT'L J. CONSTITUTIONAL L. 91 (2004).

29. See, e.g., Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?* 92 GEO. L.J. 259, 261 (2004); Karlan, *supra* note 19 (arguing that felon disenfranchisement violates the 8th Amendment ban on cruel and unusual punishment).

30. See, e.g., works cited at http://www.sentencingproject.org/pubs_05.cfm (last visited Mar. 9, 2006).

31. See, e.g., Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000); Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71 (2003).

synthesize all of the recent decisions of constitutional courts into one analysis. This article attempts all of these goals.

In Part II, the article revisits *Richardson v. Ramirez*, questioning its conclusion that the text of the Fourteenth Amendment affirmatively sanctions felon disenfranchisement. To answer this inquiry, the article returns to the legislative history of the Fourteenth Amendment, in particular the discussion surrounding the words “or other crime” in section 2. The article establishes that while the *Ramirez* Court believed that the words “or other crime” emerged mysteriously from the black box of congressional committee, a review of the legislative history shows they were actually contemplated in open session before entering committee. This is significant, because the whole text of the plenary discussions has been preserved, whereas the Committee discussions have not. Examining these plenary discussions, it is clear that the words “or other crime,” when taken in their proper context, were meant to refer to crimes of rebellion and disloyalty, particularly treason. By this understanding of the phrase, section 2 of the Fourteenth Amendment only affirmatively sanctions the disenfranchisement of those committing crimes of rebellion or disloyalty to the State, such as treason. With this textual bar removed with respect to most crimes, felon disenfranchisement can thus be examined through means-end constitutional scrutiny, as has become the practice for other first-generation voting rights issues.

In Part III, the article discusses the growing phenomenon of a “transnational judicial discourse” as it has been understood by justices of the United States Supreme Court. In particular, this examination distinguishes the more controversial universalist and genealogical interpretations of the transnational judicial discourse, from the less controversial dialogical interpretation of the discourse, which has been separately endorsed by five current and two recent justices.

In Part IV, the article surveys the recent prisoner disenfranchisement decisions in Canada, South Africa, and Europe. In the Canadian context, the unanimous decision of the Supreme Court in 1993, which found a blanket disenfranchisement of all prisoners to be unconstitutional, contrasts with a much closer 5-4 decision in 2002 invalidating a disenfranchisement law limited to inmates serving sentences of two years or more. In South Africa, the new Constitutional Court, after extensive examination of the Canadian decisions, held by a 9-2 vote that a provision denying the right to vote to prisoners serving sentences without the option of paying a fine was unconstitutional. Finally, the European Court of Human Rights, also after examination of the Canadian decisions, concluded that a British law denying the vote to all prisoners, irrespective of the length of their sentence or gravity of their offense, violated Protocol

No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe.

In Part V, the article undertakes a comparative analysis of the international decisions, identifying in them a continuum of applicability of prison disenfranchisement based on the seriousness of the offense. Returning to the U.S. scenario, and in light of the argument in Part II that the Constitution does not affirmatively sanction felon disenfranchisement, this article offers some suggestions in Part VI on what a continuum of applicability of felon disenfranchisement would look like under a strict scrutiny analysis. The article concludes that the time has come to move beyond the original textual premise in *Ramirez* and develop a more nuanced approach to the applicability of felon disenfranchisement in the United States.

II. THE U.S. DISCOURSE ON FELON DISENFRANCHISEMENT

The Supreme Court's conclusion that Section 2 of the Fourteenth Amendment provides an "affirmative sanction" for felon disenfranchisement has effectively foreclosed constitutional challenges to the practice.³² This differs widely from other "first generation" voting rights issues, such as poll taxes, literacy tests, and residency requirements, which have either been struck down as equal protection violations³³ or prohibited by the Voting Rights Act.³⁴ This difference may be unwarranted: this Part re-examines the legislative history of the adoption of the Fourteenth Amendment, calling the *Ramirez* conclusion into question.

The *Ramirez* Court based its conclusion that the Constitution affirmatively sanctioned felon disenfranchisement on Section 2 of the Fourteenth Amendment, a provision concerning apportionment of congressional representation:

'[W]hen the right to vote . . . 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 which the number of such male citizens shall bear to the

32. *Johnson v. Bush*, 405 F.3d 1214, 1217-18 (11th Cir. 2005).

33. *See supra* notes 9-10.

34. Pub.L.No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)) (banning literacy tests nation-wide).

whole number of male citizens twenty-one years of age in such State.³⁵

By concluding that this provision provided “an affirmative sanction” for felon disenfranchisement, the Supreme Court foreclosed the need for an equal protection inquiry.³⁶ In doing so, it closed the door to any form of means-end equal protection scrutiny, resting its decision wholly, and delicately, on the three words “or other crime.” It did not consider the seriousness of the crime leading to disenfranchisement in any level of detail. The *Ramirez* majority’s reliance on Section 2 of the Fourteenth Amendment as a constraint on Section 1 is open to question. As Marshall argued in his dissent regarding the legislative history of the Fourteenth Amendment, “[i]t is clear that § 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment.”³⁷ Rather, it was included to “provide[] a special remedy - reduced representation - to cure a particular form of electoral abuse - the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination.”³⁸

Although scholars after *Ramirez* have continued to make this point persuasively,³⁹ it is problematic in that it amounts to re-litigating *Ramirez* based on the exact argument the majority already considered and rejected. Even with the passage of time, and change in composition of the Supreme Court, it seems unlikely that it would overrule its former precedent without some changed circumstances or new argument; this is all the more true since the *Ramirez* argument is a textual one, based on the intent of the

35. *Richardson v. Ramirez*, 418 U.S. 24, 42-43 (1974) (quoting U.S. CONST. art. XIV, § 2) (emphasis in the original).

36. *Id.* at 54.

37. *Id.* at 74 (citing Bonfield, *The Right to Vote and Judicial Enforcement of Section Two of the Fourteenth Amendment*, 46 CORNELL L. Q. 108, 109 (1960); HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 98, 126 (1908); BENJAMIN B. KENDRICK, *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 290-91 (1914); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 185 (1956); Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-ninth Congress*, 1965 SUP. CT. REV. 33, 44 (1965)).

38. *Id.*

39. See, e.g., David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976) (arguing that “there is not a word in the fourteenth amendment suggesting that the exemptions in section two’s formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts.”).

framers,⁴⁰ not something subject to an evolving interpretation.⁴¹ Rather than attempting to re-litigate *Ramirez* on the same arguments that failed the first time around – however strong those arguments may appear – it is time for courts and commentators alike to broaden their inquiry.

The approach propose in this article is true to the original reasoning of *Ramirez*, because it accepts that the explicit mention of “crime” in Section 2 places a limit on the equal protection analysis of felon disenfranchisement under Section 1. Rather than taking issue with the linkage between Section 1 and Section 2, as does the *Ramirez* dissent, it relies on this linkage as did the *Ramirez* majority. However, it attempts to go beyond the *Ramirez* majority by developing a more nuanced understanding of what the Framers meant by “other crime” in Section 2.

A. *Re-Examining the Legislative History of the Fourteenth Amendment*

Both the majority⁴² and the dissent⁴³ in *Ramirez* comment that very little legislative history exists as to the phrase “or other crime” in Section 2 of the Fourteenth Amendment, the words upon which the *Ramirez* decision is based. For example, Justice Marshall notes in the dissent that “the proposed § 2 went to a joint committee containing only the phrase ‘participation in rebellion’ and emerged with ‘or other crime’ inexplicably tacked on.”⁴⁴ The only cited basis for this understanding of the legislative history, however, is a footnote in a law review note published the year before the *Ramirez* decision,⁴⁵ but that law review note’s analysis of the legislative history is partially incorrect. In that note, Howard Itzkowitz and

40. *Ramirez*, 418 U.S. at 54 (“We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 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.”).

41. Compare the Supreme Court’s Eighth Amendment jurisprudence, which is not based on a static textual reference but rather on the “evolving standards of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

42. *Ramirez*, 418 U.S. at 43 (“The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here.”).

43. *Id.* at 72-73.

44. *Id.* at 73.

45. Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 746 n. 158 (1973).

Lauren Oldak stated that the proposed Section 2 began as House Resolution 51, and “was sent to a Joint Committee with the phrase ‘participation in rebellion,’” but without the words “or other crime”.⁴⁶ According to Itzkowitz and Oldak’s version of events, it was not until the bill re-emerged from Committee as House Resolution 127 six weeks later that the words “or other crime” first appeared.⁴⁷ Similarly, the review of the legislative history conducted by the majority in *Ramirez* concludes “that the particular language of § 2 upon which petitioner relies was first proposed by Senator Williams of Oregon to a meeting of the Joint Committee on April 28, 1866.”⁴⁸ A careful reading of the legislative history, however, shows that several different versions of House Resolution 51 were printed for further consideration in committee,⁴⁹ including one specifically invoking the word “crime.”⁵⁰

On March 12, 1866, Senator Grimes’ proposed version of House Resolution 51 contained an exceptions clause worded: “except for crime or disloyalty.”⁵¹ Thus, contrary to conventional understanding, the key word “crime” was proposed before H.R. 51 ever went to the “black box” of the Joint Committee. This is significant because the whole text of the plenary discussions has been preserved, which makes it possible to fully investigate what Senator Grimes was reaching for in proposing this precise language. In this regard, Grimes stated that he had “taken it from a proposition submitted by a distinguished Representative in the House of Representatives, Mr. Broomall.”⁵² An examination of Representative Broomall’s earlier interventions leaves absolutely no room for doubt that Mr. Broomall understood the word “crime” in this context to refer to crimes of disloyalty related to the recent rebellion. He stated:

By the doctrine laid down by all the writers upon public law, . . . [the victor in civil war] may treat its opponents either as citizens or public enemies, may hang for treason or hold as prisoners of war. . . . [T]he question of citizenship of its opponents is for it to decide.

