Democracy Unchained: Judicial Review of Felon Disenfranchisement Laws in America and an International Comparison

Antoinette Solomon

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Introduction

The fight for the right to vote has an extensive history in American jurisprudence. The right was so restrained that it was originally only extended to white men.\(^1\) However, after the Civil War and the women's suffrage movement, the right was eventually extended to blacks and women.\(^2\) Although those rights have been secured for decades, the rights of another class of citizens are still under attack. Criminal disenfranchisement laws in the United States continue to restrict the voting rights of almost 6 million citizens\(^3\) while presenting no real reason to justify these laws. After the 2000 presidential election, George Bush won the state of Florida by 537 votes eventually securing the presidency.\(^4\) With such a slight margin, if Florida's 600,000\(^5\) non-incarcerated disenfranchised felons would have been able to vote, the election arguably could have gone another way and Al Gore could have been the United States president. Proponents against criminal disenfranchisement are constantly advocating for banning these laws but 48 states still have some type of disenfranchisement legislation, with Maine and Vermont being the only unrestricted states.\(^6\) Federal legislation has been proposed, and failed\(^7\), while other countries criticize America for being too restrictive of such a fundamental right.\(^8\) This paper discusses

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\(^2\) Id.


\(^4\) Marc Mauer, Disenfranchising Felons Hurts Entire Communities, Focus, May/June 2004, at 5,6.

\(^5\) Id.


\(^8\) Marc Mauer, Disenfranchising a nation's criminals is bad for democracy, CANBERRA TIMES, http://www.sentencingproject.org/doc/publications/fd_canberratimes.pdf (American disenfranchisement policies are extreme by Australian standards, and of the industrialised world generally)
criminal disenfranchisement laws domestically and abroad. The main purpose is to advocate for American courts to adopt a narrowly tailored approach when determining whether these laws should be upheld.

Part I gives a historical breakdown of criminal disenfranchisement laws beginning in ancient Greece through the Civil Rights era. Part II offers the American jurisprudence on criminal disenfranchisement laws and how they are upheld in the state and federal courts. Advocates against these laws traditionally assert Equal Protection and voting rights violations under the Fourteenth Amendment and the Voting Rights Act of 1965. This part breaks down the analytical justification courts go through in upholding these laws. Part III gives the international perspective. This part discusses the International Covenant on Civil and Political Rights and its view on universal suffrage as well as the United Kingdom, Canada, and South Africa’s judicial analysis of criminal disenfranchisement and the reasonable and proportional scrutiny criminal disenfranchisement laws must satisfy. Part IV discusses how the international position is a better approach and should be adopted in American courts. This part also discusses how these laws have disproportionately affected a suspect class of people thus the statutes should be subject to a higher level of scrutiny, such as the “proportional” and “reasonable” scrutiny in the international cases. This part analyzes the arguments in favor of criminal disenfranchisement and how their justifications fail under international standards and should no longer be upheld.

**Historical Roots of Criminal Disenfranchisement**

Felon disenfranchisement laws have roots tracing back to ancient Greece.⁹ Criminal offenders in Athens and other Greek cities attained dishonorable status and were subject to ‘civil

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death. Civil death carried the loss of several citizenship rights, including voting. Civil death was imposed all over European countries and eventually found its way into the British Colonies. The principles of criminal disenfranchisement were almost immediate when British settlers expanded into their new land. While certain English common-law rules were neglected, criminal disenfranchisement found its place as states incorporated these laws into their state constitutions.

After the civil war, America found itself in new territory. There were millions of freed slaves with no articulable rights in the Constitution. The Reconstruction Amendments, Thirteenth, Fourteenth, and Fifteenth Amendments, were drafted to grant slaves equal civil rights as white men including the right to vote. The Fourteenth and Fifteenth Amendments were both drafted to protect the black vote but one provision was always included; criminal disenfranchisement. Twenty-nine states had criminal disenfranchisement statutes in their Constitutions by the time the Fourteenth Amendment was ratified and it did not seem as though the Reconstruction Amendments would abandon these laws. Section two of the Fourteenth Amendment prohibited voter restrictions based on race but contained an express provision that

10 Id.
11 Id.
14 The applicable text of the Thirteenth Amendment reads, “Neither Slavery now involuntary servitude, except as punishment for crime... U.S. Const. amend. XIII.
15 U.S. Const. amend. XIV § 2.
16 The applicable text of the Fifteenth Amendment reads, “The rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV § 1.
17 Richard M. Re & Christopher M. Re, Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments, 121 Yale L.J. 1584, 1605 (2012);
18 Chung, supra note 6.
still allowed states to limit voting for criminals\textsuperscript{19} while the 15\textsuperscript{th} Amendment indirectly allowed criminal enfranchisement\textsuperscript{20}. Although criminal disenfranchisement power is not expressly stated in the Fifteenth Amendment, congressional debates demonstrated that even the strongest proponents against the amendment expected this provision to be included.\textsuperscript{21}

