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# Prisoner Disenfranchisement: Four Judicial Approaches

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The right to vote occupies a central place in democratic thought and in constitutional law. During the twentieth century, constitutional democracies have tended to extend the franchise to once-excluded groups: women, racial and ethnic minorities, the indigent and the illiterate. Having extended the franchise to these groups, a legislature could not try to withdraw it without inviting great political controversy. This kind of controversy, however, does not tend to erupt when legislatures propose to disenfranchise criminal offenders serving terms of imprisonment. There may be no political costs in disenfranchising prisoners. Indeed, doing so may allow politicians to appear “tough on crime.” For this reason, courts are most likely to consider the constitutionality of legislative restrictions on the right to vote in prisoner disenfranchisement cases. These cases implicate, more obviously than other rights cases, deep questions concerning the basis for legal authority and civic duty in a democratic society, and the relationship between a government and the people it governs. It is, therefore, interesting to explore how courts around the world have approached the issues raised in prisoner disenfranchisement litigation.<sup>1</sup>

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1. There is a growing literature on the issue, much of it centred on the United States, where some states practice the perpetual disenfranchisement of ex-prisoners. See, e.g., Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300 (1989); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993); *One Person, No Vote: The Laws of Felon Disenfranchisement*, in *Developments in the Law*, 115 HARV. L. REV. 1838 (2002); Scott M. Bennett, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1 (2004); Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement under the Voting Rights Act 1965*, 73 FORDHAM L. REV. 1875 (2005); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). Constitutional doctrine in the U.S. remains governed by the Supreme Court’s ruling in *Richardson v. Ramirez*, 418 U.S. 24, 44 (1974), that the practice is authorized by section 2 of the 14<sup>th</sup> Amendment (permitting a reduction in the Congressional representation of states disenfranchising “except for participation in

This Article attempts just such an exploration. It examines four cases, each decided by a high court in a different jurisdiction: *Sauvé v. Canada (Chief Electoral Officer)*,<sup>2</sup> *Minister for Home Affairs v NICRO (National Institute for Crime Prevention and the Reintegration of Offenders)*,<sup>3</sup> *Hirst v. United Kingdom*,<sup>4</sup> and *Roach v. Electoral Commissioner*.<sup>5</sup> In each case, the respective court either struck down disenfranchising legislation as unconstitutional or declared it incompatible with an international human rights instrument. The thesis of this Article is modest, in keeping with its exploratory mission. It purports to show that, although the above decisions reflect different modes of reasoning when confronted with legislation disenfranchising prisoners, several common themes run through them.

Parts I through IV, which together represent the bulk of this Article, examine the reasoning employed by the courts in the four cases noted above. Part I analyzes the Supreme Court of Canada's 2002 decision in *Sauvé v. Canada*. This is an appropriate starting point, inasmuch as the other decisions all reference *Sauvé* to a greater or lesser extent. This is not just a historical accident. As we will see, the majority and dissenting opinions in *Sauvé* provide the most sophisticated judicial treatment of the kinds of arguments available to a government attempting to justify limitations on the right to vote. Though the majority opinion is grounded in many unspoken and contestable premises, it sets the benchmark for principled analysis.

Part II discusses the South African Constitutional Court's 2004 decision in *NICRO*. There, the government failed to convince the Court that it had a legitimate reason to disenfranchise prisoners.<sup>6</sup> In this respect, the case resembles *Sauvé* in that a majority of the Supreme Court of Canada expressed strong doubts that the disenfranchising legislation in issue advanced a pressing and substantial objective. *NICRO* is less convincing than *Sauvé*, however, because the latter case was decided after the government presented a strong case (indeed, a case supported by expert testimony by legal theorists).<sup>7</sup> By contrast, *NICRO* featured weak government submissions incapable of doing meaningful justificatory work.

Part III reviews the European Court of Human Rights' 2005 decision in *Hirst*. Unlike *Sauvé* and *NICRO*, *Hirst* did not turn on whether the disenfranchisement of prisoners furthered a legitimate state aim. Rather, it

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rebellion or other crime") and is thus not governed by the equal protection principles arising from section 1 of that Amendment and applicable to other voting rights issues.

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

3. *Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) (S. Afr.).

4. *Hirst v. United Kingdom (No.2)*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

5. *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162.

6. *See NICRO*, 2004 (5) BCLR 445 (CC) (S. Afr.).

7. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 53.

turned on the disproportionate impact on prisoners' right to vote. We will see, however, that the Court declined to explain why the state's reasons for disenfranchising prisoners were incapable of justifying a limitation on the right to vote, and that its refusal to do so made its proportionality analysis inherently suspect.

Part IV examines the Australian High Court's 2007 decision in *Roach*. Unlike the other jurisdictions we consider, Australia has no "bill of rights" and so its High Court does not engage in the sort of robust proportionality inquiry that we might see under the Canadian Charter of Rights and Freedoms, the South African Constitution, or the European Convention of Human Rights. The Australian High Court, in *Roach*, confined its inquiry to the question of whether there was a rational connection between the disenfranchisement of prisoners and the government's objectives.<sup>8</sup> Since both *Sauvé* and *NICRO* were also decided on that basis, the central issue in *Roach* was the same as the issue in those two cases. As we will see, though, the majority did not predominantly examine the government's objectives on principled grounds, but rather relied on a historical analysis. Furthermore, it misunderstood the basis on which *Sauvé* was decided, and therefore chose not to draw upon the reasoning of the *Sauvé* majority.

Part V considers a number of common themes running throughout the four cases. First, we briefly note that the four cases do not support prisoners' voting rights as robustly as one might expect. Second, we observe that the cases all explore the extent to which legislatures should be free to experiment with democratic institutions by altering the boundaries of the electorate. Third, we consider the fact that, in each case, the government in question argued that the disenfranchisement of prisoners would advance the collective sense of civic responsibility in the community. Fourth, we consider how the courts treat the idea of "universal suffrage." Finally, we look at the extent to which the different courts wrestle with the implied contractarian premises underlying the governments' civic responsibility arguments.<sup>9</sup>

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8. See *Roach*, (2007) 233 C.L.R. 162 at para. 8; see also Graeme Orr & George Williams, *The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia*, 8 ELECTION L.J. 123, 124 (2009) [hereinafter *The People's Choice*] (arguing that the Court should subject electoral law to strict scrutiny).

9. We do not isolate for scrutiny in this part the argument that the disenfranchisement may be justified as a form of criminal punishment. This is because the governments' claims about the punitive nature or effects of the disenfranchisement were not offered in any of the cases as the ultimate or sole justification for the respective bans. Nor were they articulated plainly in the language of criminal justice. And in none of the statutory regimes scrutinized was the disenfranchisement imposed by a judge as part of a criminal sentencing process. The ban in each case was formalized as a voter disqualification rather than as an explicit criminal penalty. And as a provision of election law—a civil and constitutional regime—rather than of criminal law, the disenfranchisement, like its defense, was founded more heavily on claims about democracy than on those of criminal justice.

## I.

## SAUVÉ V. CANADA (CHIEF ELECTORAL OFFICER)

Section 3 of the Canadian Charter of Rights and Freedoms states: “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.”<sup>10</sup> The Canada Elections Act denied the right to vote to any criminal offender serving a sentence of two years or more in prison.<sup>11</sup> In *Sauvé*, a narrow majority of the Supreme Court of Canada struck down the relevant section of the Act as unconstitutional.

At first glance, it might seem obvious that the Act offends the Charter, given that the latter expressly guarantees the right to vote to “every citizen.” Indeed, the government in *Sauvé* conceded that the Act infringed section 3 of the Charter.<sup>12</sup> Section 1 of the Charter, however, permits “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>13</sup> The decision in *Sauvé*, then, turned on whether the government demonstrably justified the disenfranchisement of offenders serving a sentence of two years or more in a way that is consistent with a free and democratic society. The majority concluded that the government did not. Its reasons for drawing that conclusion were unusual and striking.

In determining whether the government has justified an infringement of rights under section 1 of the Charter, one applies a two-stage test.<sup>14</sup> First, the government must prove that the rights-infringing legislation was motivated by a pressing and substantial objective.<sup>15</sup> Second, the government must prove that the way in which it has approached that objective was reasonable and demonstrably justified.<sup>16</sup> In deciding whether the second part of the test is satisfied, the government must show that (a) there was a rational connection between the legislation and the objective such that the impugned legislation was capable of advancing the objective in question; (b) the legislation minimally impaired rights, given the government’s objective; and (c) the legislation in question represented a proportionate response to the problems which made the objective pressing and substantial in the first place.<sup>17</sup> In most Charter cases, the constitutionality of legislation has turned on whether it represents a

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10. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 3 (U.K.) [hereinafter *Canadian Charter*].

11. Canada Elections Act, R.S.C., ch. E 2, § 51(e) (1985), amended by 1993 S.C., ch. 19 § 23 (Can.).

12. See *Sauvé*, [2002] 3 S.C.R. 519 at para. 6.

13. *Canadian Charter*, *supra* note 10, § 1.

14. See *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 69.

15. *Id.*

16. *Id.* at para. 70.

17. *Id.*

proportionate response. The majority opinion in *Sauvé*, by contrast, found that the government failed to show a rational connection between the Act and the government's objective. Indeed, the government had trouble convincing the majority that there was any pressing and substantial objective to advance in the first place.

*A. Pressing and Substantial Objective*

The Charter implicitly denies that certain phenomena can be cited by the government as “problems” which demand a response (legislative or otherwise). It regards certain attempts at justification, in other words, as non-starters. In *Oakes*, the Supreme Court stated:

A second contextual element of interpretation of s. 1 is provided by the words “free and democratic society.” Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.<sup>18</sup>

Though the majority did not refer to this passage from *Oakes*, it noted that certain kinds of justifications have been effectively taken off the table: “[T]he range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simple majoritarian preference for abolishing a right altogether would not be a constitutionally valid objective.”<sup>19</sup> As the emphasized line in the above passage suggests, the government has special difficulty showing that it is a problem that a class or group of citizens possesses the vote, given that the right to vote is core to the very idea of a free and democratic society. The majority in *Sauvé* echoed this observation, remarking: “[W]hen legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.”<sup>20</sup>

Notably, the government presented no evidence that the enfranchisement of the prisoners in issue interfered with the electoral process or otherwise produced

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18. *Id.* at 136 (emphasis added).

19. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 20.

