

The Transnational Judicial Discourse and Felon Disenfranchisement: Re-examining the Textual Premise of *Richardson v. Ramirez*

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Abstract

This article is simultaneously a comparative law piece about prisoner disenfranchisement in various countries, a transnational work of legal theory providing a framework for the use of foreign law in domestic constitutional courts, and a domestic analysis of the constitutional underpinnings of felon disenfranchisement.

The article begins in Parts II-III with a comprehensive comparative analysis of the recent prisoner disenfranchisement decisions in Canada, South Africa, and Europe. It notes that the over-arching theme in the decisions of all three courts, and of all the dissents, is to view the acceptability of prisoner disenfranchisement along a continuum, where it becomes more acceptable the more serious the offense committed. It is this continuum idea that informs the latter parts of the article.

In Part IV, the article examines the growing phenomenon of a “transnational judicial discourse” between domestic, foreign, and international courts. This examination carefully 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 six justices of the US Supreme Court. The dialogical version of the transnational judicial discourse is less controversial because it is used only to generate ideas which are then subject to conventional, domestic constitutional tests; it does not import foreign doctrine. The article then examines the transnational judicial discourse as it applies to felon disenfranchisement, suggesting that the concept of a continuum of applicability taken from the international cases can inform the domestic debate on felon disenfranchisement.

The article synthesizes all of this material in Part V by revisiting the foundational Supreme Court decision on felon disenfranchisement, *Richardson v. Ramirez*, in the context of the transnational judicial discourse. Using the comparative law materials in a dialogical manner, it applies the concept of a continuum of applicability for felon disenfranchisement to the US context. Applying this concept functionally, it questions whether the framers in drafting the words “or other crime” in section 2 of the Fourteenth Amendment were actually sanctioning disenfranchisement for every kind of crime along the continuum of applicability. To answer this question, it returns to the legislative history of the Fourteenth Amendment, finding that the law review Note relied on by the *Ramirez* Court is incorrect. While that Note claimed 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. With this new understanding of the phrase, the article argues that section 2 of the Fourteenth Amendment cannot be read as affirmatively sanctioning the disenfranchisement of all felons; rather, the framers only intended the disenfranchisement of those committing crimes of rebellion or disloyalty to the State, such as treason.

With the textual barrier removed and the door open to a more nuanced constitutional examination of felon disenfranchisement for various crimes, the article concludes by offering some predictions on what a continuum of applicability of felon disenfranchisement would look like under strict scrutiny analysis.

I. Introduction

After the Supreme Court held in *Richardson v. Ramirez* that Section 2 of the Fourteenth Amendment affirmatively sanctioned felon disenfranchisement, there seemed little hope of reconstructing a fruitful legal debate on the topic.¹ Until very recently, it appeared that the *Ramirez* decision was so inclusive, its textual reference so unforgiving, that the exception for purposeful discriminatory intent enunciated in *Hunter v. Underwood*² was the only possible modification of *Ramirez*'s bright line. All of that has changed in recent years.

The debate over felon disenfranchisement is now stronger than ever. Federal appeals courts in three separate circuits have all voiced their skepticism of felon disenfranchisement's compatibility with Section 2 of the Voting Rights Act (VRA). First, in *Farrakhan v. Washington*, the Ninth Circuit reversed a district court 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."³ Second, although the decision was vacated pending a rehearing *en banc*,⁴ the Eleventh Circuit decision in *Johnson v. Bush* announced a similar challenge to felon disenfranchisement under the VRA.⁵ Third, the Second Circuit has for the past decade been considering the

¹ *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). See *infra* notes 120-121 and accompanying text (discussing the opinion).

² *Hunter v. Underwood*, 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.").

³ *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003), rehearing *en banc* denied, 359 F.3d 1116 (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 that under the "totality of the circumstances" test, even if the "the cause of [the] disparate impact on [minorities'] right to vote was external to the felon disenfranchisement provision *itself*, ... [the felon disenfranchisement scheme] could provide the requisite causal link between the voting qualification and the prohibited discriminatory result." *Id.* at 1011.

⁴ *Johnson v. Bush*, 377 F.3d 1163 (2004) (order for rehearing *en banc*).

⁵ *Johnson v. Bush*, 353 F.3d 1287 (11th Cir. 2003). The district court granted of summary judgment for the State, establishing a presumption that "the re-enactment of the felon disenfranchisement provision in

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.⁶ More recently in *Muntaqim v. Coombe*, a three-judge panel held Section 2 of the VRA 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 an intent.⁷ This did not end discussion on the issue, however; it was reborn last December when the Second Circuit granted rehearing *en banc*.⁸

The debate over felon disenfranchisement is definitely no less alive in legislative halls, with the changes since 2000 alone enough to paint a very active picture. Just as the court rulings are generally favorable to those advocating for felon voting rights – reopening a debate long silenced by *Ramirez* – the recent legislative action is also almost completely favorable to increased felon voting. In Alabama, a conservative governor “signed legislation making it easier for ex-offenders to regain their voting rights.”⁹ Legislatures in Delaware and Maryland altered their laws to automatically restore the franchise to ex-felons after a post-sentence wait, subject to some exceptions; the Nevada legislature eliminated its five-year wait to apply for restoration of rights; Connecticut enfranchised probationers; and New Mexico ceased the disenfranchisement of ex-felons. The only exception to this trend was Massachusetts, which voted to disenfranchise

[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 reversed, refocusing the burden on the state to prove the 1968 constitution was free of discriminatory intent, and finding no non-discriminatory reason in the record for retaining the felon-disenfranchisement provisions in the constitution. 353 F.3d at 1301.

⁶ *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

⁷ 366 F.3d 102, 130 (2d Cir. 2004). Rehearing *en banc* denied, *Muntaqim v. Coombe*, 385 F.3d 793 (2d Cir. 2004); cert. denied, *Muntaqim v. Coombe*, 125 S. Ct. 480 (2004); rehearing *en banc* granted, *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004).

⁸ *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004).

⁹ Pamela S. Karlan, *Convictions and Doubts: Retribution, representation, and the Debate over Felon Disenfranchisement*, Stanford Law School Working Paper No. 75, p. 1, available online at http://www.sentencingproject.org/pubs_05.cfm (last accessed Mar. 2, 2005).

inmates.¹⁰ A bill was also introduced in the U.S. Congress which would guarantee the right to vote in federal elections to all former felons who at the time of the election are no longer “serving a felony sentence in a correctional institution or facility.”¹¹ 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.”¹²

There are many good reasons for this increased 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.¹³ Third, many commentators maintain that felon disenfranchisement frustrates fair redistricting principles by counting prisoners for redistricting purposes but then not counting their vote.¹⁴ None of these is the focus of this article. Rather than add one more voice to the masses which are arguing, in various ways, that felon disenfranchisement is wrong because of its functional outcomes, this article returns to the

¹⁰ Christopher Uggen & Jeff Manza, *Summary of Changes to State Disenfranchisement Laws, 1865-2003* (April, 2003), online at http://www.sentencingproject.org/pubs_05.cfm (last accessed Mar. 2, 2005).

¹¹ H.R. 259, Civic Participation and Rehabilitation Act of 2003, § 3 (108th Congress, 1st Sess., Jan. 8, 2003).

¹² Karlan, *supra* note 9, at 1.

¹³ 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,” 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).