46. *Id.*

47. *Id.*

48. *Richardson v. Ramirez*, 418 U.S. 24, 44 (1974).

49. CONG. GLOBE, 39th Cong., 1st Sess. 1289, 1321 (1866).

50. *Id.* at 1320-21.

51. *Id.*

52. *Id.* at 1321.

If I am right in all this, then it is for the Government to elect whether or not it will hereafter treat the rebels as citizens or banish them as alien enemies. . . .

A question might naturally arise whether we ought again to trust those who have once betrayed us. . . . Yet the spirit of forgiveness is so inherent in the American bosom that no party in the country proposes to withhold from these people the advantages of citizenship. . . .

Some public legislative act is necessary to show the world that those who have forfeited all claims upon the Government . . . are to be welcomed back as the prodigal son whenever they are ready to return as the prodigal son.

The act under consideration . . . embrace[s] the late rebels, and it gives them the rights, privileges, and immunities of citizens of the United States, though it does not propose to exempt them from punishment for their *past crimes*.⁵³

Read in context, it is clear that the “past crimes” to which Broomall refers are crimes of rebellion and disloyalty to the nation, in particular treason. Without mentioning any other crimes, Broomall makes specific reference to treason on five more occasions in his speech⁵⁴ before concluding with this language: “All parties agree that the people of these States, being thus disorganized for all State purposes, are still, at the

53. *Id.* at 1263 (emphasis added). Although this prior intervention of Broomall is very representative of his understanding of the word “crime” in the context and occurred during the period that Senator Grimes referred to the contribution of Representative Broomall, Grimes may have been principally referring to a prior proposition of Broomall which does not in itself contain an exceptions clause: “Whenever the elective franchise shall be denied by the constitution or laws of any State to any proportion of its male citizens over the age of twenty-one years, the same proportion of its population shall be excluded from its basis of representation.” ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 120 (Va. Comm’n on Constitutional Gov’t 1967). In the opinion of Grimes and Broomall, this wording was preferable to one that directly mentioned race, because it also accounted for subtle forms of discrimination such as literacy tests and poll taxes. By adopting Broomall’s wording, eliminating direct mention of race and by explicitly referring to “crime,” Grimes has incorporated both of Broomall’s interventions.

54. CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866) (“[W]herever my Government owes me no protection I owe it no allegiance and can commit no treason They will not say that we have a Government for the purpose of allegiance and for the punishment of treason They know that [their] loyalty is the crime and treason the virtue.”) *id.* at 1263; “[T]raitors [pride] themselves upon their treason.”) *id.* (arguing that complete trust in the Southern Senators and Representatives “requires as unquestioning a faith as to believe in the sudden conversion of whole communities from treason to loyalty.”).

election of the Government, citizens of the United States, and as such, *as far as they have not been disqualified by treason*, ought to be allowed to form their own State governments.”⁵⁵

After Senator Grimes’ proposal for H.R. 51, incorporating Broomall’s “crimes” language, Senator Wilson and Senator Sumner each individually submitted competing proposals with exclusion clauses limited to rebellion.⁵⁶ All of these proposals were ordered to be printed for consideration in committee. With these three proposals on the table — including proposals involving “rebellion” and the Grimes proposal addressing crimes of disloyalty — it is feasible that the committee’s final wording “rebellion or other crime” was an attempt to combine them. In this sense, the Itzkowitz and Oldak Note correctly concludes “that the thrust of [the Art. 2] language was to limit governmental activity by former rebels.”⁵⁷

In summary, modern analyses of the legislative history of the Fourteenth Amendment, such as that carried out by the *Ramirez* court, fail to dig deep enough. Faced with the phrase “rebellion or other crime,” they conclude that the disjunctive construction signifies opposition between acts constituting rebellion and acts constituting the other crimes. Read in context of the legislative discussions taking place at the time, it becomes clear that this is not the case. The Fourteenth Amendment was drafted after an unforgettable rebellion of the highest magnitude. In the context in which it was drafted, it seemed hardly necessary to define “crime” any further. As the excerpted portion of Representative Broomall’s intervention makes clear, the “other crime” at issue in addition to rebellion was treason. The phrase “rebellion or other crime” should be interpreted in the proper historical light to sanction disenfranchisement for only those crimes that the Framers intended, which is limited to rebellion or other crime of disloyalty to the state, such as treason.

B. Means-End Constitutional Scrutiny: The First Attempt

Through a close examination of the legislative history read in its proper context, we thus emerge from the flawed textual premise of *Ramirez*. Properly contextualized, the reference to “crime” in Section 2 of the Fourteenth Amendment is a narrow exception for rebellion and treason, not an affirmative sanction for the general practice of felon disenfranchisement. Therefore, the question of felon disenfranchisement should be treated like other first-generation voting rights issues, subject to

55. *Id.* at 1264 (emphasis added).

56. *Id.* at 1321.

57. Itzkowitz & Oldak, *supra* note 44, at 746, n. 158.

means-end equal protection scrutiny. Fortunately, we already have guidance on what this analysis would look like, because Justice Marshall reached the constitutional scrutiny analysis in his *Ramirez* dissent after dismissing the majority's section 2 textual arguments on other grounds.⁵⁸

In his equal protection analysis, Justice Marshall relied on the large jurisprudence of voting rights cases which establish voting as a fundamental right.⁵⁹ He reasoned that this case presented a similar limitation on the franchise, and he concluded that strict scrutiny was the appropriate standard of review.⁶⁰ Marshall noted that the State put forth two state interests: preventing voter fraud, and preventing felons from voting as a group "to repeal or emasculate provisions of the criminal code."⁶¹ Marshall quickly dispersed with the latter interest, noting that the Court had "explicitly held that . . . 'differences of opinion cannot justify excluding [any] group from . . . 'the franchise.'"⁶² As to the first interest of preventing voter fraud, Marshall noted that felon disenfranchisement was over-inclusive and under-inclusive to meet this end. Felon disenfranchisement was over-inclusive because it "is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather, it encompasses all former felons and there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population."⁶³ It was under-inclusive because "many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all."⁶⁴ Finding neither of the proposed interests persuasive, Marshall concluded "that the State has not met its burden of justifying the blanket disenfranchisement of former felons presented by this case."⁶⁵ If Section 2 of the Fourteenth Amendment does not affirmatively sanction felon disenfranchisement, Marshall's strict scrutiny analysis could find new life in a majority opinion of the Court. Before considering the question further, however, this article

58. Marshall dismissed the majority's section 2 arguments by concluding that section 2 of the Fourteenth Amendment related to the specific issue of representative apportionment and was not meant to control section 1. *Richardson v. Ramirez*, 418 U.S. 24, 74-76 (1974).

59. *Id.* at 77 refers to *Itzkowitz & Oldak* (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Evans v. Cornman*, 398 U.S. 419, 421-22, 426 (1970)).

60. *Ramirez*, 418 U.S. at 74-76.

61. *Id.* at 81.

62. *Id.* at 81-82 (quoting *Cipriano v. City of Houma*, 395 U.S., at 705-06).

63. *Id.* at 79.

64. *Ramirez*, 418 U.S. at 79.

65. *Id.* at 78.

will first examine the way courts in Canada, Europe, and South Africa have addressed the question.

III. THE TRANSNATIONAL JUDICIAL DISCOURSE

In recent years domestic constitutional courts have become increasingly involved in a transnational judicial discourse, a process by which one constitutional court takes note of the decisions of another constitutional court, in the course of domestic constitutional interpretation.⁶⁶ Such a process does not decide a case, but can help a judge test ideas developed using domestic constitutional tests. For example, as Professor Eskridge has noted,

[m]any of the key terms in the U.S. Constitution . . . are open textured. . . . One way for a judge to be more certain that she is not just reading her own views into the Constitution's open-textured provisions is to see if differently situated judges elsewhere in the world are reaching the same normative judgment

In this way, other countries are "laboratories" for political "experiments."⁶⁷

This exercise may reveal that what "seemed essential to constitutionalism are, rather, choices made by particular polities not necessary for other reasonable forms of constitutionalism."⁶⁸

The United States Supreme Court is increasingly engaging in the transnational judicial discourse. For example, Justice Frankfurter's 1946 majority opinion in *New York v. United States* referred to the Argentinean, Australian, Brazilian, and Canadian Constitutions, and to Brazilian constitutional jurisprudence.⁶⁹ In *Thompson v. Oklahoma*, the Court referenced foreign law in the context of its decision to overrule precedent and bar execution of juveniles.⁷⁰ In *Printz v. United States*, the Court considered and dismissed the relevance of foreign constitutional decisions on whether federal law could require state and local officials to enforce a

66. See, e.g., Jackson, *supra* note 28, at 91-92.

67. William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT'L J. CONSTITUTIONAL L. 555, 556-59 (2004) (citing *New State Ice v. Liebmann*, 285 U.S. 262, 310-11 (1932) (adopting a parallel metaphor)).