20. *Id.* at para. 15.

detrimental effects.<sup>21</sup> Instead, the government argued that disenfranchisement of these prisoners would produce two salutary outcomes. It would, first, “enhance civic responsibility and respect for the rule of law.”<sup>22</sup> Second, it would serve as an additional punishment.<sup>23</sup> As the majority noted, these objectives have an intuitively compelling quality about them – they *sound* important.<sup>24</sup> The government did not, however, point to any deficit in civic responsibility or respect for law specifically attributable to the enfranchisement of criminal offenders; nor did the government explain how sentences were otherwise inadequate by virtue of prisoners’ right to vote. Since the government did not aver to any particular problems, the majority hesitated to conclude that the objectives offered by the government were truly “pressing and substantial” as opposed to merely desired.<sup>25</sup>

Ultimately, the majority accepted the government’s claim that the objectives in question were “pressing and substantial” for no other reason than “prudence” – that is, the majority accepted the claim simply for the sake of argument.<sup>26</sup> It could take that approach because the absence of a particular problem, with which the government was ostensibly trying to cope, made it difficult for the government to prove that the disenfranchisement of some prisoners could achieve the aims which animated the impugned provision in the first place.<sup>27</sup> The government, for this reason, ran into trouble at the rational connection stage of the *Oakes* test.

#### *B. The Rational Connection Test I – Respecting Law*

Since the government could point to no concrete problem clearly tied to the enfranchisement of certain prisoners, it also could adduce no evidence that disenfranchising those prisoners would achieve the government’s stated objectives. The government could do no more than claim that the disenfranchisement of certain prisoners was inherently capable of enhancing respect for law. The majority explained the theoretical foundation of that claim in these terms:

The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an “educative message” about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote

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21. *Id.* at para. 21.

22. *Id.*

23. *Id.*

24. *Id.* at para. 22.

25. *Id.* at paras. 24, 26.

26. *Id.* at para. 26.

27. *See id.*

“demeans” the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender. In my respectful view, none of these claims succeed.<sup>28</sup>

The majority rejected each of these arguments. It rejected the first on the basis that “denying penitentiary inmates the right to vote is bad pedagogy.”<sup>29</sup> The majority drew this conclusion on the basis that, when the government strips citizens of the vote, it diminishes the force of its claim that law has legitimate authority over citizens and that citizens ought to obey it. The majority stated:

Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens’ proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country’s boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.<sup>30</sup>

There is a great deal to unpack in this passage. As an empirical claim, it is debatable: the suggestion that people experience an obligation to obey the law because they have the opportunity to contribute to policy through the electoral process is a difficult proposition to verify.<sup>31</sup> Though the majority tries to marginalize the experience of non-voters, it is telling that they too ostensibly regard themselves as having legal obligations. Perhaps the majority would argue that non-voters regard themselves as (to use Hart’s distinction) obliged rather than obligated.<sup>32</sup> It is, however, just as possible that both voters and non-voters regard themselves as obligated because, whether they contribute to policy debates or not, they think themselves better off insofar as they receive the protection of the law. Indeed, Hobbes argued that citizens should reason in just this way.<sup>33</sup> From that perspective, the right to vote is a privilege—or franchise—granted to citizens in the sense that the law would retain its authority with or without citizen participation in elections. Regarded as a privilege, the right to vote can be suspended or cancelled. Furthermore, the government could reasonably claim that, by suspending the right to vote of serious offenders, it would remind citizens of the benefits they enjoy by subjecting themselves to

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28. *Id.* at para. 29.

29. *Id.* at para. 30.

30. *Id.* at para. 31.

31. Consider the empirical research of TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

32. See H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (2d ed. 1994).

33. See THOMAS HOBBS, *LEVIATHAN* (Penguin Classics 1985) (1651).

law, and remind them that those benefits hinge on their continued obedience to it. Writing for the dissent, Gonthier J. argued that the government could reasonably adopt this *kind* of contractarian reasoning. Indeed, at times he edged towards the claim that the government was not just entitled to disenfranchise serious offenders, but that it *ought* to do so:

Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation.<sup>34</sup>

This emphasis on “stability and order” is striking because, as Hobbes realized, a legal order may be able to achieve such things even in non-democratic countries.<sup>35</sup> (Indeed, a legal order in a non-democratic country may be able to achieve those ends far more efficiently). By emphasizing this basis for respecting the law, the government would provide citizens a reason for obeying the law that would exist whether or not there are any occasional or systemic deficits in the democratic process. The government could strengthen the case for respecting the law, in other words, by reducing the public’s expectations concerning what law should achieve and how it should be created.

The dispute between the majority and the dissent can be reduced to a dispute over how to interpret the government’s objective. The dissent’s account of legal authority, however, only serves to enhance respect for law *in its thinnest sense*. The majority seems to have asked itself a different question, namely, whether disenfranchisement could enhance that special kind of respect for law *created in a constitutional democracy like Canada*. If we understand the government’s objective in that thicker sense, it seems clear that a quasi-Hobbesian analysis will not suffice precisely because that analysis will justify respect for law in democracies and tyrannies alike. Any strategy adopted by the government to encourage respect for law *as a democratic institution* will, as the majority stated, need to emphasize the fact that those subject to the law by and large contribute to its creation.<sup>36</sup> But the government, again as the majority observed, de-emphasized that very fact when it portrayed the right to vote as a privilege which may be stripped from citizens:

The “educative message” that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a

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34. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 116 (emphasis added).

35. See HOBBS, *supra* note 33.

36. *Id.* at para. 31.

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portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.<sup>37</sup>

Furthermore, the majority implied that the government cannot choose to enhance respect for law in only the thin sense; that is, it cannot choose to enhance law as a decontextualized institution. Thus, the government cannot argue that, although democratically-created laws have special virtues, it did not purport to emphasize those virtues over the virtues of law more widely understood.

It is not immediately obvious why the government could not have such a “thin” objective. Indeed, as the majority itself notes, not every person in Canada will experience the law as the product of a process in which she participated,<sup>38</sup> and so non-citizens, those under the age of majority, and citizens who have simply decided not to vote may all regard the law as something foisted upon them. It may be that the fact that *others* elected the lawmakers increases non-voters' sense of obligation. If not, the government would have good reason to encourage respect for law (whether democratically-created or not) as an institution.

The majority rejected this approach, apparently on the basis that the Constitution itself presupposes that law will be created democratically. This inference was, again, drawn from the language of section 1: the government's objective must be consistent with a free and democratic society.<sup>39</sup> The majority seems to have taken this to mean that the government cannot create “law,” properly described, which has not been created democratically, and therefore cannot intend to enhance respect for law which is anything other than democratic. But, as we have seen, laws are always created without the participation of every person expected to obey them. The majority took the view that these exclusions from the franchise do not make Canadian law any less democratic – that a fully-functioning democracy need not recognize a right to vote for non-citizens and children.<sup>40</sup> Quite the contrary, the majority stressed that Canada now enjoys “universal suffrage” and that the universality of the franchise gives Canadian law its special claim to legitimacy:

The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to

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37. *Id.* at para. 32.

38. *Id.* at para. 37.

39. *Canadian Charter*, *supra* note 10, § 1.

40. *See Sauvé*, [2002] 3 S.C.R. 519 at para. 37 (discussing the exclusion of underage citizens).

representative democracy, and erodes the basis of its right to convict and punish law-breakers.<sup>41</sup>

Because the majority took the view that the Charter presupposes universal suffrage, it likewise claimed that the government cannot strip citizens of the right to vote simply on the basis of some moral defect. The government, it argued, cannot enhance respect for the law as a democratic institution if the government conveys the message that it can pick and choose who shall have the right to vote on the basis of some favored character traits.<sup>42</sup>

But, of course, the government *does* pick and choose who may vote – non-citizens, for example, are routinely denied the right to vote.<sup>43</sup> The majority had no apparent difficulty with that, and so begs the question: why is the franchise “universal” merely because all *citizens* are presumptively entitled to vote? This point has great significance because, if non-citizens and underage citizens may be excluded without eroding the universality of the franchise—*i.e.*, without making the legal system any less democratic—then it becomes theoretically possible for the government to likewise disenfranchise *other* classes and groups without offending the system’s democratic character. Justice Gonthier seized upon this very point, observing that, although the franchise has been traditionally reserved for citizens,<sup>44</sup> the question was not whether prisoners are citizens, but whether they are members of the political *community*. Though a person’s citizenship creates a presumption that she is a member of the community, as Justice Gonthier suggested, it by no means follows that a citizen *must* be a member of the community. Serious criminal offenders, he concluded, have temporarily ruptured their connection to the community, and so fall outside the class of people entitled to participate in the electoral process:

[C]itizenship or residency is a reasonable minimum requirement for voting, since such indicators are often equated with identification to a particular political community. The importance of the nexus, however, also helps to understand the context of the particular disenfranchisement in question in the case at bar. The disenfranchisement of serious criminal offenders serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of serious crimes gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a

41. *Id.* at para. 34 (emphasis added).

42. *Id.* at para. 37.

43. The citizenship qualification is itself problematic, offering an uncertain account of how the status and roles of the citizen relate to entitlement to vote. See Jean L. Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 INTERNATIONAL SOCIOLOGY 245 (1999); Heather Lardy, *Citizenship and the Right to Vote*, 17 O.J.L.S. 75 (1997).

44. *Sauvé*, [2002] 3 S.C.R. 519 at para. 117.

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further manifestation of community disapproval of the serious criminal conduct.<sup>45</sup>

In reply, the majority suggested that if the government wanted to enhance respect for law as a democratic institution, it should have emphasized the connection that serious offenders have to the political community, not labeled them as “outsiders.”<sup>46</sup>

Given that section 3 of the Charter specifically reserves the vote for “every citizen,” we may wonder what difference it makes that a citizen is ostensibly not a member of the political community. The dissent clearly proceeded on the basis that section 1 permits infringements of section 3 and therefore allows the government to impose limits on the extent to which “every citizen” may vote. Since that right can be limited, the dissent reasoned, it makes sense to ask whether the citizens who have been prevented from voting are members of the community or not. The majority understood the notion of a limit on section 3 somewhat differently, implying that the government could only limit the voting rights of citizens by restricting the time, place, and manner by which the vote could be exercised – not by narrowing the class of citizens who could exercise it. When discussing the minimal impairment test, the majority remarked:

The question at [the minimal impairment] stage of the analysis is not how many citizens are affected, but whether the right is minimally impaired. Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*. It follows that this legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise.<sup>47</sup>

The majority’s view should be preferred, and reflects the view taken by the European Court of Human Rights in *Hirst*.<sup>48</sup>

In short, the majority’s reasons for rejecting the government’s argument that the disenfranchisement of serious offenders could enhance respect for the law rests upon a chain of contentious (and frequently buried) premises. Specifically, it rests upon the premise that the government could not intend to enhance respect for law in the thin sense. This, in turn, depends upon the premise that the Charter presupposes that law in a democratic society is created democratically, and that “democratically” should be understood as requiring the state to provide all citizens with the right to vote. This reading of “democratically” itself depends on the idea that, even though many classes and groups in Canadian society are excluded from the franchise altogether, Canada nonetheless has “universal suffrage” at least for the purposes of constitutional analysis. The dissenting opinion takes issue with all these premises to a greater or lesser extent. At the core of each of these sub-disputes lies one troubling

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45. *Id.* at para. 119.

46. *Id.* at paras. 38-40.