¹⁴ See, e.g., LANI GUINIER & GERALD TORRES, *THE MINOR’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/new_york_state_policies.shtml (last accessed Mar. 2, 2005) (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 substantively wrong in itself. As a constitutional matter, this argument has been foreclosed by the textual holding in *Ramirez* that the 14th Amendment of United States Constitution affirmatively sanctioned the practice. This article argues for a reconsideration of that premise. It does so by approaching the key phrase “or other crime” in section 2 of the 14th Amendment and re-examining whether the Framers truly intended that phrase to create the blanket disenfranchisement which it has come to support.

Courts in South Africa, Canada, and Europe have all recently examined the practice of prisoner disenfranchisement,¹⁵ concluding in their respective jurisdictions that the practice, if appropriate at all, is appropriate only for the most serious crimes and never once the prison term is complete. By engaging this international jurisprudence, this article follows the increasingly popular model of the “transnational judicial discourse” to make use of the ideas raised by the foreign courts, but not their doctrine or constitutional tests. Although a voluminous body of literature exists criticizing felon disenfranchisement,¹⁶ and although some scholars have compared the U.S. situation to one other country,¹⁷ no scholar has yet synthesized all of the recent domestic and international decisions into one analysis. Similarly, although some commentators have attempted to reopen the constitutional inquiry after *Ramirez*,¹⁸ no scholar has done so by a reinterpretation of the word “crime” in Section 2 of the 14th Amendment. This article attempts both of these goals.

¹⁵ The 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 domestic or international practice. The term “prisoner disenfranchisement” used in the international jurisdictions is also narrower and more appropriate to those jurisdictions, because it does not contemplate any possibility of disenfranchising *former* prisoners.

¹⁶ See, e.g., works cited at http://www.sentencingproject.org/pubs_05.cfm (last accessed Mar. 2, 2005) (which represents just the tip of the iceberg).

¹⁷ 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).

¹⁸ 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 (2004); Karlan, *supra* note 9 (arguing that felon disenfranchisement violates the 8th Amendment ban on cruel and unusual punishment).

In Part II, I undertake a descriptive analysis of the recent prisoner disenfranchisement decisions in Canada, South Africa, and Europe. In the Canadian context, I contrast a unanimous decision of the Supreme Court in 1993 finding a blanket disenfranchisement of all prisoners unconstitutional 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 reference to 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 a fine was unconstitutional. Finally, the European Court of Human Rights, also after examination of the Canadian case, unanimously 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 III, I undertake a comparative analysis of the international decisions. I conclude that the decisions differ in six principle ways. First, the extent of prisoner disenfranchisement was different in each case. Second, the government justifications for prisoner disenfranchisement varied. Third, the courts were not uniform in the level of constitutional scrutiny they applied to prisoner disenfranchisement. Fourth, the cases accorded varying levels of attention to comparative law materials. Fifth, the cases enjoyed differing levels of agreement among the justices. Sixth, although all three Courts applied a similar test of constitutional scrutiny, each court's final holding rested on a different stage in that inquiry. I then consider two principle and important similarities between the decisions. First, all three courts relied on an astonishingly similar test of constitutional scrutiny. Second, and most important, the over-arching theme in the analysis of all three courts, and of all the dissents, was to view the acceptability of prisoner disenfranchisement along a continuum, where it becomes more acceptable the more serious the offense committed. It is this important idea that informs the latter Parts of this article.

In Part IV, I discuss the growing phenomenon of a “transnational judicial discourse.” First, I discuss this discourse generally as it has been understood by justices of the United States Supreme Court. This examination carefully distinguishes the more controversial universalist and genealogical interpretations of the transnational judicial discourse from less controversial dialogical interpretation of the discourse which has been separately endorsed by six of the Court’s current justices. The dialogical version of the transnational judicial discourse is less controversial because it is used only to generate ideas which are then subject to conventional, domestic constitutional tests; it absolutely does not import foreign doctrine. Second, I examine the transnational judicial discourse as it applies to felon disenfranchisement, returning to my conclusions in Part III and suggesting that the international cases are useful because of their notion of a continuum of applicability of prison disenfranchisement based on the seriousness of the offense.

The article synthesizes all of this material in Part V by revisiting *Richardson v. Ramirez* in the context of the transnational judicial discourse. Using the comparative law materials in a dialogical manner (to stimulate ideas, not import doctrine), it applies the concept of a continuum of applicability for felon disenfranchisement to the U.S. context. Applying this concept functionally, it questions whether the framers in drafting the words “or other crime” in section 2 of the Fourteenth Amendment were actually referring to every kind of crime along the continuum of applicability. To answer this question, it returns to the legislative history of the Fourteenth Amendment, finding that the law review Note relied on by the *Ramirez* Court is incorrect. While that Note claimed 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. With this new understanding of the phrase, section 2 of the Fourteenth Amendment thus only affirmatively sanctions the disenfranchisement of those committing crimes of rebellion or disloyalty to the State, such as treason. With the textual bar now 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. The Part concludes with a substantive application of the continuum of applicability of felon disenfranchisement. With the textual barrier removed and the door open to a more nuanced constitutional examination of felon disenfranchisement for various crimes, the Part offers some predictions on what a continuum of applicability of felon disenfranchisement would look like under strict scrutiny analysis. The article concludes that the time has come to revisit the original textual premise in *Ramirez*, accept a narrower reading of section 2 of the 14th Amendment, and develop a more nuanced approach to the applicability of felon disenfranchisement.

II. Descriptive Summary of International Decisions

a. Canada

The Canadian Charter of Rights and Freedoms states in s.3 that “Every 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.”¹⁹ Nevertheless, a Canadian law passed in 1985 prohibited prisoners from voting while in prison, regardless of the length of their sentences.²⁰ That law was challenged in the 1993 case of *Sauvé v. Canada (Sauvé 1)*, and the Supreme Court held *unanimously* that such a blanket ban was an unconstitutional denial of the right to vote guaranteed by s. 3.²¹ The Canadian Parliament responded to that decision by replacing the blanket prisoner disenfranchisement law with a new law denying the right to vote

¹⁹ CANADIAN CHARTER RTS & FREEDOMS, S.3.

²⁰ *Canada Elections Act*, R.S.C. 1985, c. E-2, ss. 51(e) [rep. & sub. 1993, c. 19, s. 23(2)], 51.1 [ad. *idem*, s. 24].

²¹ *Sauvé v. Canada (Attorney General)*, 2 S.C.R. 438 (1993) (hereinafter “*Sauvé 1*”).

only to inmates serving sentences of two years or more, codified in s. 51(e) of the *Canada Elections Act*²² The reformulated law produced new litigation, leading in 2002 to the important decision in the area of prisoner disenfranchisement announced in *Sauvé v. Canada (Sauvé 2)*.²³

In *Sauvé 2*, the Crown conceded that s. 51(e) of the *Canada Elections Act* presumptively violated the voting rights provision of s. 3 of the *Charter*; thus, the Supreme Court proceeded directly to constitutional justification analysis.²⁴ It 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.”²⁵ Although the word “rational” is used, the addition of the minimal impairment and proportionality tests suggests that the majority’s formulation corresponds to some level of heightened scrutiny analysis in American constitutional jurisprudence. Moreover, the majority clearly distinguishes 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.”²⁶

Proceeding to the application of the test, the Court noted that the government asserted two objectives for the denial of prisoner voting rights: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, enhancing the general purposes of the criminal sanction.²⁷ Expressing criticism at the broad nature of these objectives,²⁸

²² s. 51(e) (S.C. 1993, c. 19, s. 23).