68. Jackson, *supra* note 28, at 92-93 (citing Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1233-37 (1999)).

69. *N.Y. v. United States*, 326 U.S. 572 (1946).

70. *Thomas v. Oklahoma*, 487 U.S. 815 (1988).

federal regulatory scheme.⁷¹ In *Atkins v. Virginia*, the Court made reference to foreign law in a decision barring execution of mentally disabled defendants.⁷² In *Lawrence v. Texas*, the Court cited jurisprudence of European Court of Human Rights, holding that same-sex couples have a constitutional right to privacy.⁷³ Finally, in *Roper v. Simmons*, the Supreme Court employed comparative law even more actively, holding that the application of capital punishment in cases where the offender was under age eighteen at the time of the crime is unconstitutional. The Court cited several treaty provisions that are not binding on the U.S.; jurisprudence in Canada, Britain, India, and the European Court of Human Rights; and *amicus* briefs from the European Union and the Human Rights Committee of the Bar of England and Wales.⁷⁴ In addition to this case-law, five current justices⁷⁵ and two recently serving justices⁷⁶ have individually

71. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

72. *Atkins v. Virginia*, 536 U.S. 304 (2002).

73. *Lawrence v. Texas*, 539 U.S. 558 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981); *P. G. & J. H. v. United Kingdom*, App. No. 00044787/98, ¶56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988)).

74. *Roper v. Simmons*, 543 U.S. 551, at 44-48 (Mar. 1, 2005) (citing, in addition to state practice in numerous countries, the United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U. N. T. S. 3, 28 *I. L. M.* 1448, 1468-1470 (entered into force Sept. 2, 1990); International Covenant on Civil and Political Rights, Art. 6(5), 999 U. N. T. S., at 175 (prohibiting capital punishment for anyone under 18 at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5)); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U. N. T. S. 146 (entered into force July 19, 1978) (stating same prohibition); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) (stating same prohibition)).

75. Ruth Bader Ginsburg, "A Decent Respect to the Opinions of [Human]Kind": *The Value of a Comparative Perspective in Constitutional Adjudication*, 64 *CAMBRIDGE L.J.* 575 (2005); *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Justice Stevens, announcing the judgment of the Court, notes the relevance of international views on the death penalty); *Washington v. Glucksberg*, 521 U.S. 702, 785-86 (1997) (Justice Souter, concurring in the judgment of the Court, discusses the approach taken to assisted suicide in the Netherlands); *Printz v. United States*, 521 U.S. 898, 976-77 (1997) (Justice Breyer advocating for transnational judicial dialogue in dissent); *Lawrence*, 539 U.S. at 586, 604 (Justice Scalia, dissenting, citing Canadian law in expounding on his concern that a judicial decision in favor of homosexual sodomy would be the harbinger of the legalization of gay marriage).

76. Sandra Day O'Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, (1997 Spring meeting, American College of Trial Lawyers, reprinted in 4 *INT'L JUDICIAL OBSERVER*, June 1997 at 2) ("I think that I, and the other Justices of the U.S. Supreme Court, will find ourselves looking more frequently to the decisions of other constitutional courts. Some, like the German and Italian courts, have been working since the last world war. They have struggled with the same basic

endorsed the transnational judicial discourse in opinions, dissents, speeches, or articles.

It should be noted that the ramifications of the transnational judicial discourse for the United States Supreme Court are unrelated to questions of the application of international law in the United States. International law, when it applies in the United States, is binding.⁷⁷ For this reason, a complex set of rules and tests have been developed to determine the contours of its application, including the *Charming Betsy* canon,⁷⁸ the last in time rule for conflicts between treaties and statutes,⁷⁹ issues connected to the status of a treaty as either self-executing or non-self-executing,⁸⁰ and various rules regarding the extent to which customary international law applies in domestic courts.⁸¹ The binding nature of international law, when it applies in the United States, has also engendered the debate over the relationship between the Congressional treaty power and American

constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies. Others, like the South African court, are relative newcomers on the scene but have already entrenched themselves as guarantors of civil rights. All of these courts have something to teach us about the civilizing function of constitutional law.”); William Rehnquist, *Constitutional Courts: Comparative Remarks*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE, A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (“[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”).

77. “[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, § 2.; *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

78. *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”).

79. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §115(1)(a) (1987).

80. See, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988); Carlos Manuel Vásquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695 (1995).

81. See, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004); Kathleen M. Kedian, *Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of The Paquete Habana*, 40 WM. & MARY L. REV. 1395 (1999).

federalism.⁸² None of these issues comes in to play in relation to the transnational judicial discourse, because this matter concerns foreign law, not international law, and the decisions of foreign courts do not bind the United States Supreme Court.⁸³

Despite the increasing regularity of the transnational judicial discourse, it remains controversial, and the critics on the Court are as vocal as the supporters.⁸⁴ Chief among these skeptics is Justice Antonin Scalia, who is firm in his resolve that “comparative analysis [is] inappropriate to the task of interpreting a constitution.”⁸⁵ Justice Scalia’s view represents the concept of legal particularism, the belief

that legal norms and institutions generally, and constitutions in particular, both emerge from and reflect particular national circumstances, most centrally a nation’s history and political culture. In its strongest formulation, legal particularism asserts that constitutions are important aspects of national identity. Comparative jurisprudence is of no assistance at all, precisely because it comes from outside a given legal system. At best, it represents a foreign curiosity of strictly academic interest and little practical relevance. At worst, its use is a foreign imposition or even a form of legal imperialism.⁸⁶

Answering this critique requires taking a closer look at the process of transnational judicial discourse itself. Sujit Choudhry has identified

82. See *Missouri v. Holland*, 252 U.S. 416 (1920) (holding that pursuant to a treaty with Britain, the United States could regulate the hunting of migratory birds, even though Congress had no independent authority to pass such legislation); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INT’L L. 265, 309-32 (2004).

83. It should be noted that decisions of the European Court of Human Rights, such as the one discussed in this article, although international law in the sense that the Court is part of a treaty mechanism between sovereign states, are not binding on the United States because it is not a party to the treaty. Thus, the ECHR judgment, like the foreign law decisions of Canada and South Africa, is considered along with the foreign law decisions as part of the transnational judicial discourse, not as binding international law.

84. *Printz v. United States*, 521 U.S. 898 (1997).

85. *Id.* at 921, n.11. There are also doubters in the academic community. See, e.g., Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57, 58 (2004) (“Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty. . .”).

86. Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 830 (1999).

three different ways that courts use comparative jurisprudence: universalist interpretation, genealogical interpretation, and dialogical interpretation.⁸⁷ On the one extreme, the universalist interpretation directly contradicts legal particularism, premised on the belief that constitutional guarantees are transcendent, universal concepts, and “that all constitutional courts are engaged in the identification, interpretation, and application of the same set of norms.”⁸⁸ This is the slippery slope that legal particularists fear, but this type of transnational judicial discourse is not even contemplated by any of the members of the U.S. Supreme Court. Occupying a middle ground, genealogical interpretation justifies importation and application of foreign constitutional doctrines in the case of a proven historical link between the two constitutions that is so strong as to properly be considered “genealogical.”⁸⁹ This method has been used by the Canadian Supreme Court to justify the use of American constitutional doctrine on the status and land rights of Indian nations.⁹⁰ In the United States it has been promoted by none other than Justice Scalia, who has stated that he would refer to “British law for those elements of the Constitution that were taken from Britain . . . [such as] ‘the right [of an accused] to be confronted with witnesses against him.’”⁹¹

The third form of transnational judicial discourse is dialogical interpretation. As the name suggests, this process is nothing more than a “dialogue” a court engages in with the other jurisprudence, while respecting the constitutional boundaries that are important to the legal particularists. As Justice Breyer has argued, this dialogue can help “courts identify the normative and factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions.”⁹² It should be noted, in this regard, that after considering the foreign materials, the final judgment of the Court may just as easily reject as agree with them. The examination of foreign sources can be carried out just as effectively by one who opposes the foreign conclusion as one who accepts it.

87. *Id.* at 825.

88. *Id.*

89. According to this school, a genealogical link is present only when one constitutional order is born from another. *See id.* at 838.

90. *Id.* at 866-85.

91. Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan. 13, 2005), *available at*

<http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

92. Choudhry, *supra* note 86, at 825.

Justice Breyer has argued that considering foreign decisions when similar issues arise in domestic and foreign cases could only benefit the Court, which can be informed by the combined effort of the foreign analyses, without having to be bound by the results they reach. Even Justice Scalia has engaged in the dialogical form of transnational judicial discourse: in his *Lawrence v. Texas* dissent, he cited changes in Canadian law in discussing his concern that a judicial decision in favor of homosexual sodomy would be the harbinger of the legalization of gay marriage.⁹³ The dialogical form of transnational judicial discourse is thus increasingly applied in the U.S. Supreme Court.