47. *Id.* at para. 55.

48. *See Hirst v. United Kingdom (No.2)*, App. No. 74025/01, 42 Eur. Ct. H.R. 41 (2006) at para 77.

truth: Canada subjects many people within its borders, everyday, to a law created through a process in which they cannot participate.

*C. Rational Connection Test II – Demeaning the Political System*

As we have seen, the majority rejected the claim that the Constitution permits the state to exclude citizens from the franchise. They were particularly unimpressed by the argument that it would demean the political system to allow certain classes of citizens to participate in the electoral process. This claim, the majority held, is incompatible with the Charter's presumption that all persons must be treated with dignity and respect. They cursorily remarked:

The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting—whether by reason of class, race, gender or conduct—played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law. As Arbour J.A. stated in *Sauvé No. 1*, . . . since the adoption of s. 3 of the *Charter*, it is doubtful "that anyone could now be deprived of the vote on the basis . . . that he or she was not decent or responsible."<sup>49</sup>

Again, we may wonder why it is that non-citizens are barred from voting if not on the basis (at least in part) that they are presumptively unworthy of the franchise. It seems wrong to suppose that non-citizens are insufficiently well-versed in the political issues circulating in their host state – or, at least, that they suffer from these infirmities more than citizens. Their disenfranchisement likely stems, at least to some extent, from suspicions surrounding their "otherness" — their status as aliens whose good character cannot safely be presumed.

This issue becomes especially urgent when we consider the majority's concluding thoughts on the government's second objective:

Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*: compare *August*, *supra*. It also runs counter to the plain words of s. 3, its exclusion from the s.33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected.<sup>50</sup>

If denial of the franchise offends an individual's dignity, then non-citizens are offended in this way on a regular basis. If it only offends the dignity of citizens, then the majority should have explained what quality makes citizens materially different from non-citizens, since it may be that serious criminal offenders lack

49. *Sauvé*, [2002] 3 S.C.R. 519 at para. 43.

50. *Id.* at para. 44 (emphasis added).

that quality. As we have seen, Justice Gonthier's argument that people who lack a connection to the political community may be disenfranchised, and that serious criminal offenders lack such a connection, rests on this point. The majority did not do enough to explain why, given that the constitution allows non-citizens to be treated as non-members of the political community, the legislature cannot assign prisoners to that category as well.

#### *D. Rational Connection Test III – Punishment*

Finally, the majority rejected the claim that the provision in question could further legitimate penological aims—in particular, deterrence, rehabilitation, retribution, and denunciation.<sup>51</sup> First, because disenfranchisement is automatically triggered by a sentence of two years or more, there is no guarantee that disenfranchisement is a suitable punishment for all those affected by the Act.<sup>52</sup> This means that offenders may not deserve to be disenfranchised, and that the Act cannot be justified on retributivist grounds. Furthermore, disenfranchisement does not denounce any particular type of conduct.<sup>53</sup> Second, for the reasons we have already explored, the majority concluded that there is no evidence that disenfranchisement will encourage greater respect for law. On this basis, the majority concluded that disenfranchisement would neither deter nor rehabilitate criminal offenders.<sup>54</sup> Obviously, both arguments depend on premises which implicitly grounded the majority's other rational connection analyses. If we agree with the majority that (a) serious criminal offenders do not, just by virtue of committing a serious criminal offence, lack some quality possessed by other citizens; and (b) the government cannot encourage respect for law as an instrument of order and stability without also emphasizing its character as a democratic institution, we will find its reasoning persuasive. If not, we will think that the majority has begged the question yet again.

#### *E. Minimal Impairment*

The majority, then, found that the government failed to prove that a rational connection existed between its three objectives and the disenfranchisement of offenders serving a sentence of two years or more. It nonetheless addressed, albeit fleetingly and only for the sake of argument, the minimal impairment stage of the *Oakes* test. The majority found that, because the government provided no basis for concluding that those sentenced to two years imprisonment or more necessarily deserve to lose the right to vote, it could not

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51. *Id.* at para. 49.

52. *Id.* at para. 48.

53. *Id.* at para. 51.

54. *Id.* at para. 49.

show that the Act infringed section 3 of the Charter as little as possible.<sup>55</sup> The dissent stressed that the minimal impairment test does not require the least impairing legislation imaginable, and that the court should adopt a deferential posture when assessing whether the legislation is appropriately tailored.<sup>56</sup>

## II. MINISTER FOR HOME AFFAIRS V. NICRO

Unsurprisingly, given its political history, the South African Constitution is committed to the non-discriminatory distribution of the franchise. The Constitutional Court first ruled on the issue of prisoner voting rights in *August v. Electoral Commission*.<sup>57</sup> That case concerned the lack of prison facilities for registration and voting. The law at that time did not formally disqualify prisoners from voting, but neither did it place any obligation on either the prison or the electoral authorities to facilitate voting by inmates. The Constitutional Court held in *August* that the applicants had been effectively deprived of their constitutional right to vote by the absence of processes permitting the exercise of the right.<sup>58</sup> This was not, however, an unambiguous endorsement of prisoners' constitutional right to vote. The Court expressly rejected the claim that Parliament could not formally ban prisoner voting.<sup>59</sup> In the absence of such a ban, however, facilities must be made available for its exercise by all those permitted by the constitution to vote. Justice Sachs, echoing the argument that prisoners are disqualified on grounds of moral unfitness, observed that "in a country like ours, racked by criminal violence, the idea that murderers, rapists and armed robbers should be entitled to vote will offend many people."<sup>60</sup>

*August* obligated the government to facilitate prisoner voting, but only because prisoners were not formally disenfranchised through legislation. The legislature could statutorily restrict prisoners' right to vote if it had "reasonable and justifiable" grounds for doing so.<sup>61</sup> That is precisely what it did, explicitly

55. *Id.* at para. 55.

56. *Id.* at para. 163.

57. *August v. Electoral Commission* 1999 (4) BCLR 363 (CC) (S. Afr.). See also comment in N. Mbodla, *Should Prisoners Have a Right to Vote?*, 46 J. OF AFR. L. 92 (2002).

58. *August*, 1999 (4) BCLR (353) (CC) at para. 35 (observing that the disenfranchisement was occasioned "not by legislation but by logistics" impeding the exercise of the franchise).

59. *Id.* at para. 31.

60. *Id.*

61. Section 36 of the Constitution permits, and specifies criteria for, limitations of the freedoms protected by the Bill of Rights. It states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a) the nature of the right;

disenfranchising all prisoners serving a sentence of imprisonment without the option of a fine.<sup>62</sup> The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), as well as two criminal offenders serving prison sentences, challenged the law before the High Court. The Minister for Home Affairs intervened to bring the matter before the Constitutional Court as a matter of urgency. The Constitutional Court delivered its judgment in *Minister for Home Affairs v. NICRO* just six weeks before the 2004 general election.

Chief Justice Chaskalson, writing for a lop-sided majority of the Constitutional Court, remarked that “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.”<sup>63</sup> The Constitution proclaims the state’s respect for the value of “universal adult suffrage, a national common voters’ roll, regular elections and a multi-party system of democratic government.”<sup>64</sup> A further key protection is offered by section 3, which provides that all citizens are equally entitled to the rights, privileges and benefits of citizenship, and are equally subject to its duties.<sup>65</sup> Section 19(3)(a) of the Constitution stipulates that “every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution and to do so in secret.”<sup>66</sup>

According to the government, the disenfranchising legislation achieved three objectives: it preserved the integrity of the voting process; it removed the special costs associated with providing voting facilities for prisoners; and it communicated an aggressive attitude towards crime.<sup>67</sup> The first objective arose from the government’s anxieties about the special security and administrative

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- b) the importance of the purpose of the limitation;
  - c) the nature and extent of the limitation;
  - d) the relation between the limitation and its purpose; and
  - e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

S. AFR. CONST. 1996, § 36.

62. Electoral Laws Amendment Act 34 of 2003 s. 4(f).

63. *Minister for Home Affairs v Nat’l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.). See also *August*, 1999 (4) BCLR (353) (CC) at para. 17 (S. Afr.) (“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts”).

64. S. Afr. Const. 1996, § 1.

65. *Id.* at § 3.

66. *Id.* at § 19(3)(a).

67. *NICRO* 2004 (5) BCLR 445 (CC) (S. Afr.) at paras. 40-46. It is interesting, although not necessarily instructive (given the sketchy account offered of all its claims) that the government did not choose to identify directly a punitive aim for the law.

arrangements necessary to provide mobile polling stations in prisons.<sup>68</sup> As presented, this argument relied heavily on claims about costs. The government explained that it wanted to improve voting facilities for disabled, infirm, or pregnant citizens, and that they would be further disadvantaged if resources were instead directed toward prisoner voting.<sup>69</sup> The government expressed concerns about fraud and the possibility of tampering with prisoner ballots, arguing that the special arrangements needed to counter this would strain the financial resources available to administer elections.<sup>70</sup> The argument about the integrity of the voting process, as the government chose to frame it, cannot be dissociated from claims about cost.

The cost argument was made more directly in the government's second claim: "it would not be fair . . . to devote resources to criminals who are responsible for their own inability to vote, if similar provision cannot be made for deserving categories of people who through no fault of their own are unable to register to attend polling stations on election day."<sup>71</sup> The Court rejected this explanation: "The 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."<sup>72</sup>

It is difficult to understand why the government thought this argument would succeed. By basing its argument on the relative virtues of different groups of citizens, the government claimed a constitutional authority—dressed up as an argument about cost—to distribute the right to vote on the basis of the presumed moral worth of the members of those groups. The majority, like the majority of the Supreme Court of Canada in *Sauvé*, rejected that premise. Resource arguments, it held, may have relevance when assessing the adequacy of polling arrangements for (enfranchised) citizens. They cannot, however, be used to constructively disenfranchise an entire category of citizens deemed less deserving.<sup>73</sup>

The government's third stated objective related to its interest in transmitting a "tough on crime" message to its citizens. The majority rejected this explanation: "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."<sup>74</sup> Chief Justice

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68. *Id.* at para. 40.

69. *Id.* at para. 41.

70. *Id.* at para. 40.

71. *Id.* at para. 46.

72. *Id.* at para. 53.

73. *Id.* at para. 48. On the resource argument, see Part V.B.

74. *Id.* at para. 56 (stating that "it could hardly be suggested that the government is entitled to disenfranchise prisoners in order to enhance its own image").

Chaskalson did recognize that this formulation of the government's interest might conceal an underlying and implied interest in reinforcing citizens' awareness of their civic duties. He denied, however, that this objective could have any independent standing as a constitutional goal. In the Court's view, a deterrence objective founded on the idea of civic duty could be regarded as "legitimate and consistent with the provisions of section 3 of the Constitution."<sup>75</sup> Justifying the voting ban on this basis, though, "raises difficult and complex issues."<sup>76</sup> Ultimately, the government could not take advantage of Chief Justice Chaskalson's generous interpretation of its third objective; the government said little about the connection between prisoner disenfranchisement and civic responsibility, and the Court was not obligated to develop its thinking on the matter.