²³ *Sauvé v. Canada (Chief Electoral Officer)*, 3 S.C.R. 519, 2002 S.C.C 68 (2002) (hereinafter “*Sauvé 2*”).

²⁴ The basis for Constitutional scrutiny under the Canadian Charter of Rights and Freedoms is established in its S.1: “The *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. Constitutional review under this article is a two-part means-ends inquiry known as the *Oakes* test for the case in which it was developed: “To 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.” *R. v. Oakes*, 1 S.C.R. 103 (1986).

²⁵ *Sauvé 2*, *supra* note 23, at para. 7.

²⁶ *Id.* at para. 8.

²⁷ *Id.* at para. 21.

²⁸ 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.”²⁸ In this regard, it noted that the first objective “could be asserted of virtually every criminal law and many non-criminal measures” and that the

the Court proceeded to the first prong of Canadian constitutional scrutiny, determining 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: (1) 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; (2) that allowing penitentiary inmates to vote "demeans" the political system; and (3) that disenfranchisement is a legitimate form of punishment, regardless of the nature of the crime or circumstances of the offender.²⁹

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"³⁰ because it is in such stark contrast to "Canada's steady march to universal suffrage,"³¹ taking Canada "backwards in time and retrench[ing] ... democratic entitlements."³² 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, both of which rendered obsolete by s. 3.³³ 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.³⁴

second objective was also vague because Parliament had not clarified how, exactly, such a punishment would enhance the criminal sanction. *Sauvé 2*, *supra* note 23, at paras. 24-24.

²⁹ *Id.* at para. 29.

³⁰ *Id.* at para. 41.

³¹ *Id.* at para. 33.

³² *Id.*

³³ *Id.* at paras. 42-44.

³⁴ *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 concludes 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.

Because the Court found no rational connection between prisoner disenfranchisement and the government's three objectives, it did not need to proceed to the minimum impairment or proportionality inquiries, although it stated in *dicta* that a bright line disenfranchising all prisoners with sentences of two years or more would be highly suspect under both of these tests.³⁵ The Court likewise did not consider the alternative argument that prisoner disenfranchisement infringes the equality guarantee of *Charter* s. 15(1).³⁶ Thus, the Canadian Supreme Court concluded by a 5-4 vote that prisoner disenfranchisement applicable to all prisoners while they serve a sentence of two years or more was unconstitutional.

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.³⁷ After a lengthy discussion of criminology and penology and overview of international trends in prisoner disenfranchisement, the dissent found both of the government's objectives to be pressing and substantial.³⁸ 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.³⁹ 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.”⁴⁰

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

³⁵ *Id.* at paras. 54-62.

³⁶ *Id.* at para. 63.

³⁷ *Id.* at para. 67.

³⁸ *Id.* at para. 148.

³⁹ *Id.* at paras. 160-77.

⁴⁰ *Id.* at para. 207.

Constitution.”⁴¹ In the early years of the new constitution, the relationship between this provision and prisoner disenfranchisement was unclear, because no law existed outright denying prisoners the right to vote. 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.⁴² In response to this case, the South African legislature enacted the Electoral Laws Amendment Act,⁴³ amending the Electoral Act⁴⁴ so as to clearly disenfranchise in section 24(B)(2) all prisoners serving sentences of imprisonment without the option of a fine.⁴⁵ 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 once in prison.⁴⁶ 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* (hereinafter “NICRO”).⁴⁷

Constitutional scrutiny in South Africa is governed by section 36 of the Constitution and cases interpreting it.⁴⁸ That section provides that constitutional rights can only be limited if

⁴¹ CONSTITUTION OF SOUTH AFRICA, SEC. 19(3)(a).

⁴² 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).

⁴³ Act 34 of 2003.

⁴⁴ Act 73 of 1998.

⁴⁵ *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). 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.

⁴⁶ *NICRO, supra* note 45, 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.”).

⁴⁷ *Id.*

⁴⁸ 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)*

“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 legislation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve that purpose.”⁴⁹ The presence of the less-restrictive means component suggests a form of heightened scrutiny.

Applying the section 36 test, the *NICRO* Court first examined the three purposes for the legislation put forth by the government. The first purpose advanced was an effort to maintain the “integrity of the voting process.” Under this rationale, because all attempts to accommodate special categories of voters through efforts such as mobile voting stations involved risks of interference or tampering, such special arrangements should be limited. 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.⁵⁰ 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.”⁵¹ The government’s second proposed purpose was the effort to minimize the cost of the voting process. 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.⁵² The Court wholly rejected this argument, stating that “[t]here is nothing to suggest that expanding ... arrangements to include prisoners sentenced without the

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.

⁴⁹ CONSTITUTION OF SOUTH AFRICA, SEC. 36(1).

⁵⁰ *NICRO*, *supra* note 45, at paras. 40-41.

⁵¹ *Id.* at para. 53.

⁵² *Id.* at paras. 47-49.

option of a fine will in fact place an undue burden on the resources of the Commission. ... In so far as this aspect of the case is concerned, the burden of justifying the limitation falls at the first hurdle and it is not necessary to engage in the proportionality analysis that would have been necessary if the factual underpinning for the contention based on lack of resources had been established.”⁵³ 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.⁵⁴ After extensive analysis of the Canadian *Sauvé 2* case, which turned on a similar policy issue,⁵⁵ the Court concluded that

the present case is markedly different from *Sauvé [2]*. 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 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.⁵⁶

After rejecting all three of the government’s proposed purposes, the Court thus held that disenfranchising all prisoners serving sentences without the option of a fine was unconstitutional. 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.⁵⁷

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 “read holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the

⁵³ *Id.* at paras. 49-51.

⁵⁴ *Id.* at para. 55-57.

⁵⁵ See *supra* notes 27-36 and accompanying text.

⁵⁶ *NICRO, supra* note 45, at paras. 66-67.

⁵⁷ *Id.* at para. 68.

ravages of apartheid.”⁵⁸ In this regard, Madala criticized the majority’s reliance on the Canadian *Sauvé 2* case, arguing that South Africa’s unique and tainted past required “uniquely South African solutions and that one cannot simply import into a South African situation a solution derived from another country.”⁵⁹ 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. 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.⁶⁰ 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.⁶¹ 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.⁶²

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)*,⁶³ the ECHR considered a British law which disenfranchised all prisoners, regardless of their crime, for the entire time they are in prison.⁶⁴ The main question in the case was whether the prisoner disenfranchisement law violated Article 3 of Protocol No. 1 to the Convention for the Protection

⁵⁸ *Id.* at para. 113.

⁵⁹ *Id.* at para. 114.

⁶⁰ *Id.* at paras. 134-45.

⁶¹ *Id.* at para. 152.

⁶² *Id.* at para. 153.

⁶³ *Hirst v. United Kingdom (No. 2)*, European Ct. Hum. Rts. (Mar. 30, 2004).