After the Fourteenth and Fifteenth Amendments were passed, several states began revising their state disenfranchisement laws to discriminate against blacks and their newly established rights.\textsuperscript{22} States began tailoring their laws to only disenfranchise criminals who committed laws that were considered crimes only committed by black men.\textsuperscript{23} For example, Alabama changed its disenfranchisement statute to cover wife beating.\textsuperscript{24} The author of the clause "estimated the crime of wife-beating alone would disqualify sixty percent of the Negroes".\textsuperscript{25} Alabama’s all-white convention explained that this change was well "within the limits of the Federal Constitution to maintain White Supremacy".\textsuperscript{26}

During the civil rights era, President Johnson signed a key piece of legislation that would impact voting until today. On August 6, 1965, President Johnson signed the Voting Rights Act of 1965.\textsuperscript{27} The Act prohibited the "denial or abridgement" of voting on the basis of race.\textsuperscript{28} This

\begin{flushleft}
\textsuperscript{19} Re & Re, supra note 17, at 1611 (the “other crime” language was deliberate after intense debate and several draft revisions).
\textsuperscript{20} Id at 1633 ("In the end, the Fifteenth Amendment adopted the negative approach without mentioning criminal disenfranchisement... Though this provision was negatively structured, whereas Section 2 was affirmatively structured, both provisions exhibited a broadly permissive attitude toward criminal disenfranchisement").
\textsuperscript{21} Id at note supra 17, 1632-1633
\textsuperscript{22} Chung, supra note 6.
\textsuperscript{24} Chung, supra note 6.
\textsuperscript{25} Id; See Andrew L. Shapiro, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L.J. 537, 543 (1993).
\textsuperscript{28} 52 U.S.C.A. § 10301.
\end{flushleft}
congressional enactment provides protection against voter dilution and arbitrary changes for those who have historically been restricted from the ballot box.

After the passage of the Voting Rights Act, criminal disenfranchisement statutes were being challenged throughout the country. Although the purpose of the Fourteenth, Fifteenth Amendments, and the Voting Rights Act were to protect a suspect class of voters, they indirectly strengthened criminal disenfranchisement laws and suppressed the vote of millions of American citizens. Criminal disenfranchisement laws are the only significant restriction to the ballot box for American citizens.

**United States Court Challenges to State Disenfranchisement Laws**

*14th Amendment Challenges: Green v. Board of Elections of the City of New York and Ramirez v. Richardson*

Section 2 of the Fourteenth Amendment reads as follows: “When the right to vote at any election for a federal office 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 original intent of the statute was to serve as a foundation for the Civil Rights Act of 1866. However, history and judicial interpretation have given power to the Fourteenth Amendment’s express criminal disenfranchisement language and allowed states to disenfranchise felons since its inception. Courts have historically upheld these statutes based on the express language in the Fourteenth Amendment.

The New York Supreme Court was one of the first courts to uphold a state criminal disenfranchisement statute as reasonable and constitutional under the Fourteenth Amendment.

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29 Ewald, supra note 17, at 1065-66.
31 Re & Re, supra note 17, at 1603.
The New York state constitution held "no person convicted of a felony in a federal court of an offense of which such court has exclusive jurisdiction, shall have the right to register or vote at any election". The plaintiff placed majority of his argument on the equal protection clause of the 14th Amendment.

The court held that a statute will not be set aside if "any state of facts may reasonably justify" the statute. Following the John Locke theory, the court reasoned that "a man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact". The court followed up this argument with the theory that the very same criminals that this law affects should not be able to take part in the elections that put the people in power who make these laws and prosecute them for breaking them.

New York relied heavily on the clear language in provision Section 2 of the Fourteenth Amendment. The court agreed and held that they doubt the framers of the equal protection clause could have meant to outlaw these sorts of statutes that Section 2 expressly allow. Depending heavily on history and the clear language in Section 2 of the 14th Amendment, the New York Supreme Court upheld the criminal disenfranchisement statute.

Richardson v. Ramirez was the first time the United State Supreme Court addressed the issue about criminal disenfranchisement statutes. In a 6-3 decision, the court upheld the state statute and held that it did not violate the Equal Protection Clause of the Fourteenth Amendment.

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33 Green v. Board of Elections of the City of New York, 380 F.2d 445, 448 (2nd Cir. 1967).
34 Id.
35 Id.
36 Green at 451.
37 Id at 452.
38 Id.
Legislative history indicated that the framers meant exactly what was written. While there is little recorded about any debates regarding the criminal disenfranchisement provision in the Fourteenth Amendment, the court recognized this as an affirmative grant to the states to incorporate disenfranchisement provisions into their state constitutions rather than prohibiting them. During the reconstruction era, several changes were made to Section 2. Through all the changes the language “except for participation in rebellion, or other crime” was never modified. Although the confederate states had to adopt the Reconstruction Amendments to guard against depriving blacks their voting rights, states were still given the discretion to limit voting for criminals. Twenty-nine states had disenfranchisement statutes by the time the Fourteenth Amendment was ratified.