IV. SURVEY OF FOREIGN AND INTERNATIONAL DECISIONS

A. Canada

Section 3 of the Canadian Charter of Rights and Freedoms states that “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”⁹⁴ Nevertheless, a Canadian law passed in 1985 prohibited prisoners from voting while in prison, regardless of the length of their sentence.⁹⁵ That law was challenged in the 1993 case of *Sauvé v. Canada*, and the Supreme Court unanimously held that a blanket ban was an unconstitutional denial of the right to vote, guaranteed by section 3 of the Canadian Charter of Rights and Freedoms.⁹⁶ The Canadian Parliament responded to the decision by replacing the blanket prisoner disenfranchisement law with a new law, denying the right to vote only to inmates serving sentences of two years or more, codified in section 51(e) of the Canada Elections Act.⁹⁷ The reformulated law led to new litigation, *Sauvé v. Canada (Sauvé 2)*, the important decision in the area of prisoner disenfranchisement announced in 2002.⁹⁸

In *Sauvé 2*, the Crown conceded that section 51(e) of the Canada Elections Act presumptively violated the voting rights provision of section 3 of the Canadian Charter of Rights and Freedoms; thus, the Supreme Court proceeded directly to constitutional justification analysis. The basis for Constitutional scrutiny under the Canadian Charter of Rights and Freedoms is established in section 1 of the Charter, which states that “[t]he

93. *Lawrence v. Texas*, 539 U.S. 558, 604 (2003).

94. The Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982.

95. Canada Elections Act, R.S.C., ch. E 2, section 51 (e) (1985).

96. *Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438 [hereinafter *Sauvé 1*].

97. Canada Elections Act, 1993 S.C., ch. 19, section 23(2) (Can.).

98. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 [hereinafter *Sauvé 2*].

Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹⁹ Constitutional review under this article is a two-part, means-end inquiry developed in *R. v. Oakes*.¹⁰⁰ Under the *Oakes* test, “[t]o justify the infringement of a *Charter* right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified.”¹⁰¹ The Court in *Sauvé 2* stated that “the government bears the burden of proving a valid objective and showing that the rights violation is warranted – that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.”¹⁰² The majority clearly distinguished the more deferential approach taken by the dissent, noting that “[t]he right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination.”¹⁰³

Moving to the application of the test, the Court noted that the government asserted two objectives for the denial of prisoner voting rights: first, “to enhance civic responsibility and respect for the rule of law;” and second, “to provide additional punishment, or ‘enhanc[e] the general purposes of the criminal sanction.’”¹⁰⁴ Expressing criticism at the broad nature of these objectives,¹⁰⁵ the Court proceeded to the determination of whether a rational connection exists between the stated objectives and the denial of prisoner voting. The government had advanced three theories in support of this rational connection: first, that depriving prisoners of the vote “sends an ‘educative message’ about the importance of respect for the law” to both prisoners and the society at large; second, “that allowing penitentiary inmates to vote ‘demeans’ the political system;” and third, that

99. The Canadian Charter of Rights and Freedoms, *supra* note 94, at section 1.

100. *Id.* at 534; *see also* *R. v. Oakes* [1986] 1 S.C.R. 103.

101. *Id.*

102. *Id.* at 534-35.

103. *Id.* at 535.

104. *Sauvé 2*, 3 S.C.R. at 540.

105. The Court was highly critical of the general nature of these objectives, stating that “people should not be left guessing about why their *Charter* rights have been infringed.” *Id.* at 541. In this regard, it noted that “[t]he first objective . . . could be asserted of virtually every criminal law and many non-criminal measures” and that the second objective was also vague because Parliament had not clarified how, exactly, such a punishment would enhance the criminal sanction. *Id.* at 541-42.

“disenfranchisement is a legitimate form of punishment, regardless of the . . . nature of the offence or the circumstances of the . . . offender.”¹⁰⁶

First, the Court dismissed the educative message theory as bad pedagogy, stating that “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”¹⁰⁷ because it is in such stark contrast to “Canada’s steady march to universal suffrage,”¹⁰⁸ taking Canada “backwards in time and retrench[ing] . . . democratic entitlements.”¹⁰⁹ Second, the Court also dismissed the government’s argument that prisoner voting was demeaning to the political system, stating that such an argument was premised on the idea of voting as privilege rather than right, and in the concept of ‘civil death,’¹¹⁰ both of which had been rendered obsolete by section 3 of the Canadian Charter of Rights and Freedoms.¹¹¹ Finally, the Court also dismissed the government’s third argument, reasoning that a blanket prisoner disenfranchisement was arbitrary, and concluding that it fulfilled none of the traditional goals of imprisonment: deterrence, rehabilitation, retribution, and denunciation.¹¹²

Because the Court found no rational connection between prisoner disenfranchisement and the government’s stated objectives, it did not need to proceed to the minimum impairment or proportionality inquiries, although it stated in *dicta* that a bright line disenfranchisement of all prisoners with sentences of two years or more would be highly suspect under both of these tests.¹¹³ Likewise, the Court did not consider the

106. *Id.* at 543.

107. *Id.* at 548.

108. *Sauvé 2, 3 S.C.R.* at 544.

109. *Id.* at 545.

110. *Id.* at 549. The Court notes that “Edward III pronounced that citizens who committed serious crimes suffered ‘civil death’, by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise.” *Id.*

111. *Id.* at 549-50.

112. *Id.* at paras. 48-53. The Court quickly reached this conclusion with regard to deterrence and rehabilitation, stating that “[n]either the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. On the contrary, as Mill recognized long ago, participation in the political process offers a valuable means of teaching democratic values and civic responsibility.” *Id.* at para. 49. The Court concluded that prisoner disenfranchisement could not legitimately further the goals of retribution and denunciation because a blanket disenfranchisement was not individually tailored enough to necessarily reflect the moral culpability of the individual prisoner or the crime committed. *Id.* at para. 50.

113. *Id.* at paras. 54-62.

alternative argument that prisoner disenfranchisement infringes the equality guarantee of section 15(1).¹¹⁴ Thus, the Canadian Supreme Court concluded by a 5-4 vote that disenfranchising all prisoners serving a sentence of two years or more was unconstitutional.¹¹⁵

A fifty page dissent argued that because the constitutional question rested “on philosophical, political and social considerations which are not capable of ‘scientific proof,’” it was appropriate to give Parliament significant deference.¹¹⁶ After a lengthy discussion of criminology and penology and overview of international trends in prisoner disenfranchisement, the dissent found the government’s objectives to be pressing and substantial.¹¹⁷ The relaxed, deferential scrutiny of the dissent is especially clear in its minimal impairment and proportionality inquiries, which presented no significant challenge at all to the impugned provisions.¹¹⁸ The dissent concluded that “[w]hile it has been conceded that [the disenfranchisement law] does infringe s. 3 of the *Charter*, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.”¹¹⁹

B. South Africa

The 1996 South African Constitution states in section 19(3)(a) that “[e]very adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution.”¹²⁰ In the first few years of the new constitution, the relationship between this provision and prisoner disenfranchisement was unclear, because no law existed denying prisoners the right to vote.¹²¹ In *August and Another v. Electoral Commission and Others*, the Constitutional Court of South Africa held that the Electoral Commission could not disenfranchise prisoners by failing to accommodate prison voting, but it did not reach the hypothetical question of whether affirmative legislation disenfranchising prisoners would withstand constitutional scrutiny.¹²² In response to this case, the South African legislature enacted the Electoral Laws Amendment Act,¹²³ amending the

114. *Id.* at para. 63.

115. *Id.*

116. *Id.* at para. 67.

117. *Id.* at para. 148.

118. *Id.* at paras. 160-77.

119. *Id.* at para. 207.

120. S. AFR. CONST. 1996, § 19(3)(a).

121. *August and Another v. Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

122. *Id.*

123. Act 34 of 2003.

Electoral Act¹²⁴ so as to clearly disenfranchise, in section 24(B)(2), all prisoners serving sentences of imprisonment without the option of a fine.¹²⁵ The Act further disenfranchises prisoners who have already been released on election day, by preventing them in section 8(2)(f) from registering as voters while in prison.¹²⁶ In the weeks leading up to national and provincial legislative elections in South Africa in 2004, the provisions were challenged as a matter of urgency in the case of *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others*.¹²⁷

Constitutional scrutiny in South Africa is governed by section 36 of the Constitution, which provides that constitutional rights can only be limited if “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including . . . the nature of the right . . . the importance of the purpose of the limitation . . . the nature and extent of the limitation . . . the relation between the limitation and its purpose; and . . . less restrictive means to achieve the purpose.”¹²⁸

Applying the section 36 test, the *NICRO* Court first examined the three purposes for the legislation put forth by the government.¹²⁹ The first purpose advanced was an effort to maintain “the integrity of the voting process.”¹³⁰ Under this rationale, because all attempts to accommodate special categories of voters through efforts such as mobile voting stations

124. Act 73 of 1998.

125. *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and others*, case CCT 03/04 (Mar. 3, 2004) [hereinafter *NICRO*]. According to the Director-General of Home Affairs of South Africa, “it was appreciated that in the [sic] light of this judgment, unless the position of prisoners was addressed in legislation, arrangements would have to be made for them to vote.” *NICRO, supra*, at para. 43.