⁶⁴ Representation of the People Act of 1983, sec. 3.1 (“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 election.”).

of Human Rights and Fundamental Freedoms of the Council of Europe, which states: “The 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.”⁶⁵

After an extensive review of both the majority and dissenting opinions in the Canadian *Sauvé 2* case,⁶⁶ the Court proceeded to its examination of the tension between the British prisoner disenfranchisement law and Art. 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.”⁶⁷ The *Mathieu-Mohin* test appears slightly relaxed in comparison to the scrutiny used in Canada or South Africa because although similar in all other respects, it does not mention minimum impairment. Nevertheless, the Court was unwilling to entertain a level of scrutiny as relaxed as that proposed by the United Kingdom. When the British government argued that “under Article 3 of Protocol No. 1 the right to vote was not absolute and that a wide margin of appreciation [relaxed scrutiny] was to be allowed to Contracting States,”⁶⁸ 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 legislature and which derive, essentially, from unquestioning and passive adherence to a historic tradition.”⁶⁹

⁶⁵ Optional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 3, 213 U.N.T.S. 262.

⁶⁶ *Hirst*, *supra* note 63, at paras. 25-27.

⁶⁷ *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, p. 23, § 52 (cited in *Hirst*, *supra* note 63, at para. 36).

⁶⁸ *Id.* at para. 32.

⁶⁹ *Id.* at para. 41.

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.’”⁷⁰ These aims had both been accepted as legitimate in the case law of the European Commission for Human Rights, a predecessor to the ECHR.⁷¹ Relying heavily on the Canadian *Sauvé 2* decision,⁷² 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.”⁷³ Second, the Court was also deeply skeptical of the British government’s objective of enhancing civil responsibility and respect for the rule of law, stating 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.”⁷⁴ Despite these concerns, the Court did not decide the case on this basis, preferring to leave this as *dicta* and strike down the law based on its lack of proportionality.⁷⁵ 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 proportionality test. The Court emphasized

⁷⁰ *Hirst*, *supra* note 63, at para. 42.

⁷¹ *Id.* at para. 33.

⁷² 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 “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.” *Id.* at para. 43. *See also Id.* at para. 45. 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*.

⁷³ *Id.* at para. 45.

⁷⁴ *Id.* at para. 46. The Court agreed with the majority in *Sauvé 2* that in fact removal of the vote in fact runs exactly *contrary* 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.”

⁷⁵ *Id.* at para. 47.

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. The Court then considered the particular situation of the applicant, who was from a strategic perspective certainly the “ideal plaintiff.” The applicant in the case “was a man with a gross personality disorder to such a degree that he was amoral.”⁷⁶ He had completed his sentence, and was being detained solely because his personality disorder made him a potential danger to society. The Court found it impossible to accept that a law premised on punishment but which catches such a case within its reach could be considered proportional.⁷⁷ 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.”⁷⁸ The Court thus concluded that the blanket ban on prisoner voting imposed in the United Kingdom breached Article 3 of Protocol No. 1.⁷⁹ 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).⁸⁰

III. Comparative Analysis of International Decisions

The three recent international decisions on prisoner disenfranchisement are interesting both for their differences and their similarities. This Part treats each in turn.

a. Differences between the International Decisions

Each of the international decisions distinguishes itself in certain regards. First, the extent of prisoner disenfranchisement was different in each case: The provision at issue in the ECHR case denied the vote to all convicted prisoners, irrespective of length of sentence and gravity of

⁷⁶ *Hirst*, *supra* note 63, at para. 9.

⁷⁷ *Id.* at paras. 10, 49.

⁷⁸ *Id.* at para. 51.

⁷⁹ *Id.* at para. 52.

⁸⁰ *Id.* at para. 53-56.

offense; the South African law denied the vote to convicted prisoners serving sentences of imprisonment without the option of a fine; the Canadian law denied the vote to prisoners serving sentences of two years or more. Second, South Africa was the outlier when it comes to the justification advanced by the government for disenfranchisement. Whereas the governments in the Canadian and European cases advanced the dual goals of preventing crime and enhancing civic responsibility,⁸¹ the South African government's justification was markedly different, based on logistical and cost issues.⁸² Third, on the level of constitutional scrutiny, the ECHR distinguished itself from the South African and Canadian courts; whereas those latter courts struck down prisoner disenfranchisement based on a heightened constitutional review, the ECHR reached the same decision with what appears to be a more relaxed level of review. Fourth, the cases differed in the attention they accorded to the jurisprudence of other countries in the area of prisoner disenfranchisement. Whereas the majority decision of the Canadian Supreme Court did not use foreign or international sources at all, the other two courts conducted extensive investigations of the state of prisoner disenfranchisement beyond their jurisdiction, notably of the Canadian decision itself. The South African Constitutional Court analyzed the Canadian decision for no less than seven pages; it was unquestionably informed by the decision, integrating language from the Canadian case into its very holding.⁸³ The ECHR preferred to place this comparative material at the beginning of its judgment, excerpting lengthy passages from both the majority and dissenting opinions from *Sauvé 2* before beginning its analysis.⁸⁴ Fifth, the cases enjoyed differing levels of agreement among the justices. The European decision was unanimous, likely a reflection of the broader level of disenfranchisement at issue. The Canadian decision came to a 5-4 vote. The South African decision enjoyed a majority of 9 votes to 2.

⁸¹ The “preventing crime” goal differed slightly in the two cases: In the European case, it was grounded in a deterrence rationale, whereas in the Canadian case it was based on a retributive rationale.

⁸² This difference was noted by the majority in the South African case. *See NICRO, supra* note 45, at para. 65.

⁸³ *NICRO, supra* note 45, at paras. 58-67.

⁸⁴ *Hirst, supra* note 63, at paras. 25-27. It also cites relevant provisions of the *International Covenant on Civil and Political Rights*. *Id.* at paras. 22-23.

Finally, each court approached the constitutional test differently. The ECHR did not rule on the legitimate ends question, finding that the disenfranchisement law failed the proportionality test. By contrast, the South African Constitutional Court determined the ends were not compelling (finding that accommodating the prison voters would not cause an undue resource burden) and thus did not even carry out the proportionality analysis. Differing from both of these approaches, the Canadian Supreme Court, after presumptively accepting the government's stated objectives, struck down the disenfranchisement law based on a lack of connection between the means and ends.

b. Common Ground: The Continuum of Applicability

Perhaps more interesting and useful than the above differences are the similarities in the three cases, decided within differing legal and social settings on three different continents. First, despite the geographic, social, and historical differences distinguishing the three jurisdictions, all three courts relied on a remarkably similar test of constitutional scrutiny. In each case, a constitutional provision had to show an acceptable governmental objective, a connection had to exist between the stated objective and the means employed, and the means had to pass both a proportionality test and a minimum impairment test.

Second, and more importantly, the cases all 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 all the dissenting opinions made this point clearly.⁸⁵ Moving along the continuum, all three courts were clear that a blanket disenfranchisement of all prisoners which failed to account for the seriousness of their crime was unconstitutional. The distinction between the two Canadian cases exhibits this quite clearly. In the *Sauvé 1* case, a unanimous

⁸⁵ *NICRO*, *supra* note 45, at para. 115-17 (dissenting opinion of Justice Madala in South African case); *Id.* at para. 151 (dissenting opinion of Justice Ngcobo in South African case); *Sauvé 2*, *supra* note 23, at para. 71.

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 Justices found a law disenfranchising 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.⁸⁶ Taking these two cases together, it is clear that the Canadian Justices care very much about 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 always appropriate.⁸⁷ This is because 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. This is clear from 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. According to the *Sauvé 2* Court:

[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". [The trial judge noted:] '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 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.'⁸⁸

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

⁸⁶ See *supra* notes 21-36 and accompanying text.