In addition to legislative history, the Court held the plain reading of the Fourteenth Amendment expressly allowed criminal disenfranchisement, confirmed by other decisions of the United States Supreme Court. In *Lassiter v. Northampton County Board of Elections*, the court held that “residence requirements, age, previous criminal record,” are examples of what a state may take into account when determining voter qualifications.

Overall, the court held that the California disenfranchisement statute did not violate the 14th Amendment. The court relied heavily on the plain meaning of the Fourteenth Amendment, and its express provision allowing criminal disenfranchisement statutes as validating the

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40 *Id.*
41 *Id.*
42 *Ramirez* at 44-45.
43 *Id.*
44 *Id* at 50.
45 *Id* at 48.
46 *Id* at 53.
47 *Ramirez* at 53 (emphasis added).
48 *Id* at 56.
California statute.\textsuperscript{49} In addition, legislative intent and judicial interpretation supported the Fourteenth Amendment's affirmative grant of power to the states.\textsuperscript{50} Courts have allowed these types of provisions on several occasions and the Supreme Court did not think the California statute violated any constitutional rights.\textsuperscript{51}

\textbf{Historical Justifications: Johnson v. Governor of State of Florida}

While the express language in the Equal Protection Clause in the Fourteenth Amendment allows states to disenfranchise criminals\textsuperscript{52}, history has allowed this practice since before the amendment's inception. Before the Fourteenth Amendment was in the drafting process, majority of the states already had disenfranchisement statues.\textsuperscript{53} Courts have given significant weight to disenfranchisement statues because of their historical roots and alleged non-racial basis\textsuperscript{54}.

In \textit{Johnson v. Governor of State of Florida}, the complainants challenged a Florida felon disenfranchisement statute, which said, “no person convicted of a felony … shall be qualified to vote or hold office”.\textsuperscript{55} The plaintiff's argument rested heavily on historical background.

The court held the plaintiffs did not present any evidence to supplement their argument that the disenfranchisement statute was enacted with discriminatory intent.\textsuperscript{56} When the Florida constitution was instituted in 1838 the right to vote was not extended to people of color so there was no possibility of discriminatory intent.\textsuperscript{57} During Florida’s readmission process in 1868, the court recognized that there might have been some racial discrimination during the constitution

\textsuperscript{49} \textit{Id} at 54.
\textsuperscript{50} \textit{Id}.
\textsuperscript{51} \textit{Id} at 53.
\textsuperscript{52} 52 U.S.C.A. § 10301.
\textsuperscript{53} Ramirez at 48.
\textsuperscript{54} \textit{Johnson v. Governor of State of Florida,} 405 F.3d 1214, 1218 (11th Cir. 2005)
\textsuperscript{55} \textit{Id} at 1216.
\textsuperscript{56} \textit{Id} at 1219.
\textsuperscript{57} \textit{Id} at 1218.
revision process. However, the court held, given Florida’s long history of criminal disenfranchisement, isolated events of discrimination would not invalidate this long-standing statute. One hundred years later, Florida revised its Constitution. Florida chose to maintain its criminal disenfranchisement statute, and narrowed the class of people who could be disenfranchised. The 1968 provision removed people convicted of certain misdemeanors from the class of disenfranchised. The 1968 Constitution went through four stages of review before the people of Florida adopted it.

The 11th Circuit decided to answer a very important question that was left undecided by the Hunter v. Underwood court; could “subsequent legislative re-enactment eliminate the taint from a law that was originally enacted with discriminatory intent”. The court held that the Florida 1968 amendment went through several stages of amendments to remove the discriminatory taint. The passage of time and the fact no one ever alleged that the 1868 law was motivated by racial discrimination was key in this decision. The court upheld the Florida law.

Section 2 of the Voting Rights Act Challenges: Hayden v. Pataki and Farrakhan v. Gregoire

Section 2 of the Voting Rights Act prohibits any voting practice that results in a “denial or abridgment” based on race or color. This statute was enacted to work in combination with the Fourteenth Amendment to protect the minority vote. After its inception, proponents in favor of felon enfranchisement began bringing challenges under the Voting Rights Act because it did

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58 Id at 1219.
59 Id at 1218.
60 Johnson at 1220.
61 Id at 1221.
62 Id.
63 Id at 1222.
64 Id at 1223.
65 Id.
66 Id at 1225.
68 Id.
not include the same express language at the Fourteenth Amendment. However, there was not much success in this argument because courts have held the Voting Rights Act was not intended to overrule the Fourteenth Amendment thus supporting criminal disenfranchisement statutes enacted on a non-racial basis.

*Hayden v. Pataki* was a Second Circuit case in 2006. The main inquiry was whether the Voting Rights Act of 1965 ("VRA") encompass felon disenfranchisement statutes.\(^{69}\) The plaintiffs claimed a violation of Section 2 of the VRA in that the state's criminal disenfranchisement statute resulted in unlawful vote denial and dilution.\(^{70}\)

The court held that their inquiry should not be limited to the "plain meaning" of the VRA but should be based on the "persuasive reasons" that Congress did not intend the VRA to include criminal disenfranchisement statutes.\(^{71}\) In addition to these reasons, subsequent congressional legislative enactment gave more support to the argument that the VRA did not mean to include criminal disenfranchisement statutes.\(^{72}\)

After a statutory analysis, the court moved to a "clear statement" analysis. The "clear statement" rule "requires Congress to make its intent 'unmistakably clear' when enacting statutes that would alter the usual constitutional balance between the Federal Government and the

\(^{69}\) *Hayden v. Pataki*, 449 F.3d 305, 310 (2nd Cir. 2006).