126. *Id.* at para. 31 (explaining that if prisoners “had not registered before being imprisoned and are released from prison after the voters’ roll has closed but before the day of the elections, they will not be able to vote even though they are no longer in prison.”).

127. *Id.*

128. S. AFR. CONST. 1996, § 36(1). For cases interpreting this section, see, e.g., *S v Manamela and Another (Director-General of Justice intervening)* 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) para. 32; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) para. 31; *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Women’s Legal Centre as amicus curiae)* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC) para. 19; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) para. 20.

129. *NICRO, supra* note 125, at para. 38.

130. *Id.* at para. 40.

involved risks of interference or tampering, such special arrangements should be limited.¹³¹ If such efforts had to be limited, the government argued that it was more legitimate to disenfranchise prisoners than any other voter who would be unable to travel to standard polling stations, such as disabled voters, pregnant voters, or absentee voters.¹³² The Court rejected this argument, questioning the connection between accommodation of other groups and accommodation of prisoners; it concluded that “[t]he mere fact that it may be reasonable not to make special arrangements for particular categories of persons who are unable to reach or attend polling stations on election day does not mean that it is reasonable to disenfranchise prisoners.”¹³³ The government’s second proposed purpose was an effort to minimize the cost of the voting process.¹³⁴ Like its “integrity of the voting process” argument, it submitted that because costs were prohibitively high to accommodate all classes of special-needs voters, prisoners were the most legitimate class of voters to disenfranchise.¹³⁵ The Court wholly rejected this argument, stating that “[t]here is nothing to suggest that expanding . . . arrangements to include prisoners sentenced without the option of a fine will in fact place an undue burden on the resources of the Commission.”¹³⁶ The third purpose of disenfranchisement proposed by the government was to send a message to the public that the government was tough on crime, a message which both denounced crime and showed that citizens’ rights are connected to their duties.¹³⁷ After extensive analysis of the Canadian *Sauvé 2* case, which turned on a similar policy issue,¹³⁸ the Court concluded that:

[T]he present case is markedly different from *Sauvé*. The main thrust of the justification in the present case was directed to the logistical and cost issues which cannot be sustained. The policy issue has been introduced into the case almost tangentially. In contrast, the detailed record in the second *Sauvé* case contained evidence which addressed the issues relevant to the policy decisions to disenfranchise prisoners, and the purpose that it would serve. In the

131. *Id.*

132. *Id.* at paras. 40-41.

133. *Id.* at para. 53.

134. *Id.* at para. 40.

135. *Id.* at paras. 47-49.

136. *Id.* at paras. 49-51.

137. *Id.* at paras. 55-57.

138. *See supra* notes 94-119.

present case we have only statements such as that made by counsel that the government does not want to be seen to be soft on crime, and that . . . it would be unfair to others who cannot vote to allow prisoners to vote. . . . In short we have wholly inadequate information on which to conduct the limitation analysis that is called for.¹³⁹

After rejecting all three of the government's proposed purposes, the Court held that disenfranchising all prisoners serving sentences without the option of a fine was unconstitutional.¹⁴⁰

A dissenting opinion by Justice Madala agreed with the majority that the provisions presumptively violated the constitutional right to vote, but disagreed on the justification analysis. Madala argued that the multi-pronged objectives of the government "must be treated holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid"¹⁴¹ In this regard, Madala criticized the majority's reliance on the Canadian *Sauvé 2* case, arguing that South Africa's unique and tainted past "require[d] uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country."¹⁴² Another dissenting opinion by Justice Ngcobo similarly agreed with the majority that the impugned provisions were presumptively invalid, but went on to conclude that the government had a legitimate interest in denouncing crime and promoting observance of civic duties and obligations.¹⁴³ Nevertheless, Ngcobo concluded that the limitation on the right to vote was overbroad because it also applied to prisoners awaiting the outcome of an appeal, who were potentially innocent.¹⁴⁴ Ngcobo would solve this problem by reading the phrase "serving a sentence of imprisonment without the option of a fine" to exclude prisoners awaiting appeal.¹⁴⁵

139. *NICRO*, *supra* note 125, at paras. 66-67.

140. This being the case, it did not proceed to examine the second claim proposed by the applicants, that prisoner disenfranchisement violated the right to equality. *See id.* at para. 67.

141. *Id.* at para. 113.

142. *Id.* at para. 114. This argument is unsatisfying: whereas the connection between apartheid and prisoner disenfranchisement is not self-evident, the similarities between the *Sauvé 2* case and the present case are difficult to deny.

143. *Id.* at paras. 134-45.

144. *Id.* at para. 152.

145. *Id.* at para. 153.

C. *European Court of Human Rights*

Just three weeks after the South African Constitutional Court reached its decision in *NICRO*, the European Court of Human Rights (hereinafter ECHR) also made a landmark ruling in the area of prisoner disenfranchisement. In the case of *Hirst v. United Kingdom (No. 2)*,¹⁴⁶ the ECHR considered a British law that disenfranchised all prisoners, regardless of their crime, for the entire duration of their sentence.¹⁴⁷ The main issue in the case was whether the prisoner disenfranchisement law violated Article 3 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, which states: “[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”¹⁴⁸

After an extensive review of both the majority and dissenting opinions in the Canadian *Sauvé 2* case,¹⁴⁹ the Court proceeded to its examination of the tension between the British legislation and Article 3 of the Protocol. It examined this tension under the test established in *Mathieu-Mohin and Clerfayt v. Belgium*: “[The Court] has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.”¹⁵⁰ To the British government’s argument that “under art 3 of the first protocol the right to vote was not absolute and that a wide margin of appreciation was to be allowed to contracting states,”¹⁵¹ the Court responded that although a margin of appreciation did exist, “the court does not consider that a contracting state may rely on the margin of appreciation to justify restrictions on the right to vote which have not been the subject of considered debate in the

146. *Hirst v. United Kingdom (No. 2)*, Application No. 74025/01, Eur. Ct. H.R., Fourth Section (Mar. 30, 2004) (hereinafter “Hirst, Chamber Judgment”).

147. Representation of the People Act, 1983, § 3.1 (Eng.) (“A convicted person during the time that he is detained in a penal institution in pursuance of his sentence . . . is legally incapable of voting at any parliamentary or local government election.”).

148. European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, Nov. 4, 1950, Art. 3, 213 U.N.T.S. 262.

149. *Hirst, Chamber Judgment*, *supra* note 146, at paras. 25-27.

150. *Id.* at para. 36 (citing *Mathieu-Mohin v. Belgium*, 1987, 9267/81, Eur. Ct. H.R. para 52).

151. *Id.* at para. 32.

legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition.”¹⁵²

The British government submitted two objectives in support of the prisoner disenfranchisement law. First, the law served to prevent crime and punish offenders; second, it operated “to enhance civil responsibility and respect for the rule of law ‘by depriving those who have seriously breached the basic rules of society of the right to have a say in the way such rules are made for the duration of their sentence.’”¹⁵³ These aims had both previously been accepted as legitimate in the case law of the European Commission for Human Rights.¹⁵⁴ Relying heavily on the reasoning of the Canadian *Sauvé 2* decision,¹⁵⁵ the Court, however, was deeply skeptical about both objectives. First, the Court was concerned about the government’s ‘deter and punish’ objective in light of the fact that “the loss of the right to vote plays no overt role in the sentencing process in criminal cases in the United Kingdom.”¹⁵⁶ Second, the Court was also deeply skeptical of the British government’s objective of enhancing civil responsibility and respect for the rule of law, concluding that “there is no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or ‘uncitizen-like’ but whose crime is not met by such a consequence.”¹⁵⁷ Ultimately, however, the Court left these concerns as *dicta*, finding the law incompatible with the Convention based on its lack of proportionality.¹⁵⁸ In this regard, the Court held that an indiscriminate blanket disenfranchisement of all prisoners, irrespective of their crime or length of their imprisonment, could not possibly withstand the

152. *Id.* at para. 41.

153. Hirst, Chamber Judgment, *supra* note 146, at para. 42.

154. *Id.* at para. 33.

155. The deterrence objective pursued by the British government differed slightly from the retribution objective advanced in *Sauvé 2*. Nevertheless, they are both goals of imprisonment and the Court seemed to feel this link was sufficient so as to be informed by the Canadian ruling. Similarly, the Court noted that “[t]aking due account of the difference in text and structure of the Canadian Charter, the Court none the less finds that substance of the reasoning may be regarded as apposite in the present case.” *Id.* at para. 43. *See also id.* at para. 45 (explaining that the second objective of upholding civic responsibility and respect for the law, on the other hand, was identical to that pursued by the Canadian government in *Sauvé 2*).

156. *Id.* at para. 45.

157. *Id.* at para. 46 (The Court agreed with “the majority in *Sauvé* that removal of the vote in fact runs counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power.”).