Like the majority opinion, the two dissenting opinions alluded to the constitutional relevance of the idea of civic duty. Justice Madala urged that the various objectives underlying the disenfranchisement be treated "holistically as an attempt by government to inculcate responsibility in a society which, for decades, suffered the ravages of apartheid."<sup>77</sup> His understanding of the idea of civic responsibility led him to conclude that "you cannot award irresponsibility and criminal conduct by affording a person who has no respect for the law the right and responsibility of voting."<sup>78</sup> In his view, the government had done enough to show that the law served this valid purpose. Justice Ngcobo took the view that "the government has a legitimate purpose in pursuing a policy of denouncing crime and promoting a culture of the observance of civic duties and obligations."<sup>79</sup> He would have upheld the law, though he would have exempted prisoners still awaiting the outcome of an appeal.<sup>80</sup>

Both dissenting opinions assumed that enfranchisement presupposes civic responsibility, but neither explained how this view could be reconciled with a constitutional right to vote as a protection against disenfranchisement. Electoral democracy may value responsible citizenship, but this does not show that the Constitution permits the disenfranchisement of irresponsible citizens. Not all the desirable attributes to which democracy aspires may be translated into constitutionally validated rules of conduct for voters. If only dutiful citizens qualify as voters, constitutional doctrine must explain why. The weak arguments presented in this case prevented the Court from articulating such a doctrine, although the majority frequently referred to *Sauvé* to show how the

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75. *Id.* at para. 57.

76. *Id.* at para. 58.

77. *Id.* at para. 113.

78. *Id.* at para. 117.

79. *Id.* at para. 145. It is worth observing that, although the Court blurs these two purposes together, they are in fact separate.

80. *Id.* at para. 153.

government might have tried to support its third objective, and to highlight the impoverished nature of the government's reasoning. At the same time, the majority observed that this case is "markedly different"<sup>81</sup> from *Sauvé*, ostensibly because the latter was grounded in detailed submissions about the nature and impact of the policy of prisoner disenfranchisement. In *NICRO*, by contrast, "the policy issue [was] introduced into the case almost tangentially", *i.e.*, as an afterthought, when it became clear that the cost-based and logistical arguments were inadequate.<sup>82</sup> The government's failure to present and defend arguments based on clearly articulated and permissible constitutional aims denied the Court the opportunity to develop a corresponding critique of the matter from a South African perspective. As a result, the decision leaves open the possibility that a reformulated restriction on prisoner voting would be found constitutional. At the same time, the decision does not tell us how a court should assess the constitutionality of such a restriction.

Despite the stunted analysis of the issues in *NICRO*—a consequence of the government's impoverished account of its objectives—the judgment does provide a rough indication of the direction which the South African Constitutional Court may take in future prisoner disenfranchisement claims. The Court appeared receptive to the notion that ideas about civic duty are relevant to the constitutional justification of restrictions on the right to vote. The majority rejected the argument that the cost of enfranchising prisoners might justify their disenfranchisement, and also dismissed the deterrence-based justification. The government's presentation of the case did not offer the Court the scope to fully examine claims about the relationship between civic duty and the right to vote. The majority was, however, receptive to the general claim that restrictions on the right may be capable of constitutional justification on this ground. This suggests that the Court might be willing to accept the constitutionality of prisoner disenfranchisement if the government were able to provide a convincing account of the link between that practice and a sufficiently definite and precise understanding of the idea of civic duty.

### III.

#### HIRST V. UNITED KINGDOM

The European Court of Human Rights considered the question of prisoner disenfranchisement in the context of a challenge to United Kingdom law.<sup>83</sup> The

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81. *Id.* at para. 66.

82. *Id.*

83. *Hirst v. United Kingdom (No.2)*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006). The Government referred the case to a Grand Chamber after a ruling by a Chamber of the Court in *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, 38 Eur. H.R. Rep. 40 (2004) that the ban violated the Convention.

relevant statutory provision disenfranchised all convicted prisoners.<sup>84</sup> The applicant argued that the consequent deprivation of his right to vote violated Article 3 of Protocol 1 to the European Convention on Human Rights.<sup>85</sup> The Court ruled in favor of the applicant, a Grand Chamber holding that the United Kingdom's blanket disenfranchisement of all convicted prisoners breached the Convention because it constituted a disproportionate interference with the right to vote: the law made no attempt to link the disenfranchisement to the nature or severity of the offence or to the length of the sentence. The approach of the European Court of Human Rights to the interpretation of the guarantees provided by the Convention is distinct from domestic constitutional adjudication in the degree of latitude it permits to States (the margin of appreciation) to supply a degree of national character to the rights. This margin is acknowledged by the Court to be especially wide in the area of electoral law.<sup>86</sup> This important difference apart, the approach of the Court of Human Rights to the review of rights claims is broadly similar to that of constitutional courts in national jurisdictions. The Court employs the same sort of ends-means analysis, assessing the aims of the challenged law and measuring the proportionality of the methods used in furtherance of those aims. This analysis in *Hirst*, as is usual in the Court's decisions, is brief. The judgment provides little scrutiny of the aims asserted by the U.K. in defense of the law. The proportionality analysis, which forms the core of the opinion, provides only a partial and rather superficial critique of those aims. The Court compounded these problems by displaying a staunch deference to the state's own appreciation of the limits on the right, sketching a margin without drawing any detectable doctrinal lines.<sup>87</sup>

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84. The Representation of the People Act, 1983, c. 2 § 3(1). This law was amended by the Representation of the People Act 2000, section 2, inserting section 3A into the 1983 Act to enfranchise remand prisoners, confining the disenfranchisement to convicted prisoners and those offenders detained in a psychiatric facility.

85. European Convention for the Protection of Human Rights and Fundamental Freedoms, protocol 1, art. 3 (Rome, 4 Nov. 1950), 312 E.T.S. 5, *as amended by* Protocol No. 3, E.T.S. 45 [hereinafter *European Convention on Human Rights*]. "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." The Court of Human Rights interprets this provision as protecting an individual human right to vote. *See Mathieu-Mohin v. Belgium*, App. No. 9267/81, 10 Eur. H.R. Rep. 1 (1987).

86. *Mathieu*, 10 Eur. H.R. Rep. 1 at para. 52; *Zdanoka v. Latvia*, App. No. 58278/00, 45 Eur. Ct. H.R. 478, para. 115 (2006).

87. The failure of the Court to specify any clear parameters on state power is criticized in the concurring opinion of Judge Calflich, who suggests three such limits: (a) a blanket ban is unacceptable; (b) the disenfranchisement should be determined by a judge and not by the executive; and (c) where the ban is phrased as forming part of the offender's criminal punishment, it should extend during the punitive part of the sentence only and not (as in *Hirst*) into any subsequent period of preventive detention imposed to counter the risks of releasing the offender. *Hirst*, 42 Eur. H.R. Rep. 41 at paras. 7-8 (Calflich, J., concurring). The joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens is also critical of ruling for giving "States little or no guidance as to what would be Convention-compatible solutions." *Id.* at para. 8 (Wildhaber, J., Costa, J.,

*A. Legitimate Objectives and Legislative Means*

The Convention does not expressly state that the right to vote can be limited at all: Article 3 of Protocol 1, phrased as a guarantee of free elections which the contracting States are obliged to observe, refers neither to a right nor to any grounds for its limitation.<sup>88</sup> This absence of a limitations clause distinguishes the right to vote from many other rights in the Convention – notably, those contained in Articles 8 to 11.<sup>89</sup> The Court has consistently held, however, that the right to vote is not absolute.<sup>90</sup> Indeed, it has held that a member state can justify limiting the right to vote for a range of reasons that would not provide valid grounds for limiting the rights to peaceful assembly, association and expression. An objective can provide a valid reason for limiting the right to vote so long as it is compatible “with the principle of the rule of law and the general objectives of the Convention.”<sup>91</sup> The Court has explained this approach in the following terms:

Because of the relevance of Article 3 of Protocol No.1 to the institutional order of the State, this provision is cast in very different terms from Articles 8-11. Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying individual rights. The standards to be applied for establishing compliance with Article 3 must therefore be considered to be less stringent than those applied under Articles 8-11 of the Convention.<sup>92</sup>

In other words, the Convention merely requires that the state create an institutional framework capable of delivering free elections – it does not dictate any particular institutional arrangements by which that end is to be achieved, and it does not explicitly give individuals the right to vote in the elections so devised. The Convention implicitly recognizes, then, that there may be any number of ways in which democratic institutions can be structured, and that it falls to each member state, as caretaker for the collective good of its citizens, to decide which way is best. As we will see, this idea that the state is responsible for experimenting with democratic institutions is developed in *Roach*. For now, it is important to observe that the Court has adopted a deferential posture when determining whether a stated objective is capable of justifying a limit on the right to vote, in recognition of the considerable collective interests at stake.

The United Kingdom, like the government in *Sauvé*, primarily justified the disenfranchisement of prisoners on the basis of its interests in punishing

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Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

88. *European Convention on Human Rights*, *supra* note 85, protocol 1, art. 3.

89. *Id.*, sect. 1, arts. 8-11.

90. *Mathieu*, 10 Eur. H.R. Rep. 1 at para. 52; *Zdanoka*, 45 Eur. Ct. H.R. 478 at para. 115(b).

91. *Zdanoka*, 45 Eur. Ct. H.R. 478 at para. 115(b).

92. *Id.* at para 115(a). The Court also announced that the tests of “necessity” or “pressing social need” are not relevant to the analysis of restrictions on the electoral rights. *Id.* at para. 115(c).

offenders and in promoting civic responsibility and the rule of law.<sup>93</sup> The European Court of Human Rights, however, devoted little attention to the question of whether these objectives were adequate or whether there was a rational connection between those objectives and the policy of disenfranchisement. The Grand Chamber noted that the Chamber judgment had expressed reservations as to the validity of the asserted aims but found “no reason in the circumstances of this application to exclude those aims as untenable or incompatible *per se*” with the Convention right to vote.<sup>94</sup>

In taking this position, the Court echoed Justice Gonthier in *Sauvé*, who likewise took the view that the courts should defer to the government on such philosophical issues.<sup>95</sup> Justice Gonthier, however, justified his conclusion by showing how a reasonable person might conceive of the social contract in such a way that the disenfranchisement of prisoners is consistent with the existence of civic duty in a constitutional democracy. There was no such analysis in *Hirst*. One might be forgiven for supposing that, so long as the member state phrases its objective in sufficiently abstract and portentous language, the Court will refuse to challenge the state’s contention that the policy in question is rationally connected to that objective.