\(^{70}\) *Id* at 309.

\(^{71}\) *Id* at 315-316.

These reasons include (1) the explicit approval given such laws in the Fourteenth Amendment; (2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States; (3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions of the statute; (4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision; (5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions within the VRA's coverage; (6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act; and (7) the subsequent passage of statutes designed to facilitate the removal of convicted felons from the voting rolls.

\(^{72}\) *Id* at 322.
States”. The VRA did not expressly include these statutes therefore the clear statement could be applied. However, “extending coverage of the Voting Rights Act to these provisions would introduce change in the federal balance not contemplated by the framers of the Fourteenth Amendment”. The court held that the VRA did not intend to include these types of statutes. Neither the 1965 VRA enactment nor the 1982 revision included express language about these laws; nor did congress express any clear intent to include disenfranchisement statutes in VRA coverage. The court interpreted this as giving the states an implied grant of power for disenfranchisement statues under the Fourteenth Amendment that the VRA did not intend to disrupt.

Farrakhan v. Gregoire was a complex case out of the First Circuit. In the lower decision, a Washington District Court held that the state’s criminal disenfranchisement statute did not violate § 2 of the Voting Rights Act. Four years later, the decision was overturned in the 9th Circuit. The courts majority held that plaintiffs “demonstrated that the discriminatory impact of Washington’s felon disenfranchisement is attributable to racial discrimination”. The ruling was so meaningful because the 9th Circuit disagreed with three other circuits that ruled against felon disenfranchisement statutes violating the Voting Rights Act. Later in 2010, the 9th Circuit agreed to rehear the case en banc.

73 Id at 323.
74 Hayden at 326.
75 Id.
76 Id at 328.
77 Id.
78 Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (See Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).  
80 See Johnson v. Governor of Florida, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc); Hayden v. Pataki. 449 F.3d 305, 323 (2nd Cir. 2006) (en banc); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009).
The full court of 11 judges overruled their previous ruling and upheld the District Court decision. The court concluded that felon disenfranchisement statutes have a long history in the United States that predated the Jim Crow era. \textsuperscript{81} Felon disenfranchisement statutes were in effect when the Voting Rights Act was enacted in 1965 and still in place when it was amended in 1982. \textsuperscript{82} The court reasoned Congress was aware of these laws when it enacted the VRA but did not think criminal disenfranchisement statutes were “suspect”, to make any mention of them during their enactment process. \textsuperscript{83} Although there may be a disproportionate number of minorities being sent to prison and losing their voting rights, the criminal justice system has its own “unique safeguards and remedies against arbitrary, invidious or mistaken conviction”. \textsuperscript{84} The court held that the plaintiffs failed to show that the criminal justice system is “infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent”. \textsuperscript{85}

\textbf{International Covenant on Civil and Political Rights and International Court Interpretations}

\textbf{International Covenant on Civil and Political Rights and Article 25}

As one of the most progressive countries, the United States is usually amongst the leaders of new and modern updates when it comes to legislation. However, in the case of criminal disenfranchisement the United States is behind the curve. With the highest rate of incarceration\textsuperscript{86}, the US disenfranchisement laws are the most restrictive laws allowing voting restrictions since the prohibition of literacy tests. The International Covenant on Civil and

\textsuperscript{81} \textit{Farrakhan} at 993.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
Political Rights endorses the idea of universal suffrage\textsuperscript{87} and believes disenfranchisement should be limited\textsuperscript{88}. Under Article 25 of the ICCPR, the clause "guarantees the right to vote [at] elections which shall be by universal and equal suffrage"\textsuperscript{89}. The clause prohibits "unreasonable restrictions" on the right to vote\textsuperscript{90}.

The Human Rights Committee ("HRC"), established under Article 28 of the ICCPR\textsuperscript{91}, is entrusted with the several obligations including issuing general comments to clarify any ambiguities in treaty provisions\textsuperscript{92}. The "unreasonable restrictions" language has been the target of debate among treaty parties.\textsuperscript{93} The Human Rights Committee has issued several comments regarding criminal disenfranchisement. The committee wrote that "mental incapacity and age qualifications are reasonable restrictions"\textsuperscript{94} but other restrictions "should be proportionate to the offence and the sentence"\textsuperscript{95}. The United States is a party to the ICCPR\textsuperscript{96} but has neglected to adopt this "reasonable" and "proportionate" scrutiny when evaluating criminal disenfranchisement statutes. Parties to the treaty such as the U.K., Canada, and South Africa