158. *Id.* at para. 47.

proportionality test.¹⁵⁹ The Court emphasized that a blanket ban was overly arbitrary, because a person serving a mere week-long prison sentence would be disenfranchised if an election happened to fall during that week.¹⁶⁰ The Court then considered the particular situation of the applicant, who had completed his sentence and was being detained solely because his personality disorder made him a potential danger to society.¹⁶¹ The Court found it impossible to accept that a law premised on punishment, but encompassing such a case within its reach, could be considered proportional.¹⁶² Finally, the Court found “no evidence that the legislature in the United Kingdom has ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners.”¹⁶³ The Court concluded that the blanket ban on prisoner voting imposed in the United Kingdom was incompatible with Article 3 of Protocol No. 1.¹⁶⁴

On 23 June 2004 the Government made a request for the case to be referred to the Grand Chamber under Art. 43 of the Convention¹⁶⁵ and on 10 November 2004 a panel of the Grand Chamber accepted that request.¹⁶⁶ The Grand Chamber issued a judgment in October 2005. In the Grand Chamber, “[t]he applicant adopted the terms of the Chamber judgment . . . reject[ing] the argument that the Chamber had not given appropriate weight to the margin of appreciation.”¹⁶⁷ The applicant “disputed that punishment could legitimately remove fundamental rights other than the deprivation of liberty”¹⁶⁸ and further argued that “[t]he blanket ban was . . . disproportionate, arbitrary and impaired the essence of the right.”¹⁶⁹ The Government argued that, under Article 3 of Protocol No. 1, the right to

159. *Id.* at para. 48.

160. *Id.* at para. 49.

161. *Id.* at para. 10.

162. *Id.* at paras. 10, 49.

163. *Id.* at para. 51.

164. *Id.* at para. 52. In light of this conclusion, it did not consider the alternative arguments that the law breached Article 14 of the Protocol (non-discrimination), or Article 10 of the Protocol (freedom of expression). *Id.* at para. 53-56.

165. *Hirst v. United Kingdom (No. 2)* [GC], Application no. 74025/01, Eur. Ct. H.R. para. 6 (Oct. 6, 2005), <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hirst&sessionId=6399719&skin=hudoc-en> (hereinafter “*Hirst*, Grand Chamber Judgment”).

166. *Id.* at para. 7.

167. *Id.* at para. 42.

168. *Id.* at para. 44.

169. *Id.* at para. 45.

vote was not absolute, that a wide margin of appreciation was to be allowed to Contracting States in determining the conditions under which it was exercised, and that the Chamber judgment failed to give due weight to this consideration.¹⁷⁰ The Government also argued that

the Chamber erred in effectively assessing the compatibility of national law *in abstracto*, overlooking that on the facts of this case, if the United Kingdom were to reform the law and only ban those who had committed the most serious offences, the applicant, convicted of an offence of homicide and sentenced to life imprisonment, would still have been barred.¹⁷¹

Both parties took note of comparative materials, the Applicant raising the recent Canadian and South African decisions enfranchising prisoners, and the Government attempting to distinguish them.¹⁷² The Court also received observations from several third party interveners, most notably the Latvian Government, who was “concerned that the Chamber’s judgment would have a horizontal effect on other countries which imposed a blanket ban on convicted prisoners voting in elections.”¹⁷³

After reviewing relevant provisions of the International Covenant on Civil and Political Rights, recommendations of the Council of Europe, and surveying the law of member states of the Council of Europe, the Grand Chamber examined the Canadian and South African decisions extensively.¹⁷⁴ In its examination of the case at hand, it re-affirmed that the margin of appreciation was wide, noting that “[t]here are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe.”¹⁷⁵ At the same time, it noted that “[i]t is . . . for the Court to determine in the last resort whether the requirements of Article 3 of

170. *Id.* at para. 47.

171. Hirst Grand Chamber Judgment, *supra* note 165, at para. 49.

172. *Id.* at paras. 46, 48 (the government arguing that “the second *Sauvé* case was decided by a narrow majority of 5 to 4, concerned a law, different in text and structure, interpreted by domestic courts to which the doctrine of margin of appreciation did not apply and that there was a strong dissent which was more in accord with the Convention organs’ case-law.”).

173. *Id.* at para. 55.

174. *Id.* at paras. 26-39.

175. *Id.* at para. 61 (citing *Mathieu-Mohin*, § 52; *Matthews v. United Kingdom* [GC], no. 24833/94, § 63, ECHR 1999-I; *Labita v. Italy* [GC], no. 26772/95, § 201, ECHR 2000-IV; *Podkolzina v. Latvia*, no. 46726/99, § 33, ECHR 2002-II).

Protocol No. 1 have been complied with,” deciding whether “any conditions imposed . . . thwart the free expression of the people in the choice of the legislature.”¹⁷⁶

The Court noted that this was “the first time that [it] has had occasion to consider a general and automatic disenfranchisement of convicted prisoners.”¹⁷⁷ It began this analysis by emphasizing that “prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention.”¹⁷⁸ Because any restrictions on other rights require justification, the Court proceeded to “determine whether the measure in question pursued a legitimate aim in a proportionate manner.” The Court concluded that the aims proposed by the Government, “preventing crime and punishing offenders and enhancing civic responsibility and respect for the rule of law,” were legitimate, but found the means disproportional, concluding that “a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.”¹⁷⁹ Thus, the Grand Chamber essentially followed the reasoning of the earlier Chamber judgment.¹⁸⁰

A joint dissenting opinion by five judges noted that the wording of Article 3 of Protocol No. 1 differs

176. *Id.* at para. 62.

177. *Id.* at para. 68.

178. *Id.* at para. 69 (citing *Ploski v. Poland*, no. 26761/95, judgment of 12 November 2002; *X. v. the United Kingdom*, no. 9054/80, Commission decision of 8 October 1982, DR 30, p. 113 (right to respect for family life), *Yankov v. Bulgaria*, no. 39084/97, §§ 126-145, ECHR 2003-XII, *T. v. the United Kingdom*, no. 8231/78, Commission report of 12 October 1983, DR 49, p. 5, §§ 44-84 (right to freedom of expression), *Poltoratskiy v. Ukraine*, no. 38812/97, §§ 161-171, ECHR 2003-V (right to practice their religion), *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A, no. 80; *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A, no. 18 (right of effective access to a lawyer or to court for the purposes of Article 6), *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61 (right to respect for correspondence), *Hamer v. the United Kingdom*, no. 7114/75, Commission report of 13 December 1979, DR 24, p. 5; *Draper v. the United Kingdom*, no. 8186/78, Commission report of 10 July 1980, DR 24, p. 72 (right to marry)).

179. *Id.* at para. 82.

180. *Id.* at paras. 87, 89 (concluding, like the Chamber judgment, that it was unnecessary to consider violations under Articles 10 and 14 of the Convention).

from nearly all other substantive clauses in the Convention and its Protocols in that it does not directly grant individual rights and contains no other conditions for the elections, including in relation to the scope of a right to vote, than the requirement that "the free expression of the opinion of the people" must be ensured.¹⁸¹

The joint dissenters explained that the majority's categorical finding that a general restriction on voting for persons serving a prison sentence violated Article 3 of Protocol No. 1 was difficult to reconcile with the wide margin of appreciation afforded in Article 3 of Protocol No. 1 in the Court's case law.¹⁸² The dissenters emphasized that "the Court is not a legislator and should be careful not to assume legislative functions."¹⁸³ In this regard, the dissenters noted that although the majority considered the judicial decisions of South Africa and Canada in meticulous detail, they only provided "summary information concerning the legislation on prisoners' right to vote in the Contracting States."¹⁸⁴ Moreover, to the extent that the majority did examine the legislative debate behind the British law in question, the joint dissent argues that they were also dismissive of the parliament's conclusions, arguing that "it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions."¹⁸⁵ Thus, the dissenters were critical not only of the transnational judicial discourse, but also of the role of the judiciary in the disenfranchisement debate as a general matter.

V. COMPARATIVE ANALYSIS OF FELON DISENFRANCHISEMENT: THE CONTINUUM OF APPLICABILITY

Although the three cases discussed above were decided in different legal systems, and the felon disenfranchisement provisions in each varied, a definite trend can be identified in that all three cases attempted to view the acceptability of prisoner disenfranchisement along a continuum. On the far end of the spectrum, it was a forgone conclusion in each case that any continued disenfranchisement after release from prison would be unconstitutional. Indeed, even several of the dissenting opinions clearly

181. Hirst Grand Chamber Judgment, *supra* note 165, dissenting Opinion of Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens, para. 2.

182. *Id.* at para. 5.

183. *Id.* at para. 6.