It is important to keep in mind that, as the *Sauvé* majority showed, the practice of prisoner disenfranchisement need not purport to encourage civic responsibility. The state’s argument in *Hirst* depended on contestable assumptions about the links between criminal offending and democratic participation. The image of the dutiful citizen could be countered with an image of prisoners as penitent (or at least educable) wrongdoers receptive to the sort of rehabilitation which their enfranchisement might support. The image of the electorate as a closed community of well-behaved democrats from which prisoners are excluded may be contrasted with the idea of an inclusive franchise open to the appeals of the disenfranchised. The *Hirst* Court, by deferring to the state on “philosophical” questions effectively marginalized a robust conception of the right to vote at the outset of its analysis.

### *B. Proportionality and the Margin of Appreciation*

As we have seen, the Court adopted a deferential posture when determining whether the state’s proffered objective was capable of justifying a limitation on the right to vote. In deciding whether the limitation was proportionate, this deferential attitude re-emerged to some extent: the Court did not seriously weigh

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93. *Hirst v. United Kingdom* (No.2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 74 (2006).

94. *Id.* at para. 75. *See also* the Chamber judgment, where the Court accepted, despite its doubts, that the aims could be regarded as legitimate “even on an abstract or symbolic plane.” *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, 38 Eur. H.R. Rep. 40 at para. 47 (2004).

95. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 101.

the salutary effects of the legislation against the seriousness of the limitation. It is hard to see how it could do so, given that it did not actually decide that the legislation was rationally connected to the objective in the first place.<sup>96</sup> Nonetheless, the Court struck down the legislation on proportionality grounds on the basis that it stripped *all* non-remand prisoners of the right to vote, and therefore did not minimally impair the right.<sup>97</sup>

The trouble, of course, is that the Court did not explain how and why disenfranchisement could be rationally connected to the promotion of civic responsibility at all; without doing so, it could not explain why the disenfranchisement of one prisoner might be more or less wrongful than the disenfranchisement of another. The United Kingdom argued on this basis that the Court should defer to its judgment about how the objective could best be advanced and, therefore, how far the limitation on the right to vote should go. The Court rejected this argument, finding that the state had not weighed the competing interests with sufficient care, and so had not done enough to justify judicial deference.<sup>98</sup>

In a sense, this seems eminently reasonable: the state cannot claim that its disenfranchising legislation deserved deference, as a judgment about the best way to advance the public's collective interest in well-functioning democratic institutions, when it did little to weigh that interest at the time the disenfranchising legislation was drafted and enacted. At the same time, it is striking to see a court denounce legislation on the basis that it was enacted too quickly: democratically elected legislatures frequently pass laws in response to some public outcry – in, as it were, the heat of the moment. No one would argue that this is a good way to craft a statute, but it is rarely claimed that it amounts to a constitutional problem threatening the statute's validity.<sup>99</sup> The United Kingdom also relied upon the margin of appreciation doctrine to support its claim that the Court should defer to its approach to the objectives (assuming their validity).<sup>100</sup> The doctrine reflects the Court's respect for state legislative autonomy and distinctive national understandings of particular human rights. It permits the Court to delineate (however approximately) a zone within which states may give effect (or “appreciate”) their understandings of Convention

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96. This point is picked up in the joint concurring opinion of Judges Tulkens and Zagrebelsky, in whose view the law, irrespective of any argument about proportionality, lacks any rational basis because “the real reason for the ban is the fact that the person is in prison.” *Hirst*, 42 Eur. H.R. Rep. 41 (Tulkens, J., & Zagrebelsky, J., concurring).

97. *Hirst*, 42 Eur. H.R. Rep. 41 at para. 82.

98. *Id.* at para. 79. The UK Parliament debated the issue, briefly, during the passage of the Representation of the People Act 2000. *See supra* note 84.

99. As the joint dissenting opinion authored by Judge Wildhaber observes, “it is not for the Court to prescribe the way in which national legislatures carry out their legislative functions.” *Id.* at para. 7 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

100. *Hirst*, 42 Eur. H.R. Rep. 41 at para. 52.

doctrine on the right to free elections. Of course, this assumes that the disenfranchising legislation truly reflected an appreciation of prisoners' interest in participating in the democratic process. As we have seen, the Court doubted that the U.K. government had bothered to consider those interests at all. Even if it had, the Court took the view that the blanket ban on prisoner voting did not fall within such a margin – that it was simply too indiscriminate.<sup>101</sup>

Again, it is not clear from the Court's judgment why a blanket ban falls outside the range of reasonable interpretations of the right to vote. Because the Court did not more carefully examine the state's objectives, it did not explain why some people might be disenfranchised but not others. The ruling demands only that legislators should exercise care in making decisions about prisoner disenfranchisement if they expect deference from the courts in applications for judicial review. That is, to be sure, a positive outcome in itself. A legislature may, however, fully ventilate an issue—*i.e.*, look like it has seriously weighed all competing interests—but nonetheless decide to impose something *approaching* a blanket ban. The Court has not yet clearly said why or how a near-blanket ban devised under such circumstances could be incompatible with the right to vote. It has, in other words, encouraged experimentation with ideas about suffrage in the absence of a clear account of the terms of the right. This is especially problematic given the potential implications of the Court's doctrine for the laws of other signatory states to the Convention which maintain rules disenfranchising prisoners.<sup>102</sup>

#### IV.

##### ROACH V. ELECTORAL COMMISSIONER

According to section 7 of the Australian Constitution, Senators must be “directly chosen by the people of the State.”<sup>103</sup> Section 24 of the Constitution similarly requires members of the House of Representatives to have been “directly chosen by the people of the Commonwealth.” The *Commonwealth Electoral Act* 1918 (Cth), as amended by the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act* 2006 (Cth), disqualified those convicted of a criminal offence, and serving a sentence of full-time detention, from voting in elections for the Senate and the House of Representatives.<sup>104</sup> In *Roach*, a majority of the High Court ruled that the Act, in

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101. *Id.* at para. 82.

102. This point is made in Judge Wildhaber's dissenting opinion, noting that thirteen of the forty-five contracting States disenfranchise prisoners and that “all states with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention”. *Id.* at para. 6 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., & Jebens, J., dissenting).

103. Commonwealth of Australia Constitution Act, 1900, § 7 (U.K.).

104. Commonwealth Electoral Act, 1918, c. 93 § (8AA) (Cth.), as amended by the Electoral

its amended form, violated sections 7 and 24 of the Constitution.<sup>105</sup> The majority was represented by a three-judge plurality opinion written by Justices Gunmow, Kirby and Crennan, as well as a concurring opinion penned by Chief Justice Gleeson. Justices Hayne and Heydon each wrote in dissent. Among the four opinions, however, there is in fact strikingly little disagreement in principle. Indeed, the various opinions complement each other in many respects. For this reason, we will consider them together.

#### A. *The Implementation of Democratic Institutions*

Chief Justice Gleeson's ruling was most grounded in considerations of constitutional and political theory. Chief Justice Gleeson emphasized that the Australian Constitution was not the product of a rights-based culture, but the creation of people who wanted to form a federal union based on British institutions – and, notably, Parliamentary sovereignty.<sup>106</sup> He made this appeal to “social facts” to underscore the point that institutions of democracy are creatures of statute; that, although the Constitution requires members of the Senate and the House of Representatives to be chosen by the people, it allows the government to determine the means by which this choice is made.<sup>107</sup> Indeed, it seemed that Chief Justice Gleeson wanted to use the case as an opportunity to show just how committed the Australian Constitution is to the doctrine of Parliamentary sovereignty; if, he seemed to argue, the Constitution leaves it to Parliament to devise the machinery of democracy, then Parliamentary authority must be logically prior to respect for democratic values and cannot rest on conformity with them.<sup>108</sup>

This point was quietly picked up by the three-judge plurality, as well as Justice Heydon (writing in dissent). They emphasized that democracy is a work-in-progress, an on-going experiment, and that government must be free to try new approaches for administering democracy without fear that, having tried one technique, it will be locked into that approach for perpetuity. The plurality remarked:

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and Referendum Amendment (Electoral Integrity and Other Measures) Act, 2006 (Cth).

105. *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162.

106. *Id.* at paras. 1-2.

107. *Id.* at paras. 4-6.

108. The trouble with this reasoning is that Chief Justice Gleeson did not explore the conditions of the framers' respect for Parliamentary sovereignty; in particular, he did not consider whether that respect might have been premised on the tradition of democracy in Britain. Such a question is important: if a robust democracy was a condition for the framers' commitment to Parliamentary sovereignty, then they may have perceived the authority of Parliament as depending to some extent upon the creation of institutions that would strengthen the connection between law-making and popular will as much as possible. This, in turn, affects the way in which we should read the phrase “directly chosen by the people of the State.” The problem with Chief Justice Gleeson's historical account, then, is not that it is historical, but that it is not historical enough – he provides just enough information to beg the question.

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The plaintiff's case proceeds on the footing that questions respecting the extent of the franchise and the manner of its exercise affect the fundamentals of a system of representative government. However, it has been remarked in this Court that in providing for those fundamentals the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution. Ultimately, the issues in the present case concern the relationship between the constitutionally mandated fundamentals and the scope for legislative evolution.<sup>109</sup>

Two points are worth mentioning about these comments. First, they tie neatly into the observation made by Chief Justice Gleeson that the Constitution does not specify how representatives are to be chosen by the people; it specifies only that Parliament is constitutionally required to devise institutions allowing them to make that choice. That being the case, it would be peculiar if the Constitution barred Parliament from experimenting with the institutional design of democracy so that it could be as efficient and robust as possible. The Constitution cannot be so short-sighted. That argument, however, has limited force. It can explain why Parliament ought to have the freedom to tinker with the mechanisms by which the people can make their choice. It is not obvious, however, that Parliament ought to have the same freedom to narrow the boundaries of "the people" itself.

This raises the second point. Though the above argument, in favor of institutional experimentation, emphasizes the need to give Parliament the freedom to determine how democracy can be made to work better, the question of whether a group or class is entitled to vote is not a proposition that can be tested empirically. It is a moral question that cannot be resolved with any amount of experimentation, but only through sustained reflection. The plurality did not speak of experimentation – only of "evolution."<sup>110</sup> That language suggests not just a process by which the legislature can tinker with the nuts and bolts of institutions, but a process of reflection whereby the implications of democratic principles themselves can be further explored and understood.<sup>111</sup> That reflective process, whereby the legislature must constantly confront its own (in)coherence as a representative body, is surely salutary; we want a legislature to have the power to expand the franchise – to follow the inclusive logic of democracy in the face of exclusionist traditions. This is surely what it means to have a legislature committed not only to the text but the spirit of the Constitution. Without this freedom, historically disadvantaged groups could never become full participants in the political community. It is not so obvious, though, why we should place much (if any) constitutional importance on the power of the legislature to *narrow* the class of persons who have the franchise. We may think that the state should be continually working to expand its (and

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109. *Roach*, 233 C.L.R. 162 at para. 45. See also Justice Heydon's remarks at para. 180.

110. *Id.* at para. 45.