\textsuperscript{91} Id at 245 (The HRC is "comprised of eighteen independent experts and charged with three main functions: issuing general comments, examining country reports, and assessing individual complaints involving state parties which have ratified the additional protocol."). See International Covenant on Civil and Political Rights, art. 28, Dec. 16, 1966, 999 U.N.T.S. 171, available at https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf (last visited Nov. 9, 2014).
\textsuperscript{92} Ziegler, supra note 98, at 245 ("these comments should be considered highly in treaty interpretation"). See Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 640 (1st ed., Engel 1993).
\textsuperscript{93} Ziegler, supra note 98, 244.
\textsuperscript{96} International Covenant on Political and Civil Rights, http://www.ushnetwork.org/our-work/issues/iccpr (last visited Nov. 9, 2014) ("The United State signed the Covenant on October 5, 1977, and ratified on June 8, 1992").
have begun to modernize their courts and have evaluated their respective disenfranchisement statutes under a “proportionate” level of scrutiny. Their respective courts have analyzed their criminal disenfranchisement statutes differently than the US and appear to be encouraging criminal disenfranchisement statutes to be narrowly tailored to serve a legitimate purpose.

_Hirst v. United Kingdom_

In _Hirst v. United Kingdom_, a convicted felon challenged Section 3 of the Representation of the People Act that says which denied voting rights to persons detained in prison. The plaintiff’s main argument was that disfranchisement “was in harmony with the fundamental nature of democracy”. He asserted that the ban on voting rights did not serve any legitimate aim and did not encourage “prevention of crime or respect for the rule of law”.

The court recognized that the rights under Article 3 of Protocol 1 are “not absolute” and states have room to enact legislation that respects these limits. However, the court determined that although this criminal disenfranchisement statute may have a legitimate aim the court followed the lowered decision and found criminal disenfranchisement statutes must be proportional in its execution but the government failed here. “It was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff had expired.” The court held that the

97 Ziegler, supra note 98, 221 (“Courts in non-American jurisdictions assess disenfranchisement legislation by applying balancing or proportionality review, which arguably sets a higher threshold for reviewing legislation that the American strict scrutiny test”).
99 _Hirst_ at para 43.
100 _Id._
101 _Id_ at 44.
102 _Id_ at 47.
103 _Hirst_ at para 47.
104 _Id_ at para 75.
105 _Id_ at 76; _see also_ at 79.
106 _Id._
United Kingdom’s blanket restriction on felon voting fell outside the “acceptable margin of appreciation”.\textsuperscript{107}

While Article 3 gives the states wide discretion, this “automatic and indiscriminate” statute strips away such a “vitaly important Convention right”\textsuperscript{108} without any justification. The statute “applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances”.\textsuperscript{109} The court held that “in light of modern-day penal policy and current human rights standards” a law so broadly applied could not be maintained.\textsuperscript{110}

\textit{Sauvé v. Canada (Chief Electoral Officer) ("Sauvé II")}

In 1993 the Canadian Supreme Court heard \textit{Sauvé v. Canada (Attorney General) ("Sauvé I")}. This case was challenging a Canadian disenfranchisement statute that restricted all felon voting rights.\textsuperscript{111} The court held that the law was not a reasonable restriction.\textsuperscript{112} Although the judge felt the law was “crafted carefully enough to avoid limiting the right to vote more than necessary”, “this was not enough to satisfy that the law was a reasonable limit on the right to vote”.\textsuperscript{113} The court struck down this disenfranchisement statute.\textsuperscript{114}

After \textit{Sauvé I}, the federal government enacted a new criminal disenfranchisement statute. This new statute allowed all inmates “serving less than two years” the opportunity to vote.\textsuperscript{115} In 2002, the Canada Supreme Court heard arguments challenging this new disenfranchisement

\begin{footnotes}
\item[107] \textit{Id} at 82.
\item[108] \textit{Id}.
\item[109] \textit{Id}.
\item[110] \textit{Id} at 79.
\item[112] \textit{Id}.
\item[113] \textit{Id}.
\item[114] \textit{Id}.
\item[115] \textit{Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, 532 (Can.).}
\end{footnotes}
statute. The court used the same reasoning as *Sauvé I* and held that in order for the statute to be constitutional, the government must show “that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified”. 116

The court held that the right to vote was exclusively withheld from legislative override117 and is “fundamental to our democracy”. 118 The government’s first argument failed because they did not present any real evidence as to why these prisoners serving more than 2 years do not deserve the right to vote as opposed to prisoners serving less than two years. 119

As for the proportionality prong, the government was not proportional in its execution. 120 The court held that the government’s responsibility is to make sure legislation promotes civic responsibility and imposes appropriate punishment. 121 The statute does not achieve either goal. As for the first argument, the court held,

“With respect to the first objective of promoting civic responsibility and respect for the law, 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. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility. The government’s novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation.” 122

In regards to the appropriate punishment, the government failed here as well. The court held that Canada’s blanket restriction on all inmates regardless of what crimes committed does not contribute to the original aims of imprisonment. 123

116 *Id* at 521.
117 *Id* at 536.
118 *Id* at 521.
119 *Sauvé* at 521.
120 *Id* at 521-522.
121 *Id* at 522.
122 *Id*.
123 *Id* at 523.
"Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration. In light of the disproportionate number of Aboriginal people in penitentiaries, the negative effects of s.51(e) [of the Canada Elections Act] upon prisoners have a disproportionate impact on Canada’s already disadvantaged Aboriginal population.”