⁸⁷ *Sauvé 2*, *supra* note 23, at 162 (“[A]ny higher cutoff line, i.e. 5, 10, or 25 years of incarceration, would also, technically, be less intrusive.”).

⁸⁸ *Id.* at para. 164.

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 (10 years or more), the Special Committee on Electoral Reform (2 years or more), the majority in *Sauvé 2* (2 years is over-inclusive),⁸⁹ and the dissent (give deference to the 2 year standard).⁹⁰ Everyone agreed, however, on the concept of a continuum, and the importance of only catching “serious offenders” along that continuum. Everyone agreed that disenfranchising offenders with sentences of less than two years would be over-inclusive.

This continuum notion was also present in the ECHR decision, 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.”⁹¹ Against this background, the ECHR unanimously condemned the blanket disenfranchisement at issue in the *Hirst* case.

The South African Court was also aware of the continuum notion. 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, prisoners “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. Third, prisoners

⁸⁹ *Sauvé 2*, *supra* note 23, at para. 54.

⁹⁰ *Id.* at para. 163.

⁹¹ *Hirst*, *supra* note 63, at para. 43.

sentenced to imprisonment without the option of a fine were denied the right to vote.⁹² Although these three levels alone could be viewed as an inclusiveness continuum, the large (9-2) majority was unconvinced that such an approach could sufficiently solve the inclusiveness problem, 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.”⁹³

Thus, in all three of the international 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 will catch and the less likely courts have been to find it acceptable. Cases with blanket disenfranchisement laws 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 approach differs markedly from the recent cases in U.S. Circuit courts challenging felon disenfranchisement under the Voting Rights Act.⁹⁴ Whereas the VRA approach focuses on the discriminatory effects of felon disenfranchisement, *all three* of the international tribunals explicitly passed up a discrimination or equality-based inquiry.⁹⁵ While the VRA approach of the Circuit Courts adds an important front against felon disenfranchisement in the U.S., the international decisions raise the idea that another, more inherent criticism of felon disenfranchisement should not be forgotten. The time has come to revisit whether *Ramirez*'s holding is – or should be – so broad as to extend to all crimes a state chooses to put in its felon disenfranchisement statute.

⁹² *NICRO*, *supra* note 45, at para. 43.

⁹³ *Id.* at 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.”).

⁹⁴ See *supra* notes 3-8 and accompanying text.

⁹⁵ See *supra* notes 36, 57, 80, and accompanying text.

IV. The Transnational Judicial Discourse

a. *The US Supreme Court and Transnational Judicial Discourse*

This article uses the term “transnational judicial discourse” to describe the use by one constitutional court of case law of another constitutional court in the course of domestic constitutional interpretation. This is a much narrower and newer question than the issue of the relevance of international law in a given domestic system. This latter issue, in the U.S., is as old as the Constitution itself,⁹⁶ and implicates many complex subsidiary issues, such as the extent to which customary international law applies in domestic courts,⁹⁷ issues connected to the status of a treaty as either self-executing or non-self-executing,⁹⁸ the *Charming Betsy* canon,⁹⁹ the last in time rule for conflicts between treaties and statutes,¹⁰⁰ and the relationship between the Congressional treaty power and American federalism.¹⁰¹ None of these issues come in to play in the comparatively less contentious notion of a transnational judicial discourse, because the foreign law decisions at issue in the transnational judicial discourse *cannot* bind the domestic constitutional court that is considering them. Rather, the constitutional court is merely engaging in some comparative law before getting down to the job of domestic constitutional interpretation.

⁹⁶ See, e.g., *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.”).

⁹⁷ See, e.g., T. Alexander Aleinikoff, *The United States Constitution and International Law: 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).

⁹⁸ See, e.g., Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA J. INT’L L. 627 (1986); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760 (1988).

⁹⁹ *Murray v. Schooner Charming Betsy*, 2 Cranch 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.”).

¹⁰⁰ See RESTATEMENT 3D OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(a) (1987).

¹⁰¹ See Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH. J. INTL. L. 265, 309-32 (2004).

Constitutional courts worldwide are increasingly adopting this transnational judicial discourse.¹⁰² The US Supreme Court is no exception, as was first evident in *Lawrence v. Texas*, citing jurisprudence of European Court of Human Rights in holding that same-sex couples have a constitutional right to privacy.¹⁰³ In *Roper v. Simmons*, decided last spring, the Supreme Court engaged comparative law even more actively. In holding unconstitutional the application of capital punishment in cases where the offender was under age eighteen at the time of the crime, the Court cited several treaty provisions 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.¹⁰⁴ These cases are no accident or historical blip; in fact, six of the nine current justices have *individually* endorsed the transnational judicial discourse in other opinions, dissents, speeches, or articles.¹⁰⁵ United States

¹⁰² Cody Moon, *Comparative Constitutional Analysis: Should the United States Supreme Court Join the Dialogue?* 12 WASH. U. J.L. & POL'Y 229 (2003).

¹⁰³ *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)).

¹⁰⁴ *Roper v. Simmons*, 2005 U.S. LEXIS 2200, at pp. 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), as noted, *supra*, at 13); 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)).

¹⁰⁵ Moon, *supra* note 102, at 240-41) (citing *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); *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); *Printz*, *supra* note 108, at 976-77 (Justice Breyer advocating for transnational judicial dialogue in dissent); Ruth Bader Ginsburg & Deborah Hones Merritt, Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue, 21 *Cardozo L. Rev.* 253, 282 (1999) (emphasizing that comparative analysis is "emphatically ... relevant to the task of interpreting constitutions"); 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 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 these courts have something to teach us about the civilizing functions of

Supreme Court justices are also meeting with their foreign colleagues – from national constitutional courts and the European Court of Justice (ECJ) – with increasing regularity. Justice Sandra Day O'Connor has led Supreme Court delegations to meet with their counterparts in France, Germany and England. There have also been two official meetings between the United States Supreme Court and the ECJ, one in 1998 in Brussels and another in 2000 in Washington.¹⁰⁶ In a very telling move, Chief Justice Rehnquist recently created a branch of the federal judiciary exclusively dealing with foreign policy issues, to "coordinate the federal judiciary's relationship with foreign judiciaries and with official and unofficial agencies and organizations interested in international judicial relations and the establishment and expansion of the rule of law and administration of justice."¹⁰⁷

Despite these events, the transnational judicial discourse remains controversial, and the doubters on the court are equally vocal as the supporters. Chief among these doubters is Justice Antonin Scalia, who is firm in his resolve that "comparative analysis [is] inappropriate to the task of interpreting a constitution."¹⁰⁸ 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

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 ground in so many countries, it is time that the United States courts begin looking to the decision of other constitutional courts to aid in their own deliberative process.").

¹⁰⁶ Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1120 (2000).

¹⁰⁷ *Id.* at 1122-23 (citing Chief Judge Michael M. Mihm, *International Judicial Relations Committee Promotes Communication, Coordination*, 1 INT'L JUD. OBSERVER 1 (Federal Judicial Center & American Society of International Law, Washington, D.C.) (Sept. 1995)).

¹⁰⁸ *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997). 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 . . .").

strictly academic interest and little practical relevance. At worst, its use is a foreign imposition or even a form of legal imperialism.¹⁰⁹

According to the legal particularists, the transnational judicial discourse is at its best irrelevant, and at its worst represents a dangerous threat of legal imperialism. Answering this heavy critique requires taking a closer look at the process of transnational judicial discourse itself.