111. This kind of evolution is the subject of Martha Nussbaum's recent work. See MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE* (2006).

our) moral horizons, and not perpetually second-guessing the advances it has made.<sup>112</sup>

### B. Universal Suffrage and the Standard of Review

As we have seen, various members of the Court stressed the idea that Parliament has a great deal of leeway in devising mechanisms by which representatives can be chosen by the people. No matter which mechanism is devised, though, Chief Justice Gleeson claimed that it must accommodate “universal suffrage.”<sup>113</sup> This sounds more impressive than it is – the Chief Justice quickly observed that there is nothing universal about universal suffrage. It permits exceptions. Parliament has leeway in determining which exceptions to recognize.<sup>114</sup> It must, however, have a “substantial reason” for limiting a group’s right to vote, inasmuch as “[a]n arbitrary exception would be inconsistent with choice by the people.”<sup>115</sup> This reasoning, on its face, is somewhat curious: if Parliament is entitled to devise exceptions to the right to vote—if it can do so without undermining the universality of “universal suffrage”—we might wonder why it must provide substantial reasons to justify the exception. After all, if “universal suffrage” by definition means something less than *universal* suffrage, then a person cannot make a valid constitutional objection to Parliament’s exception of certain groups solely on the basis that the exception makes the right to vote less than universal.<sup>116</sup> And, in the absence of a valid objection, there seems nothing for Parliament to justify. Before we can say that Parliament owes a justification, we would need to find something objectionable in the *kind* of exception it has crafted – in the kind of groups excluded from the franchise. Chief Justice Gleeson alludes to this very point when discussing the sort of reasons available to justify an exception:

It is difficult to accept that Parliament could now disenfranchise people on the ground of adherence to a particular religion. It could not, as it were, reverse Catholic emancipation. Ordinarily there would be no rational connection between religious faith and exclusion from that aspect of community membership involved

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112. This view of franchise reform is borne out by the manner in which current political debates about existing voter qualifications are structured, being phrased in terms of extending the right to vote (to those below the current age limit, or persons with mental impairment, or resident non-citizens, or expatriates), never as a claim about the legitimacy of disenfranchising a sector of the current electorate. Academic debate reflects a similar “universalizing” momentum. See, e.g., Kay Schriener, Lisa A. Ochs & Todd G. Shields, *The Last Suffrage Movement: Voting Rights for Persons with Cognitive and Emotional Disabilities*, 27 PUBLIUS 75 (1997); Claudio Lopez-Guerra, *Should Expatriates Vote?*, 13 J. POL. PHIL. 216 (2005); Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1464 (1998).

113. *Roach*, 233 C.L.R. 162 at para. 6.

114. *Id.* at paras. 6-7.

115. *Id.* at para. 8.

116. See *The People’s Choice*, *supra* note 8, at 136 (observing that the majority’s approach is “hamstrung by its circularity”).

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in participation, by voting, in the electoral process. It is easy to multiply examples of possible forms of disenfranchisement that would be identified readily as inconsistent with choice by the people, but other possible examples might be more doubtful. An arbitrary exception would be inconsistent with choice by the people. There would need to be some rationale for the exception; the definition of the excluded class or group would need to have a rational connection with the identification of community membership or with the capacity to exercise free choice. Citizenship, itself, could be a basis for discriminating between those who will and those who will not be permitted to vote. Citizens, being people who have been recognised as formal members of the community, would, if deprived temporarily of the right to vote, be excluded from the right to participate in the political life of the community in a most basic way. The rational connection between such exclusion and the identification of community membership for the purpose of the franchise might be found in conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right.<sup>117</sup>

This passage suggests that Parliament, when it provides “substantial reasons” for crafting an exception, does not purport to limit or curtail universal suffrage. Rather, it justifies disenfranchisement by denying that the Constitution guarantees the right to vote to the excluded group in the first place. It can make this argument by claiming that those who have been disenfranchised are outside the boundaries of the political community. To put the matter another way, “universal suffrage” is *truly universal* but only relative to a particular class of persons; namely, those who are members of the political community and have the capacity to exercise free choice. Those who are not members of that community may be denied the right to vote without offending either the principle of universal suffrage or sections 7 and 24 of the Constitution.

Those serving a sentence for a serious criminal offence, Chief Justice Gleeson claimed, fall into the category of persons who may be so excluded.<sup>118</sup> They fall into this category ostensibly because, by engaging in serious criminal conduct, they have implicitly rejected the notion that they owe responsibilities by virtue of their membership in the community. Without that sense of responsibility—that is, without respect for the community’s legal order—an offender is not *really* a member of the political community irrespective of his formal status as a citizen.<sup>119</sup> In making this argument, Chief Justice Gleeson drew upon Justice Gonthier’s opinion in *Sauvé*. Though he never explicitly acknowledged that Justice Gonthier was writing in dissent, Chief Justice Gleeson attempted to cast doubt on the extent to which the majority decision in *Sauvé* could inform the Court’s reasoning in *Roach*:

The litigation in *Sauvé* concerned an issue similar to the present, but the issue arose under a different legal regime. *The Canadian Charter of Rights and Freedoms*, in s3, guarantees every citizen the right to vote. Section 1, however,

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117. *Roach*, 233 C.L.R. 162 at para. 8.

118. *Id.* at para. 19.

119. *Id.* at para. 12.

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permits “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” This qualification requires both a rational connection between a constitutionally valid objective and the limitation in question, and also minimum impairment to the guaranteed right. It is this minimum impairment aspect of proportionality that necessitates close attention to the constitutional context in which that term is used. No doubt it is for that reason that the parties in the present case accepted that *Sauvé* (like the case of *Hirst* discussed below) turned upon the application of a legal standard that was different from the standard relevant to Australia. The Supreme Court of Canada had previously held that a blanket ban on voting by prisoners, regardless of the length of their sentences, violated the Charter. The legislature changed the law to deny the right to vote to all inmates serving sentences of two years or more. Dividing five-four, the Supreme Court of Canada again held that the legislation violated the Charter. The central issue was whether the s1 justification (involving the minimum impairment standard) had been made out.<sup>120</sup>

These remarks further flesh out the implications of the claim that legislatures have a great deal of leeway when determining who shall have the right to vote. Since legislatures may, but need not, exclude certain classes from the franchise, it follows that different legislatures may disagree as to the precise margins of the excluded classes though all provide a degree of inclusiveness necessary for a democratic society. The above passage suggests that, under the Canadian Charter, the government runs afoul of the Constitution not only when it violates some absolute minimum threshold of inclusiveness, but also when it fails to show that it has included as many people as possible given the pressing and substantial objectives which motivated the exclusion in the first place. The Australian Constitution imposes no such burden on the government, which can legislate as it likes so long as it does not violate the minimum threshold. The plurality quietly accepted this view when it formulated the “substantial reason” test, asking itself whether the exclusion of a group or class from the franchise is rationally connected to an objective consistent with representative government.<sup>121</sup> For this reason, both the plurality and Chief Justice Gleeson made a number of large claims about the limited extent to which constitutional reasoning can be transplanted from one jurisdiction to another.<sup>122</sup>

Although the plurality and Chief Justice Gleeson were quite right that constitutional context matters, they gravely misrepresented the issue in *Sauvé*. That case indeed turned on the application of section 1 of the Charter. It was decided, however, not on the basis of minimal impairment, but rather on the basis that the government showed no *rational connection* between the disenfranchising legislation in issue and the government’s objective of

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120. *Id.* at para. 15.

121. *Id.* at para. 85.

122. *Id.* at paras. 17, 101. *See also* the dissenting remarks of Justice Hayne at paras. 159-166. Such claims bear a striking resemblance to arguments made by Justice Scalia in *Roper v. Simmons*, 543 U.S. 551 (2005).

encouraging respect for the law.<sup>123</sup> The majority in *Sauvé* did not rule that the legislature disenfranchised too many people, but that the government failed to justify disenfranchising *anyone at all*. According to the majority in *Sauvé*, the government could only use section 1 to justify burdening the right to vote to a certain degree – not to justify removing the right to vote altogether. The *Roach* plurality's mistake would make no difference if the proffered objective in *Sauvé* was different from that provided in *Roach*. It appears, however, that they are the same. The *Sauvé* majority's reasoning, therefore, cuts to the heart of the argument relied upon by the plurality and Gleeson C.J. Since they misunderstood that reasoning, they provided no retort.

Much of the three-judge plurality's decision, like that of Justice Hayne, dwells on how the *framers* understood the right to vote. The plurality observed that, historically, it was thought acceptable and appropriate to exclude from the franchise those convicted of serious criminal offences, since such people lacked the character to participate in matters pertaining to the public interest. It was largely on this basis that the plurality concluded that the challenged provision failed to pass constitutional muster. Like Chief Justice Gleeson, the plurality simply concluded that the legislation failed to distinguish between the different levels of culpability among offenders.<sup>124</sup> Unlike Chief Justice Gleeson, or the Supreme Court of Canada in *Sauvé*, the *Roach* plurality did not ground its decision in a conceptual analysis of the relationship between voting, character, and citizenship. Rather, it based its decision on the simple failure of the legislation to conform to the framers' intentions. The plurality briefly noted that prisoners remain citizens, and that the Constitution envisages their re-integration into the community.<sup>125</sup> It did not, though, say why the Constitution would envisage such a thing or why it is a fact worth mentioning. We might suppose that the plurality was alluding to the sort of social contract analysis undertaken by the Supreme Court of Canada—perhaps suggesting *sub silentio* that the framers of the Australian Constitution would have been heavily influenced by that kind of political theory—but this is unclear. In any case, history rather than theory seems to do most of the heavy lifting in the plurality opinion.

Ultimately, though both the plurality and Chief Justice Gleeson found that the legislation in issue violated the Constitution, both also accepted that Parliament *could* disenfranchise serious offenders. The plurality upheld the earlier legislation which disenfranchised offenders serving a sentence of three years or more.<sup>126</sup> This legislation, the plurality concluded, sufficiently distinguished between serious and non-serious offenders.<sup>127</sup> Chief Justice

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123. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 at para. 53 (Can.).

124. *Roach*, 233 C.L.R. 162 at paras. 90, 102.

125. *Id.* at para. 84.

126. *Id.* at para. 102.

127. *Id.* at paras. 101-102.

Gleeson suggested that the Constitution *might* allow Parliament to disenfranchise many offenders sentenced to less than three years on the basis that they too could be regarded as “serious offenders.”<sup>128</sup> The dissenting opinions, therefore, have much in common with the plurality and concurring opinions. Indeed, one might argue that the dissenting opinions simply apply the logic of the “substantial reasons” test used by the plurality and Chief Justice Gleeson. Both the plurality and Chief Justice Gleeson seemed to accept that encouraging civic responsibility represents an objective consistent with representative democracy.<sup>129</sup> Both accepted, moreover, that the substantial reasons test simply required the government to show that a rational connection existed between disenfranchisement and that objective.<sup>130</sup> But why think that the government cannot encourage a sense of civic responsibility by disenfranchising non-serious offenders? They are, after all, still *offenders*. If we accept that the duty to obey the law rests on some sort of social contract, non-serious offenders have broken that contract just as surely as any others. By holding that the disenfranchisement of serious offenders satisfied the rational connection test, while simultaneously holding that there was nothing more than the rational connection test, the plurality and Chief Justice Gleeson seem committed to upholding the legislation challenged in *Roach*.