Following the same line of reasoning as the Hirst court, Canada found that the criminal disenfranchisement statute was over inclusive and did not “minimally impair the right to vote”. The court gave no weight to the fact that the Canadian statute was less restrictive than a blanket restriction. The Canadian court encouraged the legislature to enact a statute that is narrowly tailored to serve legitimate means that the court will find reasonable.

Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)

The South African court heard arguments in Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) in 2004. This case challenged Electoral Act sections 8(2)(f), 24B(1) and (2). Although South Africa had a restriction on criminal voting, Section 1 of the constitution declared that the Republic of South Africa was built upon several values including “universal suffrage”. Universal suffrage was one of the founding principles of the republic but was not an absolute right. Voting may be subject to reasonable limitations including restrictions upon those who “commit crimes... in breach of their constitutional duty not to do so”.

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124 Sauve at 523.
125 Id at 523-524.
126 Id.
127 Section 1(d) of the South African Constitution reads “Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness”. S. Afr. Const., 1996 § 1.
128 Id.
129 Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders, 2005 (3) SA 280 (CC) at 37-38 para. 25 (S. Afr.) (“To sum up, the right to vote is vested in all citizens. It is informed by the foundational values in section 1 of the Constitution and in particular section 1(d). It is, however, not an absolute right. It is subject to limitation in terms of section 36.”)
The South African government made several arguments that were identical to the same ones being asserted in American courts. The government’s main contention was that criminal disenfranchisement is to secure the “integrity of the voting process”.\textsuperscript{130} Prisoners would be entitled to special provisions that other voters would not be allowed to take advantage of such as, specific polling stations in the prison.\textsuperscript{131} The government argued that if they allow classes of criminals to vote this would drive costs and put a strain on the government’s financial resources.\textsuperscript{132}

The court did not accept any of these arguments. The South African court held, in a 5-4 decision, blanket criminal disenfranchisement was unacceptable and failed to pass the same scrutiny from the \textit{Sauvé} case.\textsuperscript{133} The majority rejected the government’s arguments regarding South Africa looking weak on crime and prisoners seeming favored over other voters.\textsuperscript{134} “A fear that the public may misunderstand the government’s true attitude to crime and criminals provides no basis for depriving prisoners of fundamental rights that they retain despite their incarceration.”\textsuperscript{135} The court based their holding on a goal of moving past their previous history of discrimination and held “in light of our history where denial of the right to vote was used to entrench white supremacy and to marginalize the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected”.\textsuperscript{136}

\textsuperscript{130} \textit{Id} at para. 40.
\textsuperscript{131} \textit{Id}.
\textsuperscript{132} \textit{Id}.
\textsuperscript{133} \textit{Id} at para. 67.
\textsuperscript{134} \textit{NICRO} at 56.
\textsuperscript{135} \textit{Id}.
\textsuperscript{136} \textit{Id} at 47.
Conclusion

Unconscious Racism Through Facially Neutral Laws

The main reason these laws should be struck down is that they have been discriminating against a suspect class of people and should be held to a higher level of scrutiny during judicial analysis. Blacks and Latinos account for 28.9% of the total American population but make up almost sixty percent of the prison population.137 Many of the most restrictive states are in the South where Blacks and Latinos predominately reside.138 While the disenfranchisement laws appear neutral on its face, they have had a disparate impact on the Black and Latino population throughout most of their history. Many states assert that these laws have been in effect since before Blacks were given the right to vote.139 However, after the Civil War, many states began using disenfranchisement laws as tools to discriminate against the Black population without overtly discriminating against Blacks.140 Between 1850 and 1870, the non-white prison population of the South grew at an alarmingly rapid rate.141 In Alabama, “whereas 2% of the Alabama prison population was nonwhite in 1850, 74% was nonwhite in 1870, though the total nonwhite population increased by only 3%.”142

Most of the prison population today can be attributed to the “war on drugs”. During the 1970’s, President Nixon declared a war on drugs to combat the growing number of drug users and violent crime.143 During the 80’s, President Reagan expanded the war on drugs causing a

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138 Chung, supra note 22.
139 Johnson at 1218.
140 Chung, supra note 22.
dramatic increase in the number of nonviolent offenders being imprisoned.\textsuperscript{144} The number of imprisoned drug offenders went from 40,000 in 1980 to over 500,000 today, growing by 1100%.\textsuperscript{145} The largest affected populations are the Black and Latino communities. While African-Americans are 14\% of total regular drug users, 37\% of total arrests result from Blacks charged with drug crimes.\textsuperscript{146} Inner-city focused police presence has contributed to the outrageous number of arrests in the minority community that has led to more and more Black and Latino men disenfranchised everyday. The alleged "war on drugs" seems identical to the Jim Crow era where the main goal was racial control in the mid-60's.\textsuperscript{147} These disenfranchisement laws have led to an overwhelming number of minorities excluded from the ballot box due to outdated policy reasons and a judicial system that has failed to recognize the deep discriminatory roots with which these laws were born from.