184. *Id.*

185. *Id.* at para. 7.

made this point.¹⁸⁶ Moving along the continuum, all three courts were clear that a blanket disenfranchisement of all prisoners that failed to account for the seriousness of their crime was unconstitutional. The distinction between the two Canadian cases demonstrates this point quite well. In the *Sauvé 1* case, a unanimous court held that a blanket disenfranchisement on all prisoners was an unconstitutional violation of the Canadian Charter of Rights and Freedoms. In *Sauvé 2*, the Court found a law that disenfranchised prisoners serving a sentence of two years or more also violated the Canadian Charter of Rights and Freedoms, but the margin was a much closer 5-4 vote.¹⁸⁷ Taking these two cases together, it would appear that the Canadian Justices are interested in the length of sentence when considering the disenfranchisement issue. There may well be some better place to draw the line, something longer than a two year sentence, where a majority of the Justices would agree that disenfranchisement is appropriate.¹⁸⁸ Moreover, as is clear from the actions of the Canadian government in the period between the two cases – including a special governmental Commission, the Lortie Commission, which considered prisoner disenfranchisement in depth – the real question at issue in the Canadian context is not the length of sentence, but the seriousness of the crime at stake, the former serving as a proxy for the latter:

[T]he Lortie Commission . . . concluded that prisoners who had been convicted of an offence punishable by a maximum of life imprisonment and who had been sentenced to a prison term of 10 years or more should be disqualified from voting for the duration of their incarceration. A Special Committee on Electoral Reform, which reviewed the Lortie Commission's Report, recommended, however, that a two-year cutoff was appropriate since this would catch "serious offenders".¹⁸⁹

The trial judge in *Sauvé 2* noted that:

The Special Committee spent a great deal of time trying to determine whether a two-year limit for the disqualification was appropriate, or whether a cutoff of five years, or seven

186. *NICRO*, *supra* note 125, at paras. 115-17.

187. *See supra* notes 96-115 and accompanying text.

188. *Sauvé 2*, *supra* note 98, at para. 162 ("[A]ny higher cutoff line, i.e. 5, 10, or 25 years of incarceration, would also, technically, be less intrusive.").

189. *Id.* at para. 164.

years, or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually, the Special Committee recommended a two-year cutoff since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution.¹⁹⁰

The conversation between the Lortie Commission and the Special Committee on Electoral Reform makes clear that the operative concern to be addressed in setting the minimum prison sentence resulting in disenfranchisement was an effort to ensure that disenfranchisement was limited to *serious* offenders. It engaged in a detailed investigation of which cut-off point would most effectively catch these serious offenders, without being over-inclusive. This is a difficult inquiry, and differences of opinion developed between the Lortie Commission (ten years or more), the Special Committee on Electoral Reform (two years or more), the majority in *Sauvé 2* (two years is over-inclusive),¹⁹¹ and the dissent (give deference to the two year standard).¹⁹²

The notion of a continuum was also present in the 2004 ECHR Chamber judgment, which seemed to test its position along the continuum by reference to the distinction between the two *Sauvé* decisions in Canada. It emphasized that although,

as the [British] government pointed out, the [*Sauvé 2*] decision was taken by five votes to four, it may be noted that this was in relation to a less restrictive bar imposed on prisoners (those sentenced to two years or more) and that in the first *Sauvé* case, concerning a blanket bar on all convicted prisoners, the decision was unanimous. Taking due account of the difference in text and structure of the Canadian Charter, the court nonetheless finds that substance of the reasoning may be regarded as apposite in the present case.¹⁹³

Against this background, the 2004 ECHR Chamber judgment unanimously condemned the blanket disenfranchisement at issue in the *Hirst* case. Although less than unanimous, the 2005 Grand Chamber similarly found a

190. *Id.*

191. *Id.* at para. 54.

192. *Id.* at para. 163.

193. *Hirst*, Chamber Judgment, *supra* note 146, at para. 43.

blanket disenfranchisement incompatible with Article 3 of Protocol No. 1, no matter how wide a margin of appreciation was allowed to the British legislation.¹⁹⁴

The continuum idea was also present in the South African decision. The legislation at issue in the South African case distinguished between three kinds of prisoners. First, prisoners who were awaiting trial were allowed to vote because of a presumption of innocence. Second, “[p]risoners sentenced to a fine with the alternative of imprisonment who were in custody because they had not paid the fine” were also allowed to vote based on the rationale that failure to pay the fine was likely due to poverty, an unacceptable basis for disenfranchisement.¹⁹⁵ Third, prisoners sentenced to imprisonment without the option of a fine were denied the right to vote.¹⁹⁶ Although these three levels alone could be viewed as a continuum regulating the application of disenfranchisement, the large (9-2) majority was convinced the continuum still needed adjusting, arguing that disenfranchisement of the third class of prisoners, sentenced to imprisonment without the option of a fine, constituted “a blanket exclusion akin to that which failed to pass scrutiny in the first *Sauvé* case.”¹⁹⁷

Thus, in all three of these decisions, the operative question was the seriousness of the offense for which disenfranchisement should result. The more inclusive the disenfranchisement law, the more minor offenses it included, and the less likely courts were to find it acceptable. Cases with blanket disenfranchisement laws often received unanimous condemnation by the courts in question, whereas laws limited to a smaller, more serious set of offenses left those courts much more divided. This is not to suggest that “seriousness” has the same meaning in all legal systems. In fact, in the three different countries studied, three different proxies for seriousness emerge. For example, in South Africa, the legislature had determined that all crimes for which the penalty is a sentence of imprisonment without the option of a fine are necessarily serious enough to trigger disenfranchisement.¹⁹⁸ In Canada, on the other hand, the legislature determined that all sentences of two years or more are crimes serious

194. *Id.*

195. *NICRO*, *supra* note 125, para. 43.

196. *Id.*

197. *Id.* para. 67 (noting that the Government “mentions crimes involving violence or even theft, but the legislation is not tailored to such crimes. Its target is every prisoner sentenced to imprisonment without the option of a fine. We have no information about the sort of offences for which shorter periods of imprisonment are likely to be imposed, the sort of persons who are likely to be imprisoned for such offences, and the number of persons who might lose their vote because of comparatively minor transgressions.”).

198. *Id.*

enough to trigger disenfranchisement.¹⁹⁹ Because of different sentencing practices and different applications of criminological theory, neither of these proxies for seriousness will necessarily be appropriate in the United States. However, this does not matter in the dialogical transnational judicial discourse. All that matters is the idea that legislatures are likely to view certain crimes as stronger candidates for disenfranchisement than other crimes. Having removed the textual bar to a more searching constitutional inquiry into felon disenfranchisement in Part II, the transnational judicial discourse suggests that the U.S. Supreme Court should consider whether the seriousness of the crime can, or should play a more active role in the legal discourse on felon disenfranchisement. The next Part will revisit felon disenfranchisement in the context of the United States, attempting to foresee what a continuum of applicability of felon disenfranchisement could look like under the application of strict scrutiny.

VI. ENVISIONING THE CONTINUUM OF APPLICABILITY IN THE UNITED STATES

After examining the continuum of applicability in the international context above, this Part returns to the United States. It attempts to envision, based on the new information uncovered in the legislative history, what a continuum of applicability of felon disenfranchisement would look like. Envisioning such a continuum of applicability for felon disenfranchisement is a difficult task. Because of the Supreme Court's original textual misinterpretation in *Ramirez*,²⁰⁰ discussed in Part II, the continuum that can be distilled from current case law is based on a rational basis test, not strict scrutiny. In an article comparing disenfranchisement and employment discrimination of former felons,²⁰¹ Elena Saxonhouse outlines the existing continuum under this rational basis approach. First, the Supreme Court has held that felon disenfranchisement laws passed with racially discriminatory intent will not withstand constitutional scrutiny.²⁰² Second, a lower court has held that "no rational basis [exists] to preclude the registration of those who have been incarcerated within the last five years and who had not been registered previously, when those who were legally registered prior to incarceration *may* vote upon their

199. Hirst, Chamber Judgment, *supra* note 146, para. 41.

200. *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974).

201. Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597 (2004).

202. *Hunter v. Underwood*, 126 S. Ct. 650 (2005).

release.²⁰³ Third, a federal district court has held that Section 2's affirmative sanction of felon disenfranchisement is inapplicable to misdemeanants.²⁰⁴ Fourth, a district court has held that a state may not "haphazardly pick and choose" disqualifying crimes.²⁰⁵ Fifth, a district court has held that felon disenfranchisement laws may not discriminate based on sex.²⁰⁶

Thus, even under rational basis scrutiny, a continuum of applicability of felon disenfranchisement has begun to emerge in the United States. First, disenfranchisement statutes passed with racially discriminatory intent are definitely unconstitutional. Second, disenfranchisement statutes which blatantly discriminate based on other factors, such as sex, are also suspect. Third, disenfranchisement for misdemeanors is highly questionable under any reading of the legislative history of section 2 of the Fourteenth Amendment and Reconstruction Acts.²⁰⁷

Importantly, however, this continuum is based on holdings premised on the belief that *Ramirez* allows for, at most, rational basis scrutiny of felon disenfranchisement.²⁰⁸ As this article argues,²⁰⁹ the legislative history of section 2 of the Fourteenth Amendment was misinterpreted by the

203. *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (emphasis in original).

204. *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974-76 (S.D. Miss. 1995).

205. *Allen v. Ellisor*, 477 F. Supp. 321, 324 (D.S.C. 1979), rev'd, *Allen v. Ellisor*, 664 F.2d 391 (5th Cir. 1981), vacated by 454 U.S. 807 (1981). See also *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983) (State conceding that it could not disenfranchise similarly situated blue-eyed felons but not brown-eyed felons).