Sujit Choudhry has identified three different ways that courts use comparative jurisprudence: universalist interpretation, genealogical interpretation, and dialogical interpretation.¹¹⁰ 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.”¹¹¹ 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 US Supreme Court. Occupying a middle ground, genealogical interpretation justifies importation and application of foreign constitutional doctrines because of a proven historical link between the two constitutions that is so strong as to properly be considered “genealogical.”¹¹² Although 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,¹¹³ its use has never been suggested by any of the members of the United States Supreme Court.

Finally, the least controversial 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, respecting the constitutional boundaries so important to the legal particularists. This non-binding dialogue can help “courts identify the normative and

¹⁰⁹ Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 830 (1999).

¹¹⁰ *Id.* at 825.

¹¹¹ Choudhry, *supra* note 109, at 825.

¹¹² According to this school, a genealogical link is present only when one constitutional order is born from another. Choudhry, *supra* note 109, at 838.

¹¹³ *Id.* at 866-85.

factual assumptions underlying their own constitutional jurisprudence by engaging with comparable jurisprudence of other jurisdictions.”¹¹⁴ Whether the constitutional traditions at issue are very similar or strikingly different is irrelevant to the dialogical approach, which operates only as ‘food for thought’ before the court begins the real job of domestic constitutional interpretation. It is this form – and only this form – of transnational judicial discourse that is increasingly applied in the US Supreme Court.

In the recent debate between Justice Scalia and Justice Breyer on the relevance of foreign court decisions to US Constitutional interpretation,¹¹⁵ Justice Breyer firmly adopted this dialogical approach. He argued that considering foreign decisions when similar issues arise in domestic and foreign cases could only benefit the Court because it is making use of the foreign brain power of many constitutional court judges to flesh out all of the issues without having to be bound by the results they reach. This answers the two chief critiques of the legal particularists. First, the potential to flesh out issues could be quite valuable, answering the legal particularist’s irrelevance concern. Second, the non-binding nature of this exercise answers the legal particularist’s ‘legal imperialism’ concern. The Court is free to take any ideas the foreign court discussed and then treat them in its own way, using domestic constitutional tests.

b. The Transnational Judicial Discourse and Felon Disenfranchisement

The previous section establishes that a majority of the Supreme Court is willing to engage in the transnational judicial discourse, and that this discourse would be of the least invasive dialogical form. If the judges are willing to engage in such discourses, prisoner disenfranchisement presents an ideal area to do so because of similarities of circumstances and

¹¹⁴ *Id.* at 825.

¹¹⁵ Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan. 13, 2005), online at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (last accessed February 28, 2005).

constitutional tests involved. It is thus worth revisiting the conclusions drawn in Part III with an eye towards ways the U.S. Supreme Court might benefit from the various analyses undertaken.

As discussed *supra* Part III(b), the over-arching theme shared by the decisions in Canada, South Africa, and the ECHR is that prisoner disenfranchisement exists along a continuum of acceptability with seriousness of the crime committed as the most prominent variable. Thus, while unanimous courts in Europe and Canada found a blanket disenfranchisement unacceptable because it punished even non-serious offenders, the Canadian Supreme Court split 5-4 on a disenfranchisement law that only affected prisoners convicted of more serious crimes for which the sentence was two years or greater. Similarly, the Lortie Commission in Canada had the stated goal of disenfranchising only “serious” offenders.¹¹⁶ The transnational judicial discourse thus suggests that the U.S. Supreme Court consider whether the seriousness of the crime can or should play a more active role in the legal discourse on felon disenfranchisement.

This is not to suggest that “seriousness” has the same meaning from one legal system to the next. Indeed, 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. In Canada, on the other hand, the legislature determined that all sentences of two years or more are necessarily for crimes serious enough to trigger disenfranchisement. 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. But this does not matter in the dialogical transnational judicial discourse. All that matters is the concept, that legislatures are likely to view certain crimes as stronger candidates for disenfranchisement than other crimes. Perhaps in the U.S. those crimes have unique substantive characteristics compared with the serious criteria identified in other countries. There is no need to adopt the identical concept, because the dialogical transnational discourse

¹¹⁶ See *supra* note 88 and accompanying text.

only uses the idea of a continuum, not its precise framework. Adopting no more than this idea, the next Part critically reconsiders the framers’ original intent in drafting the constitutional provision that has become crucial to the constitutionality of felon disenfranchisement, section 2 of the Fourteenth Amendment.

V. A Return to the U.S. Discourse on Felon Disenfranchisement

After having established above that prisoner disenfranchisement in other jurisdictions exists along a continuum of applicability based on the offense committed, this Part will consider this question in the domestic context on two distinct levels. First, it will reconsider the Supreme Court’s seminal decision in *Richardson v. Ramirez* with an eye to this continuum idea. Employing the continuum notion *functionally*, this Part will question the understanding that the words “or other crime” in section 2 of the Fourteenth Amendment were meant to affirmatively sanction disenfranchisement for a broad range of crimes with little regard to seriousness or substance of the crime itself. It will answer this question by a review of legislative history of the adoption of the Fourteenth Amendment, showing that the crimes contemplated by the Framers were only those existing in a very particularized, narrow section of the overall continuum of crimes. Thus, although the question comes from the continuum notion developed from foreign materials, the answer comes wholly from a domestic source, the legislative history of the Framers. Second, the Part then considers the notion of a continuum *substantively*, envisioning what a U.S. Continuum of applicability of felon disenfranchisement would look like without the affirmative sanction now believed to exist in section 2 of the Fourteenth Amendment.

a. A Functional Use of the Continuum: Returning to Ramirez

Ever since *Richardson v. Ramirez*, the constitutional posture 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 education,¹¹⁷ property,¹¹⁸ and wealth¹¹⁹ involved the classic ends-means constitutional scrutiny we have come to expect from equal protection decisions, *Richardson* relied on a decidedly different, textual, argument. This textual argument focused on § 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 proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.¹²⁰

Based on this language, the Supreme Court held that the Constitution thus provided an “affirmative sanction” for felon disenfranchisement, foreclosing the need for an equal protection inquiry.¹²¹ In so doing, the Supreme Court closed the door to any form of means-ends 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 persuasively argued in dissent, the legislative history of the Fourteenth Amendment is quite clear that Section 2 “was not intended and should not be construed to be a limitation on the other sections of the Fourteenth

¹¹⁷ *Lassiter v. Northampton Election Board*, 360 U.S. 45 (1959) (upholding literacy tests as a requirement for the franchise).

¹¹⁸ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (striking down a law on equal protection grounds which 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).

¹¹⁹ *Harper v. Virginia Bd. Of Elections*, 383 U.S. 663 (1966) (invalidating the poll tax as a requirement for voting in state and local elections).

¹²⁰ *Ramirez*, *supra* note 1, at 42-43 (citing U.S. CONSTITUTION ART. 14, SEC. 2) (emphasis by Supreme Court).

¹²¹ *Id.* at 54.