Courts must adopt the same reasoning as the Sauvé and NICRO courts, in that both of these courts have recognized a historical system used to discriminate against a minority of people and have held these disenfranchisement laws must be evaluated with a higher level of scrutiny to protect such a fundamental right. The NICRO court specifically articulated that the right to vote was historically used to "entrench white supremacy",\textsuperscript{148} while Sauvé said they must protect their "already disadvantaged Aboriginal population"\textsuperscript{149}. The United States has such a long history of discriminating against its minority population that further ignorance in promoting disenfranchisement laws does nothing but continue to subject the Black and Latino population to a feeling of inferiority in the society. The same disenfranchisement laws that are in state

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\textsuperscript{144} Id.
\textsuperscript{147} Id.
\textsuperscript{148} NICRO, supra note 146.
\textsuperscript{149} Sauvé, supra note 134.
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constitutions in 48 states have historically been used to discriminate against millions of minorities throughout the years and serves no valid purpose but to create a secondary, inferior population, similar to the pre and post Civil War era’s.

Policy Considerations in Favor of Criminal Disenfranchisement

Proponents in favor of criminal disenfranchisement laws usually assert three main policy arguments in favor of these laws; purity of the “ballot box”, felons have already shown their willingness to break the law and allowing them to vote would increase the likelihood of voter fraud, and exclusion from the voting booth is necessary to prevent harmful changes to the law.  

While at first glance, these arguments may appear legitimate, there is little to no valid research in favor of any of these arguments.

Purity of the “Ballot Box”

This purity of the ballot box language was first articulated in Washington v. State. The court held:

“It is quite common also to deny the right of suffrage, in the various American States, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.”

This argument serves as the basis for legislatures to prohibit classes of voters from the polls because proponents for these laws believe ex-criminals may taint the ballot box. “A State has an interest in preserving the integrity of her electoral process by removing from the process those

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151 Richardson v. Ramirez, 418 at 79-80 (Marshall, J. dissenting) (“there is no evidence that ex-felons are more likely to commit voter fraud than anyone else”).
152 Washington v. State, 75 Ala. 582, 585 (1884).
persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims.”

Under the ballot box argument falls two different assertions: the idea that allowing criminal enfranchisement gives room for increased voter fraud and harmful changes to the law. However, both of these positions are unfounded. There is no research that shows a correlation between crime and voting issue. However, there are studies that prove ex-felons who are allowed to vote have a lower rate of recidivism because the restoration of basic civil rights help them feel less of an outcast and transition easier back into their communities. Due to groundless arguments such as the ballot box argument, ex-felons find themselves feeling like outcasts because they are shunned from society and their civil rights are limited.

“...The disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box...the disinherited must sit idly by while others elect his civil leaders and while other choose the fiscal and governmental politics which will govern him and his family.”

Voter Fraud

The first justification for criminal disenfranchisement stems from a concern about increased voter fraud. Proponents have argued that people who commit crimes are more likely to commit voter fraud and skew elections. Justice Marshall dissenting in Ramirez gave no legitimacy to the voter fraud argument asserted on behalf of the state and found there is no evidence that felons were more likely to commit voter fraud than the average non-criminal

155 Mark E. Thompson, Don’t Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of E-Felons as Cruel and Unusual Punishment, 33 Seton Hall L. Rev. 167, 193 (2002).
157 Chung, supra note 22.
voter.159 Quoting Dunn, Justice Marshall said the states have several safeguards in place to protect against any instances of voter fraud thus this argument should not be substantiated.160 Justice Marshall found the statute to be over-inclusive and under-inclusive.161 It does not include criminals who have a “marked propensity” for voting crimes but instead includes all felons despite their criminal offense.162 Justice Marshall unintentionally adopted the international language and wrote that the law was “not tailored to achieve its articulated goal since it crudely excludes large numbers of otherwise qualified voters”.163 He believed that criminal disenfranchisement statutes should be narrowly tailored to satisfy a legitimate goal.

In addition to safeguards in place to protect against voter fraud, proponents who assert this argument have failed to put forth any evidence that proves the crimes committed have any connection to voter fraud. “The state effectively labels the ex-felon potentially dangerous to the electoral process, despite any nexus between his past offense and the evil the state seeks to protect.”164 There has been no correlation between crimes such as polygamy or murder to prove that this person has a greater propensity to commit voter fraud than the average citizen.165 Criminal disenfranchisement undermines the most basic theory underlying American jurisprudence – “that a person is innocent until proven guilty.”166 It continues to punish a person that has been vindicated after serving their sentence. It serves no other purpose but as an additional punishment.