## V.

### SOME COMMON THEMES

The decisions in *Sauvé*, *NICRO*, *Hirst*, and *Roach* are grounded in different forms and standards of reasoning. Nonetheless, we can detect a number of themes and issues which the courts all confronted to a greater or lesser extent.

#### A. Pyrrhic Victories?

It is worth observing at the outset that, although legislation was struck down or declared incompatible in all four cases, none confidently stand for the proposition that the broad disenfranchisement of prisoners is constitutionally problematic. Although all four courts emphasized the importance of the right to vote, none were prepared to treat disenfranchisement as inherently incompatible with it.<sup>131</sup> *Sauvé* was decided by a narrow 5:4 majority. In *NICRO*, the South

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128. *Id.* at para. 19.

129. *Id.* at paras. 18-9, 89, 101-2.

130. *Id.* at para. 85.

131. See *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, paras. 9, 14 (Can.) (per McLachlin, C.J.) (The right to vote is “fundamental to” and “a cornerstone of our democracy”); *Minister for Home Affairs v Nat’l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.) (per Chaskalson, C.J.) (“The right to vote is foundational to democracy.... It is for us a precious right which must be vigilantly respected and

African Constitutional Court invalidated the legislation in issue only because the government was unprepared to justify the claim that the disenfranchisement of prisoners could inculcate a sense of civic duty; it hedged its bets that a more compelling argument could be made in another case. Furthermore, the government can still rely on *dicta* from *August* that the disenfranchisement of prisoners is probably justifiable to some extent. The European Court of Human Rights, in *Hirst*, heavily relied on the legislature's apparent failure to critically reflect upon its objectives when drafting the legislation.<sup>132</sup> The Court did not suggest that those objectives were indefensible or that they are inherently illegitimate. The Court's superficial analysis of the government's stated objectives leaves open the possibility that those objectives could justify the disenfranchisement of many prisoners (though a blanket ban is likely off the table). Finally, the Australian High Court in *Roach* struck down one disenfranchising statute, but upheld another, and Chief Justice Gleeson appeared unwilling to say that the statute could not have gone even further without offending the Constitution.<sup>133</sup>

*B. The Value of Institutional Experimentation and Resource-Based Arguments*

All the cases discuss the extent to which legislatures should be free to experiment with alternative means of delivering free elections. In *Hirst*, the European Court of Human Rights implicitly deferred to the United Kingdom's claim that it could achieve its objective of encouraging civic responsibility by disenfranchising prisoners, and it indicated a willingness to defer to member states with respect to decisions about how far the right to vote could be limited to achieve that objective.<sup>134</sup> This deference—rooted in the Convention doctrine of the margin of appreciation—was grounded in the view that free elections ultimately promote a collective interest, and that domestic legislatures, not courts, are uniquely well-positioned to decide how that interest can best be advanced.<sup>135</sup> The Australian High Court, in *Roach*, likewise stressed that courts should defer to the legislative determinations regarding the manner in which

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protected"); *Hirst v. United Kingdom (No.2)*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 at paras. 58-59 (2006) (observing that the right "is crucial to establishing and maintaining the foundations of an effective and meaningful democracy" and "is not a privilege"). *Roach*, 233 C.L.R. 162, provides—unsurprisingly, given the absence of a tradition of explicit constitutional rights in Australia—the least enthusiastic acknowledgement of the constitutional status of the right to vote. See para. 7 (per Gleeson, C.J.) (acknowledging that the Constitution's provision for government "by the people" has "come to be a constitutional protection of the right to vote") and para. 86 (Gummow, J.) (observing that "this case concerns not the existence of an individual right, but rather the extent of the limitations upon legislative power derived from the text and structure of the Constitution").

132. See *Hirst*, 42 Eur. H.R. Rep. 41 (2006).

133. *Roach*, 233 C.L.R. 162 at para. 19.

134. See *Hirst*, 42 Eur. H.R. Rep. 41 (2006).

135. See *id.*

elections are administered, and the kinds of people who should be permitted to participate in them.<sup>136</sup> In *Roach*, this deference was justified through an appeal to “parliamentary sovereignty” rather than a “margin of appreciation.”<sup>137</sup> The effect, however, is the same. To be sure, both *Hirst* and *Roach* rest on the premise that legislatures cannot have *unlimited* authority to tinker with the voting rolls – that, *e.g.*, the blanket disenfranchisement of prisoners represents a bridge too far. At the same time, though, the courts in both cases have trouble explaining why this kind of broad disenfranchisement is impermissible. This difficulty is tied, in both cases, to a lack of theoretical engagement with the respective legislatures’ stated objectives.

*NICRO* and the majority opinion in *Sauvé* show the least deference to legislatures, and this lack of deference is directly tied to doubts—whether implied or explicit—about the extent to which lawmakers need the freedom to engage in institutional experimentation. In *NICRO*, the South African government explicitly justified its claim to deference on the basis that the resources needed to make prisoner voting possible would be better allocated elsewhere.<sup>138</sup> Among the four cases we have examined, *NICRO* was the only case where the government stated this kind of resource-based objective. As we have seen, the Constitutional Court rejected it as a valid objective, at least in the context of a blanket ban. This is understandable: a government could always save money by not holding elections, and it seems wrong to allow mere frugality to justify sweeping away democracy altogether or to constructively disenfranchise whole classes. We should acknowledge, though, that the government did not present any evidence that special economic conditions compelled the government to make the choices it made, and that this was not the ideal case for deciding whether economic conditions can *ever* justify restrictions on the manner in which the right to vote may be exercised. Reasonable people may disagree on that point, especially in a country like South Africa, where scarce resources are needed to combat many pressing social concerns like housing and crime control.<sup>139</sup> In any event, the *NICRO* Court clearly indicated that it will turn a skeptical eye to such arguments when and if they are made

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136. See *Roach*, 233 C.L.R. 162 at para. 102.

137. See *id.*

138. See *Minister for Home Affairs v Nat’l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at para. 44 (S. Afr.).

139. Consider the Supreme Court of Canada’s decision in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 (Can.), where resource-based arguments were successfully used to justify a limitation on the right to equality. See, especially, para. 75:

The financial health of the Province is the golden goose on which all else relies. The government in 1991 was not just debating rights versus dollars but rights versus hospital beds, rights versus layoffs, rights versus jobs, rights versus education and rights versus social welfare. The requirement to reduce expenditures, and the allocation of the necessary cuts, was undertaken to promote other values of a free and democratic society...

(and supported with an appropriate evidentiary foundation).

The majority's opinion in *Sauvé* most clearly emphasized that the state cannot experiment with voting entitlements of citizens: it must provide all citizens with the vote. The state can limit the right to vote, but this only means that it can burden each citizen's ability to exercise that right (for instance, by making voting stations further apart), not strip it away altogether. The suggestion is that the legislature can experiment with the way votes are cast and with some of the conditions under which votes are cast, but that it cannot experiment with the right of some citizens to vote in the first place. The Court in *NICRO* did not go so far, but neither did it reject the *Sauvé* majority's argument out of hand.

### C. Encouraging Civic Responsibility

In all four cases, the government relied on the claim that the disenfranchisement of at least some prisoners would encourage civic responsibility and respect for the rule of law (though, in South Africa, this argument was clearly used reluctantly and at the prodding of the Court itself). The argument met with mixed levels of success. It was utterly rejected by the majority in *Sauvé*, but accepted by the plurality in *Roach*. The Constitutional Court in *NICRO* was receptive to the claim, but the government could not assert it forcefully enough and only the dissent accepted it outright. The Court in *Hirst* avoided addressing the merits of this argument altogether.

The argument is tightly bound to the other themes running through the cases.<sup>140</sup> Obviously, the government invoked the need to inculcate civic responsibility to buttress its claim that it could reasonably fiddle with democratic institutions. More than this, though, the civic responsibility argument implicitly claims that the state is entitled to restrict the vote to citizens satisfying a test of moral fitness, and in this sense implicates what it means for a democracy to feature "universal suffrage." Furthermore, prisoner disenfranchisement is said to inform citizens' collective sense of civic responsibility because it reinforces the existence of a social contract.

As Justice Gonthier's analysis in *Sauvé* shows, the civic responsibility argument presupposes that, by breaching the criminal law, an offender has removed herself from the community by failing to acknowledge her moral

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140. The argument was raised in *Sauvé*, *Hirst* and *Roach* in tandem with the distinct claim that disenfranchisement constitutes a supplementary form of criminal punishment (conceptualized as a straight consequence of the act of offending rather than as an idea about a deeper sort of civic irresponsibility). The court in each case was unenthusiastic about the merits of this claim, preferring instead to concentrate on the argument that the disenfranchisement is punitive in a broader sense that does not depend on its characterization as a formal criminal law punishment. See Christopher P. Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 THE REV. OF POLITICS 277 (1998) for an argument (in defense of a voting ban) founding on a connection between the ideas of punishment and civic virtue.

responsibilities to it.<sup>141</sup> The argument is not implausible. It is, as we have seen, associated with influential contractarian arguments for a duty to obey the law. Moreover, we noted in the discussion of *Sauvé* that we can deny the force of the civic responsibility argument only by begging a series of questions that the majority did not directly confront.

If the civic responsibility argument has force, however, it also tends to prove too much: if true, it appears to support the conclusion that the government can disenfranchise not only *some* criminal offenders, but *all* of them. That, in the end, may be its greatest weakness. The respective courts were reluctant to say that the state is justified in disenfranchising an offender simply because she has committed *any* criminal offence; that an offender can be treated as having divorced herself from the community by committing offences that we typically regard as trivial. Hence, the courts in *Hirst* and *Roach* both found the blanket nature of the disenfranchisement fatal to the constitutionality of the law in question, though neither regarded the civic responsibility argument problematic in itself.

It is quite understandable that the courts would prefer not to say that the violation of the criminal law *per se* makes a person morally unfit to vote (and therefore susceptible to disenfranchisement). After all, everyone commits some criminal offences *sometimes*, though they are not necessarily prosecuted for their criminal conduct. To avoid the conclusion that anyone can be deprived of the right to vote on grounds of moral unfitness, we need a principled basis for distinguishing serious criminal offences from less serious ones. The respective governments did not provide such a basis in any of the cases reviewed. As a result, they were effectively compelled by the force of their own reasoning to make the sweeping claim that they had the authority to deny the franchise to a whole class of citizens.