Amendment.”¹²² 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.”¹²³ Although scholars after *Ramirez* have continued to make this point persuasively,¹²⁴ it is problematic in that it amounts to re-litigating *Ramirez* all over again on the exact argument the majority already considered and rejected. Even with new members on the Court, it seems unlikely that the Supreme Court 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 framers, not something potentially subject to an evolving interpretation.¹²⁵

Rather than attempting re-litigate *Ramirez* on the same arguments that failed the first time around – however strong those arguments may appear – it is time for commentators and courts alike to broaden their inquiry. It is at just this brainstorming stage when a dialogical comparative law analysis can be the most useful: By looking to similar litigation abroad, we can gain ideas potentially testable in the domestic setting. This proves true in the present case: This article’s comparative law analysis has shown that international decisions on prisoner disenfranchisement focus on the nature of the crime when subjecting the practice to constitutional scrutiny, making this a central element of their proportionality analysis. It has, in fact, been so central to the analyses of the international courts that they chose to forego equality and discrimination analysis

¹²² *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); H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 98, 126 (1908); B. KENDRICK, JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 290-291 (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)).

¹²³ *Id.*

¹²⁴ *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.”).

¹²⁵ Compare the Supreme Court’s Eighth Amendment jurisprudence, which is not based on a static textual reference but rather on the “evolving standard of decency that mark the progress of a maturing society.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

altogether.¹²⁶ Without adopting any of those courts' conclusions or legal tests (the fear of the legal particularists), an approach emphasizing a dialogical transnational judicial discourse merely adopts the *idea* of considering the nature of the crime in interpreting the Constitution's textual reference. It then proceeds to traditional methods of constitutional interpretation, in this case an examination of the discussions of the Framers to attempt to uncover exactly what sorts of crimes they meant when they wrote the words "or other crime."

This textual approach 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 like the *Ramirez* dissent, it relies on this linkage like the *Ramirez* majority. It then shifts the focus to developing a more nuanced understanding of just what the Framers meant by "other crime" in Section 2.

b. Re-Examining the Legislative History

It is generally accepted that we know nothing about the Framer's original intent in writing the crucial words "or other crime" in section 2 of the Fourteenth Amendment. In this light, both the majority¹²⁷ and the dissent¹²⁸ in *Ramirez* comment that very little legislative history exists as to this phrase. Agreeing with the majority on the lack of legislative history, Justice Marshall notes in 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."¹²⁹ The only cited basis for this understanding of the legislative history, however, is a footnote in a

¹²⁶ See *supra* notes 36, 57, 80, and accompanying text.

¹²⁷ *Ramirez*, *supra* note 1, 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.")

¹²⁸ *Id.* at 72-73.

¹²⁹ *Id.* at 73.

law review note published the preceding year,¹³⁰ but that law review note’s analysis of the legislative history is incorrect. In that note, Howard Itzkowitz and 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”].”¹³¹ 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.¹³² A careful reading of the legislative history, however, shows that several different versions of House Resolution 51 were printed for further consideration in committee,¹³³ including one specifically invoking the word “crime.”¹³⁴

On March 12, 1866, Senator Grimes’ proposed version of House Resolution 51 contained an exceptions clause worded “except for crime or disloyalty.”¹³⁵ 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, and it is thus 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 from the House of Representatives, Mr. Broomall.”¹³⁶ 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. ... The question of citizenship of its opponents is for it to decide. If I am right in all this, then it is for the

¹³⁰ 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).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Cong. Globe, 39th Cong., 1st Sess., 1289, 1321 (1866).

¹³⁴ *Id.* at 1320-21.

¹³⁵ *Id.*

¹³⁶ Cong. Globe, 39th Cong., 1st Sess., 1321 (1866).

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.*¹³⁷

Read in context, it is clear that the “past crimes” to which Broomall refers are crimes of rebellion, in particular treason. Without mentioning any other crimes, Broomall makes specific mention to treason on five more occasions in his speech¹³⁸ 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 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.”¹³⁹

After Senator Grimes’ proposal for H.R. 51, incorporating Broomall’s “crimes” language, Senator Wilson and Senator Sumner each individually submitted competing proposals with

¹³⁷ Cong. Globe, 39th Cong., 1st Sess., 1263 (1866) (emphasis added). But note: 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. ALFRED AVINS, *THE RECONSTRUCTION AMENDMENTS’ DEBATES* 120 (1967) (“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.”). This wording was preferable to one which directly mentioned race, in the opinion of Grimes and Broomall, 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.

¹³⁸ 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.”); *Id.* (“They will not say that we have a Government for the purpose of allegiance and for the punishment of treason.”); *Id.* (“They know that there loyalty is the crime and treason the virtue.”); *Id.* at 1264 (“[T]raders [pride] themselves on their treason.”); *Id.* (arguing that complete trust in the Southern Senators and Representatives would “require as unquestioning a faith as to believe in the sudden conversion of whole communities from treason to loyalty.”).

¹³⁹ Cong. Globe, 39th Cong., 1st Sess., 1264 (1866) (emphasis added).

exclusion clauses limited to rebellion.¹⁴⁰ All of these proposals were ordered to be printed for consideration in committee. With these three proposals on the table, it is entirely feasible that the committee’s final wording “rebellion or other crime” was an attempt to combine them. Thus, although Itzkowitz and Oldak were wrong in some of the specifics in their Note relied on by the *Ramirez* court, they are completely correct that “the thrust of [the Art. 2] language was to limit governmental activity by former rebels.”¹⁴¹

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 are quick to conclude that the disjunctive phrase 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 mean what the Framers intended: “rebellion or other crime *of disloyalty*.” Thus, the continuum notion has relevance in the domestic setting, because the Framers were considering only a very specific set of crimes when they drafted the exceptions clause in section 2 of the Fourteenth Amendment.

c. Means-End Constitutional Scrutiny: A First Attempt

By a close examination of the legislative history read in its proper context, we thus emerge from the original textual premise of *Ramirez*. Properly contextualized, the reference to “crime” in Section 2 of the Fourteenth Amendment is a narrow exception for rebellion and

¹⁴⁰ *Id.* at 1321.

¹⁴¹ Itzkowitz & Oldak, *supra* note 130, at 746, n. 158.

treason, not a show-stopping affirmative sanction of general felon disenfranchisement. The question of felon disenfranchisement should therefore be treated like other first-generation voting rights issues, subject to means-ends 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 argument on the basis that section 2 of the Fourteenth Amendment related to the specific issue of representative apportionment and was not meant to control section 1.¹⁴²

In his equal protection analysis, Justice Marshall relied on the large jurisprudence of voting rights cases establishing voting as a fundamental right.¹⁴³ Reasoning that this case presented a similar limitation on the franchise, he concluded that strict scrutiny was the appropriate standard of review.¹⁴⁴ 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.”¹⁴⁵ 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.’”¹⁴⁶ As to the first interest of preventing voter fraud, Marshall noted that felon disenfranchisement was both 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.”¹⁴⁷ It was under-inclusive because “many of

¹⁴² *Id.* at 74-76.

¹⁴³ *Id.* at 77 (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, 421-422, 426 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966); *Carrington v. Rash*, 380 U.S. 89, 93-94 (1965)).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 79-81.

¹⁴⁶ *Id.* (citing *Cipriano v. City of Houma*, 395 U.S., at 705-706; *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *Evans v. Cornman*, 398 U.S. 419, 423 (1970)).