160 Id at 80 (J. Marshall dissenting) (quoting Dunn v. Blumstein, 405 U.S. 330, 353 (1972) (“Where a State has available remedial action to supplement its voter registration system, it can hardly argue that broadly imposed political disabilities...are needed to deal with the evils of fraud”).
161 Id at 79.
162 Id.
163 Id.
164 Thompson, supra note 156, at 193.
165 Id at 191. Howard Itzkowitz & Lauren Oldak, Restoring the Ex-Offender’s Right to Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 738-9 (1973)
166 Id.
Harmful Changes to the Law

This argument rests on the theory that felons are more likely to vote for politicians who appear soft on crime and are more likely to vote for legislation that will change the landscape of the criminal justice system.167 This idea was taken from Supreme Court cases such as Murphy v. Ramsey and Davis v. Beason.168 However, these cases are pre-20th Century decisions and the Supreme Court has held that such “difference of opinions cannot justify for excluding any group from the franchise”.169 While there are supporters of softer crime statutes, there is no support that says all criminals are more likely to vote for this particular candidate and impact the polls so much as to change the laws.

A second argument against this theory is that the Supreme Court has held that limiting voters based on how they may vote is unconstitutional. In Carrington v. Rash, the Supreme Court said “‘fencing out’ from the franchise a sector of population because of the way they may vote is constitutionally impermissible”.170 The court held that the right to vote is “so vital to maintenance of democratic institutions”; certain groups of people should not be excluded because of fear of how they will vote.171 This theory was used as the basis to keep women and blacks from the polls and has been repeatedly repudiated in courts. This idea has no place in a society that bases its laws and elected official on a majority rule policy. The right to vote must remain unimpeded to maintain a diverse electorate.

International Legal Reasoning: “Proportionality” and “Reasonable”

The United Kingdom, Canadian, and South African courts all followed Article 25 of the ICCPR and engaged in a “reasonable” analysis. This approach is a better analysis in regards to

167 Ramirez at 81-82.
168 Ramirez at 81-82.
169 Id.
170 Carrington v. Rash, 380 U.S. 89, 94 (1965) (citing Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).
171 Id.
criminal disenfranchisement laws because they impact such a fundamental right that their execution should be narrowly tailored to fit a legitimate aim. The Supreme Court held in *Reynolds v. Sims*

"The right of suffrage is a fundamental matter in a free and democratic society; since right to exercise franchise in free and unimpaired manner is preservative of other basic civil and political rights any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized."\(^{172}\)

Under this reasoning, the Supreme Court is encouraging a more thorough analysis of criminal disenfranchisement laws. The Court in *UK v. Hirst* held that their specific criminal disenfranchisement law might have served a legitimate purpose but lacked proportionality to be upheld.\(^{173}\) The court found that blanket restrictions of felon voting were arbitrary and "could no longer serve the aim of punishing the applicant once his tariff had expired".\(^{174}\) The court refuted all the evidence in favor of the statute and placed heavy significance on the fact that disenfranchisement would occur despite which offense was committed.\(^{175}\) The fact the law was applied to all prisoners regardless of the offense was considered arbitrary and found to serve no legitimate purpose.\(^{176}\)

The Canadian court in *Sauve* followed in the same line of analysis. The court engaged in a proportionality analysis and found that the government failed to "establish a rational connection."\(^{177}\) The court held that voter denial must "comply with the requirements for legitimate punishment".\(^{178}\) The "punishment must not be arbitrary and must serve a valid criminal purpose".\(^{179}\)


\(^{173}\) *Hirst* supra at note 112.

\(^{174}\) *Hirst* supra at note 111.

\(^{175}\) *Hirst* at para. 82.

\(^{176}\) *Id.*

\(^{177}\) *Sauve* supra at note 127.

\(^{178}\) *Sauve* at 522.

\(^{179}\) *Id.*
The reasonable analysis allows the courts to take into account the effect the law has on the class of potential voters and evaluate whether these laws have a legitimate purpose. Instead of blindly relying on history, the court can engage in a case-by-case analysis to determine if the charged offense may have any effect on the criminal’s ability to vote in an unimpaired manner and subject state criminal disenfranchisement statutes to a more modern standard.

The HRC issued a comment in 2002 that said “the Committee fails to discern the justification for [disenfranchisement] in modern times, considering that it amount to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation”.\textsuperscript{180} The court in \textit{Harper v. Virginia State Board of Elections} held the “Equal Protection Clause is not shackled to the political theory of a particular era”\textsuperscript{181} and “notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change”.\textsuperscript{182} Taking into account the encouragement to modernize criminal disenfranchisement laws and conduct a reasonable and proportional analysis, American courts should engage in a case-by-case analysis to reevaluate their upholding of these laws based on stagnant political theories and unsupported policy arguments. “The fact that disenfranchisement laws have long historical roots is, of course, an inadequate justification for retaining them: as standards of moral decency or political rights evolve, societies continually reject practices that were formally acceptable.”\textsuperscript{183}

Criminal disenfranchisement serves no other purpose but to “cast out from the center of the

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\textsuperscript{182} Id.
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political community those who violate the community’s deepest norms". America must allow itself to conduct a more detailed analysis and narrowly tailor these laws to serve a legitimate purpose. With such a fundamental right at stake, American courts must make sure to be protecting this right at all costs and not just allowing blanket provisions to strip American citizens of their democratic entitlement.