206. *Hobson v. Pow*, 434 F. Supp. 362, 367 (N.D. Ala. 1977).

207. In addition to the conclusive evidence that the framers of the Fourteenth Amendment intended to limit disenfranchisement to crimes of rebellion and treason, discussed above, several of the framers expressed their desire to limit disenfranchisement to infamous or heinous crimes. For example, Senator Johnson of Maryland spoke only of "those who may have committed crimes of the most *heinous* character." *Ramirez*, 418 U.S. at 47. (emphasis added). Johnson included on this list "murderers, robbers, house-burners, counterfeiters of the public securities of the United States." *Id.* Similarly, the majority in *Ramirez* noted that at the time of the adoption of the Fourteenth Amendment, 29 states disenfranchised persons convicted of *infamous* crimes. *Id.* at 48. It seems highly doubtful that a misdemeanor could be considered "infamous" or "heinous." Similarly, disenfranchisement in the Reconstruction Acts, passed by the same Congress as the Fourteenth Amendment, was limited to "felonies at common law." *Ramirez*, 418 U.S. at 49 (citing Reconstruction Act, Act of Mar. 2, 1867, c. 153, 14 Stat. 428).

208. See *Allen v. Ellisor*, 477 F. Supp. 321, 324 (D.S.C. 1979), rev'd, *Allen v. Ellisor*, 664 F.2d 391 (5th Cir. 1981), vacated by 454 U.S. 807 (1981) (arguing that *Ramirez* did not intend to preclude rational basis scrutiny of felon disenfranchisement statutes).

209. See *supra* notes 42-57 and accompanying text.

Ramirez court, and that section should not operate as a barrier to the Court's traditional strict scrutiny of limits placed on voting, a fundamental right. In this light, the continuum of applicability would shift significantly. Because Justice Marshall adopted strict scrutiny in his *Ramirez* dissent, his contribution once again becomes significant. Applying strict scrutiny, Marshall elaborated a continuum in which certain serious crimes or voting-specific crimes could justify disenfranchisement, but other crimes could not.²¹⁰ As Marshall wrote:

To say that § 2 of the Fourteenth Amendment is a direct limitation on the protection afforded voting rights by § 1 leads to absurd results. If one accepts the premise that § 2 authorizes disenfranchisement for any crime, the challenged California provision could, as the California Supreme Court has observed, require disenfranchisement for seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler . . . Disenfranchisement extends to convictions for vagrancy in Alabama or breaking a water pipe in North Dakota, to note but two examples . . . Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 does not differentiate between felonies and misdemeanors.²¹¹

Finally, consistent with the recent decisions in Canada, Europe and South Africa discussed in this article, Marshall concluded that disenfranchisement of *former* felons who have completely served their sentence was unjustifiable.²¹²

Ultimately, a continuum of applicability of felon disenfranchisement will be for the courts to define on a case by case basis, once the current textual road-block gives way to a nuanced constitutional balancing process. But, one can begin to speculate. First, *Underwood* would still stand at the far end of the continuum, barring any disenfranchisement statute passed with racially discriminatory intent. Second, the disenfranchisement of former felons would be extremely difficult to justify when the absence of any textual "affirmative sanction" for felon disenfranchisement is combined with a strict scrutiny approach. Although Justice Marshall in

210. *Ramirez*, 418 U.S. at 76.

211. *Id.* at 76 n.24 (citing *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P. 2d 412 (1966); Gary L. Reback, Note, *Disenfranchisement of Ex-felons; A Reassessment*, 25 STAN. L. REV. 845, 846 (1973)).

212. *Ramirez*, 418 U.S. at 86.

Ramirez believed all former felons should be re-enfranchised under strict scrutiny,²¹³ this article's reading of the legislative history would still affirmatively sanction disenfranchisement of former felons who had committed one of a narrow set of crimes related to rebellion, such as treason. Third, under a strict scrutiny test, the somewhat controversial decisions of the lower courts discussed by Saxonhouse are likely to find much more widespread acceptance. For example, the decision of the Southern District of Mississippi not to disenfranchise misdemeanants²¹⁴ appears uncontroversial under strict scrutiny, because the punishment is not narrowly tailored to the crime. The most difficult and important question in the construction of a continuum, however, will be for what crimes the practice *is* justifiable under narrow tailoring and proportionality analyses. Courts may conclude that because the "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights,"²¹⁵ no government interest could possibly be compelling enough to infringe upon it, except for preventing the affirmatively sanctioned crimes of rebellion and other crimes of disloyalty such as treason. On the other hand, they could plausibly conclude that certain crimes of fraud, or crimes involving a high degree of moral turpitude, are serious enough to satisfy proportionality and related closely enough to crimes of disloyalty to satisfy narrow tailoring.

In conclusion, even with the textual understanding that section 2 of the Fourteenth Amendment affirmatively sanctions felon disenfranchisement, a continuum of applicability of the practice has begun to develop in the lower courts. If courts would accept the argument presented in this article, limiting the affirmative textual sanction to crimes of rebellion such as treason, the continuum of applicability would both strengthen and shift. The continuum would strengthen because rather than relying on a supposed textual sanction, courts would confront the issue and test the appropriateness of felon disenfranchisement in light of all the potential challenges to the practice that come onto their docket. The continuum would shift because strict scrutiny would provide a much more stringent paradigm to examine felon disenfranchisement. Under such a paradigm, the side of the continuum allowing felon disenfranchisement would be limited to three narrow areas. First, disenfranchisement for crimes involving rebellion or treason would be affirmatively sanctioned by the text of section 2 of the Fourteenth Amendment. Second, by a similar rationale, disenfranchisement for crimes involving disloyalty in voting may

213. *Id.* at 54-55.

214. See *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974-76 (S.D. Miss. 1995).

215. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

be justified. Finally, disenfranchisement for crimes involving an extremely high level of moral turpitude may, or may not, be considered serious enough to conclude that disenfranchisement is a proportional response and considered sufficiently related to crimes of disloyalty so as to satisfy narrow tailoring.

VII. CONCLUSION

After years of dormancy, the debate over felon disenfranchisement in the United States is alive again under the rubric of the Voting Rights Act (VRA). Although the VRA represents a valuable tool for those attempting to challenge felon disenfranchisement laws, this article questions whether it should be the only tool. Limiting judicial challenges of felon disenfranchisement to Section 2 of the VRA suggests that it is only discriminatory outcomes which make felon disenfranchisement problematic, without considering the potentially inherent constitutional injustice of the practice. Since the Supreme Court held in *Ramirez* three decades ago that the Constitution affirmatively sanctioned felon disenfranchisement, however, there has been little hope of resurrecting a constitutional argument as to the inherently problematic nature of the practice.

This article argues that the *Ramirez* court misunderstood what crimes the Framers viewed as so serious as to affirmatively sanction disenfranchisement as a punishment for their commission. Whereas *Ramirez* read the word "crimes" broadly, leading to the disenfranchisement of felons generally, this article suggests that a proper reading of Section 2 of the Fourteenth Amendment would only provide an affirmative sanction for disenfranchisement in cases of treason, disloyalty, or other crimes of disloyalty to the state.

Comparing recent foreign and international decisions on prisoner disenfranchisement, this article notes that courts consistently place a heavy emphasis on viewing prisoner disenfranchisement along a continuum of applicability with the seriousness of the offense as the major variable. This is consistent with the U.S. situation: the Framers also viewed disenfranchisement along a continuum, intending the phrase "or other crime" to apply only to crimes of rebellion or disloyalty to the state, such as treason. If this is true, then in the case of felony crimes other than rebellion and treason, it is appropriate to proceed to a means-end equal protection analysis. Because Justice Marshall in his *Ramirez* dissent reached the equal protection analysis through another route, we already have an idea of what that analysis would look like. Marshall found in *Ramirez* that neither the state interests of preventing voter fraud nor of

preventing felon group voting was compelling enough to disenfranchise former felons who have completely served their sentence. The final Part of the article attempts to go beyond Marshall's analysis, proposing a generalized continuum of applicability for felon disenfranchisement in the United States. Beginning with the existing continuum, developed under rational basis scrutiny and the *Ramirez* understanding of the legislative history, it concludes by extrapolating to a strict scrutiny paradigm.

For better or worse, we live in a world where a few prisoners in Florida, if allowed to vote, have the potential to determine the election of the most powerful person on earth. Felon disenfranchisement is definitely *not* a novel, or merely academic question. It is a serious question, not only for its potential to alter elections; not only for its potential to operate in a discriminatory manner; and not only for the interplay between felon disenfranchisement, prison location, and redistricting. All of these reasons are important, but this article attempts to suggest another: we should care about felon disenfranchisement because it *inherently* contradicts the rest of our constitutional jurisprudence on the right of every citizen to vote. This article has suggested that it is time to re-examine the original textual premise of the *Ramirez* decision that section 2 of the Fourteenth Amendment affirmatively sanctions felon disenfranchisement. A full constitutional dialogue under strict scrutiny will be a nuanced and laborious process, one for judges and legislatures. If this article has clearly emphasized the need to revisit that constitutional dialogue, it has done its job.