¹⁴⁷ *Id.* at 79.

those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all.”¹⁴⁸

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.”¹⁴⁹

d. Looking Ahead: A Broader Examination of the Continuum

This Part began with a procedural application of the continuum of applicability concept. Having established the presence of a continuum internationally, it applied the idea of a continuum domestically by questioning whether the framers of the Fourteenth Amendment meant the words “or other crime” to sweep as broadly as they have been interpreted. By examining the original legislative history of the framing of the Fourteenth Amendment, this Part has answered that question in the negative. This final section now considers an altogether different application of the continuum; whereas the original application was procedural, giving reason to reconsider the meaning of a textual reference, this application is substantive, attempting 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 mistake in *Ramirez*, discussed above, the continuum which can be distilled from the current case law is based on rational basis, not strict scrutiny. In an article comparing disenfranchisement and employment discrimination of former felons,¹⁵⁰ Elena Saxonhouse outlines the existing continuum under this rational basis approach. First, the Supreme Court has held that felon disenfranchisement laws passed with racially

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 78.

¹⁵⁰ Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597 (2004).

discriminatory intent will not withstand constitutional scrutiny.¹⁵¹ Second, a lower court has held that "no rational basis [exists] to preclude the registration of [former felons] who were incarcerated within the last five years and who had not registered previously, when those who were legally registered prior to incarceration may vote upon their release."¹⁵² Third, a federal district court has held that Section 2's affirmative sanction of felon disenfranchisement is inapplicable to misdemeanants.¹⁵³ Fourth, a district court has held that a state may not "haphazardly pick and choose" disqualifying crimes.¹⁵⁴ Fifth, a district court has held that felon disenfranchisement laws may not discriminate based on sex.¹⁵⁵

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.¹⁵⁶

¹⁵¹ *Underwood*, *supra* note 2.

¹⁵² *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000).

¹⁵³ *McLaughlin v. City of Canton*, 947 F. Supp. 954, 974-76 (S.D. Miss. 1995).

¹⁵⁴ *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).

¹⁵⁵ *Hobson v. Pow*, 434 F. Supp. 362, 367 (N.D. Ala. 1977).

¹⁵⁶ 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*, *supra* note 1, at 47. (emphasis added). Johnson included on this list "[m]urderers, robbers, houseburners, 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." *See, e.g.*, Reconstruction Act. Act of Mar. 2, 1867, c. 153, Sect. 5, 14 Stat. 428 (cited in *Ramirez*, *supra*, at 49).

Importantly, however, this continuum is based on holdings premised on the belief that *Ramirez* allows for, at most, rational basis scrutiny of felon disenfranchisement.¹⁵⁷ As this article has argued,¹⁵⁸ the legislative history of section 2 of the Fourteenth Amendment was misinterpreted by the *Ramirez* court and that section thus should not operate as a barrier to the Court's traditional strict scrutiny for voting as a fundamental right. In this light, the continuum of applicability would likely shift significantly. Because Justice Marshall adopted strict scrutiny in his *Ramirez* dissent, his contribution again becomes significant. Applying strict scrutiny, Marshall adopts a continuum of acceptability in which certain serious crimes or voting-specific crimes could justify disenfranchisement, but other crimes could not.¹⁵⁹ 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.¹⁶⁰

Consistent with all the international decisions' majorities and dissents,¹⁶¹ Marshall concludes that disenfranchisement of *former* felons who have completely served their sentence is unjustifiable.¹⁶² It is important for legal particularists to note that Marshall reached this decision decades before the international decisions discussed in this article, and he reached it solely on the basis of traditional U.S. Constitutional interpretation. Claims of "legal imperialism" in the context of the transnational judicial discourse are difficult to sustain in light of the fact that

¹⁵⁷ 1623-27 (arguing convincingly that *Ramirez* did not intend to preclude rational basis scrutiny of felon disenfranchisement statutes).

¹⁵⁸ See *supra* notes 127-141 and accompanying text.

¹⁵⁹ See *supra* notes 85-93 and accompanying text.

¹⁶⁰ *Richardson, supra* note 1, at 76 (citing *Otsuka v. Hite*, 64 Cal. 2d 596, 414 P. 2d 412 (1966); *Note, Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN. L. REV. 845, 846 (1973)).

¹⁶¹ See *supra* note 85 and accompanying text.

¹⁶² *Richardson, supra* note 1, at 86.

Marshall's equal protection analysis came out almost identical to the international decisions, decades before those opinions were even written.

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, we 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. But, whereas Justice Marshall in *Ramirez* believed all former felons should be re-enfranchised under strict scrutiny, my 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 misdemeanants¹⁶³ looks quite uncontroversial under strict scrutiny, because the punishment is not narrowly tailored to the crime. But, these cases all fall relatively far to one side of the continuum. If the courts re-examine the intention of the Framers of the Fourteenth Amendment and debunk the affirmative sanction currently supporting felon disenfranchisement, the most difficult and important question they will face is for what crimes the practice *is* justifiable under narrow tailoring and proportionality analysis. They may conclude that the franchise, as a "fundamental political right ... preservative of all rights,"¹⁶⁴ always comes out on top in proportionality analysis, except for crimes of rebellion such as treason. On the other hand, they could plausibly conclude that certain

¹⁶³ See *supra* note 153.

¹⁶⁴ See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

crimes related to voting or crimes involving a high degree of moral turpitude are serious enough to satisfy proportionality and related closely enough to voting 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 on to their docket. The continuum would shift because strict scrutiny would provide a much more stringent paradigm within which to justify felon disenfranchisement. Under such a paradigm, the side of the continuum allowing felon disenfranchisement would likely 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 be legitimate. Finally, disenfranchisement for crimes involving an extremely high level of moral turpitude may (or may not) prove serious enough to satisfy proportionality.

VI. Conclusion

After years of dormancy, the debate over felon disenfranchisement in the U.S. is alive again under the rubric of the Voting Rights Act. Although the Voting Rights Act 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 the VRA suggests that it is only *discriminatory* outcomes which make felon disenfranchisement problematic, not the potentially *inherent* injustice of the practice. Since the Supreme Court held in *Ramirez* three decades ago that the Constitution affirmatively

sanctioned felon disenfranchisement, however, there has seemed little hope of resurrecting a constitutional argument as to the inherently problematic nature of the practice. Comparative law provides an idea to suggest this original textual premise be re-examined. In all three of the recent international cases discussed in this article, the courts placed a heavy emphasis on viewing prisoner disenfranchisement along a continuum of acceptability with the nature of the offense as the major variable. With this idea in mind, this article has examined the original intent of the Framers to determine if the phrase “or other crime” was as broad as the *Ramirez* Court interpreted it. Comparative law operates in this dialogical way not to import a foreign test or doctrine, but rather to generate an idea which is then tested using conventional domestic tools of Constitutional interpretation. Interestingly, it appears that, like the international context, 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 crimes other than rebellion and treason, it is appropriate to proceed to the 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, quite safe territory along the continuum of applicability. The final section 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 under rational basis scrutiny and the *Ramirez* understanding of the legislative history, it concludes by extrapolating to the future strict scrutiny paradigm.

For better or worse, we live in a world where a few prisoners in Florida, if allowed to vote, could 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; 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. Reviewing the legislative history of the framers, it argues that strict scrutiny is appropriate for felon disenfranchisement for the vast majority of crimes except those related to rebellion or disloyalty to the state, such as treason. It concludes by suggesting some indication of what a continuum of applicability of felon disenfranchisement might look like under strict scrutiny. Of course, a full constitutional dialogue under strict scrutiny will be a nuanced and laborious process, the work of judges and legislatures; but, if this article has clearly emphasized the need to revisit that constitutional dialogue, it has done its job.