There is a further, decidedly awkward question to ask: if criminal offenders are morally unfit to vote, how does a prison sentence improve their moral fitness? Justice Gonthier appeared to say that the completion of a sentence would lead to the offender's return—both physically and symbolically—to the community.<sup>142</sup> That is, however, mysterious. If we are to avoid concluding that the disenfranchisement of prisoners represents the creation of a moral fitness test that anyone can fail, we need a theory of civic responsibility much more sophisticated than anything argued in any of the four cases – including *Sauvé*.

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141. With respect to the legislative schemes discussed here, offending is accompanied by a temporary suspension of membership, rather than its permanent loss. This may explain the observation by the *Roach* majority that “[p]risoners who are citizens and members of the Australian community remain so” despite the Court’s endorsement of a ban on those serving sentences of three years or more. *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162 at para. 84.

142. *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 at para. 120 (Can.).

*D. Engagement with the Implied Social Contract*

In each of the four jurisdictions we have examined, the government justified the disenfranchisement of prisoners at least in part on the basis that doing so would encourage civic responsibility among citizens. The presupposition, of course, is that citizens *ought* to feel some sort of civic duty; that prisoner disenfranchisement reveals a moral obligation that would otherwise exist anyway. This obligation is typically grounded in the idea of a social contract.<sup>143</sup> The precise nature of that contract is most hotly and explicitly contested in *Sauvé*.

As we have seen, the majority in *Sauvé* partly rested its conclusion, that there was no rational connection between the disenfranchising legislation in issue and the government's objective of encouraging civic responsibility, on the premise that Canadian citizens contract into a particular *kind* of legal order. Specifically, they contract into a legal order in which authority flows from "the people" to its representatives, and not the other way around.<sup>144</sup> Because the government takes its authority from the vote, it cannot pick and choose who is entitled to vote.<sup>145</sup>

The dissenting judges in *Sauvé*, on the other hand, took the view that the government could choose to enhance respect for law (as we have said, "in the thin sense") by appealing to nothing more than the value of stability and order; *i.e.*, to the primary good of having a "sovereign" empowered to impose order from above. On this view of the legal order, sovereignty has logical priority over citizenship and the franchise, and so the government has the authority to decide whether certain classes should have the vote in the first place. Justice Gonthier, writing the dissenting opinion in *Sauvé*, expounded this view chiefly to underscore its reasonableness – that is, to establish that this was one of several reasonable ways to envision the social contract in Canada, and that the Court should defer to the government on this point of political philosophy.<sup>146</sup> We have seen that this authority-centered model of the social contract has been enthusiastically adopted by various other judges. Justice Madala, dissenting in *NICRO*, suggested that the government was reasonable in not wanting to "reward" criminal conduct with the franchise – implicitly reasoning that the

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143. This is not to say that it must be grounded in contractarian premises. It may, for example, be grounded in republican ideas of civic virtue. See Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045 (2002) (distinguishing "contractarian liberal" and "civic-virtue republican" arguments, and arguing that neither justifies the ban). This distinction was not made in the cases discussed here, and is not pursued in our discussion.

144. See *Sauvé*, 3 S.C.R. 519 at para. 31.

145. *Id.* Nor, arguably, should it regard prisoners as "[r]epudiating the entire social contract with a single felonious breach." Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 131 (2003).

146. *Sauvé*, 3 S.C.R. 519 at paras. 101-02 (Gonthier, J., dissenting).

franchise is a privilege conferred by the government.<sup>147</sup> Chief Justice Gleeson, concurring in *Roach*, likewise endorsed the reasoning described by Justice Gonthier in *Sauvé*.<sup>148</sup>

Indeed, the *Sauvé* majority's reasoning has not traveled nearly as well as that of the *Sauvé* dissent. The *NICRO* majority cited Chief Justice McLachlin's opinion to illustrate the complexity of the questions raised by the government's objective of increasing civic responsibility, but it did not explicitly endorse the way in which the *Sauvé* majority resolved them.<sup>149</sup> The *Hirst* majority chose not to adopt any particular conception of the social contract at all, tacitly following Justice Gonthier on the narrow point that the state deserves deference on questions of political philosophy.<sup>150</sup> The plurality of the Australian High Court, in *Roach*, appears to have misunderstood the reasoning in *Sauvé* altogether, and in any event grounds its judgment in history rather than philosophy.

The majority opinions in *NICRO* and *Hirst*, and the plurality opinion in *Roach*, are at best ambivalent towards the highly rights-centered conception of the social contract urged by Chief Justice McLachlin, though they all reach similar conclusions as that reached in *Sauvé* and (with the exception of *Roach*) cite the *Sauvé* majority opinion extensively. High courts outside Canada have been quite reluctant to require the state in their respective jurisdictions to construct objectives that fit a particular philosophical model of the social contract. Unsurprisingly, this reluctance increases or decreases depending on the nature of the (quasi-)constitutional document in play. In Canada, section 1 of the Charter specifically avers to the rights-centeredness of Canadian legal and political discourse, making certain models of the social contract—those which primarily emphasize authority and security—markedly less tenable.<sup>151</sup> The European Convention of Human Rights must accommodate a range of cultural attitudes towards sovereignty and rights, and so it is perhaps no great surprise that the Court in *Hirst* opted not to prefer one conception of the social contract over several others. The Australian Constitution, meanwhile, is not overtly rights-centered at all, and so the Court in *Roach* scarcely addressed the theoretical issues.

There is, indeed, something rather peculiar about the suggestion that the courts can forbid the state from making the philosophical claim that an interest in stability and order provides a reason for citizens to respect the law whether or not they have contributed to the process by which it was made. Either it

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147. See *Minister for Home Affairs v Nat'l Inst. for Crime Prevention and the Reintegration of Offenders (NICRO)* 2004 (5) BCLR 445 (CC) at para. 117 (S. Afr.).

148. See *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162 at para.19.

149. See *NICRO* 2004 (5) BCLR 445 (CC) at paras. 61-62.

150. See *Hirst v. United Kingdom (No.2)*, App. No. 74025/01, 42 Eur. H.R. Rep. 41 (2006).

151. See *Canadian Charter*, *supra* note 10, § 1.

provides a reason or it does not. If it does, then it is startlingly artificial for a court to pretend otherwise just because the legal order in question recognizes constitutional rights. Throughout the “war on terror,” many have argued that an existential threat to the state can justify the suspension of rights; that the Constitution is not a “suicide pact.”<sup>152</sup> The implicit premise, of course, is that the state has logical priority over the rights-claims to which it is ordinarily subject. It is, therefore, far from obvious that a quasi-Hobbesian case for civic duty loses all its resonance in a constitutional democracy.

We may find it odd to see the *Sauvé* majority explicitly ruling out certain kinds of philosophical arguments, but it is also striking that the courts which least engaged the theoretical issues were also those least equipped to decide the very practical question of whether the government’s objectives were rationally connected to the legislation in issue. The proportionality inquiry in *Hirst* was virtually incoherent because it refused to decide whether the government’s objective could be rationally connected to the disenfranchisement of prisoners; it could not decide that question without asking itself (a la the majority in *Sauvé*) how civic responsibility could be justified in a modern constitutional democracy. The majority in *NICRO* overtly acknowledged that it could not assess the government’s reasoning without a higher level of argumentation.<sup>153</sup>

*Roach* is intriguing because most of the judges in that case attempted to decide it with reference to history rather than philosophy; *i.e.*, by showing that the framers of the Australian Constitution would have thought that the disenfranchisement of prisoners was tied to a concern about their moral fitness. It refused to engage on a more theoretical level with what it means to be morally fit enough to vote – to show civic responsibility. This failure hamstrung the *Roach* plurality in its attempt to articulate a coherent basis for drawing a constitutional line at the blanket disenfranchisement of prisoners, but not elsewhere.

### E. Universal Suffrage

The idea of civic responsibility is closely connected to both citizenship and suffrage. If a person is responsible, she must be responsible *to someone*.<sup>154</sup> In the case of civic responsibility, one is responsible to a particular political community. To be a citizen is ostensibly to be a member of the class to whom civic responsibility is owed, and also a member of the class owing it. Voting is one important way in which citizens exercise civic responsibility, and so suffrage has a close symbolic relationship to citizenship. It is a mark of one’s

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152. See *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson J., dissenting); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

153. See, e.g., *NICRO* 2004 (5) BCLR 445 (CC) at paras. 65-67.

154. See R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW*, ch. 2 (2007).

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membership in a community of self-rulers. This community can, however, re-define itself: voters may lose their membership if they fail to meet the standards prescribed by the polity. This means that a prisoner voting ban may be justified in terms which emphasize ideas of suffrage as membership of a community of deserving citizens, rather than as a purely legal entitlement to participate in periodic elections. The difficulty for the courts is that the constitutional right to vote exists principally to protect against such selective, merit-based distributions of the franchise. Courts charged with enforcing the right to vote must provide an account of the franchise which is compatible with the emphasis of the rights-tradition on equal and near-universal distribution of the franchise as a matter of inherent human entitlement rather than awarded civic status. Constitutional rights cannot comfortably accommodate the notion of merit hidden within descriptions of suffrage as a reward for being an observant member of the polity.

Prisoner disenfranchisement poses a challenge for courts precisely because it plays on a powerful and surviving intuition that moral fitness or worth (summarized in such bans as conformity to the criminal law) might legitimately determine who votes. This intuition is arguably so strong because it echoes ongoing legislative, judicial and popular awareness that the right to vote is at best an approximate translation of ideas about suffrage. While no legislator or judge would proclaim hostility to an express constitutional guarantee of the right to vote, it is conceivable that such actors might wish to recognize aspects of the suffrage ideal which voting rights doctrine threatens to undermine.

The prisoner disenfranchisement cases, to a greater or lesser extent, all ask what it means for a democracy to have “universal” suffrage. The courts all agree that a modern democracy must have universal suffrage if it is to count as a democracy in the first place, and that the law in their respective jurisdictions presupposes it. Nevertheless, all permit the disenfranchisement of segments of the population. As we noted in the discussion of *Sauvé*, the problem arises primarily because the presence of foreign nationals within domestic borders complicates any claim that, in a modern democracy, those subject to law contribute to its creation. Either the restriction of the franchise to citizens is inconsistent with that claim, or the franchise by definition extends only to citizens. The courts have invariably taken the second view of the matter in the cases we have reviewed. They have, however, disagreed about the basis for restricting the franchise to citizens, and this has led to disputes over whether certain classes of *citizens* may be disenfranchised. Thus, although the entire Supreme Court of Canada agreed that only citizens can have an unqualified right to vote, the dissenting judges on that Court explained that position by claiming that citizens have a particular characteristic which makes them presumptively, but not invariably, suitable for the franchise. The *Sauvé* dissent used that reasoning, in turn, to explain how the government could justify disenfranchising certain criminal offenders. Chief Justice Gleeson then went further with this reasoning in *Roach*, using it to justify the disenfranchisement of a wider class of

criminal offenders, as well as the mentally impaired. The other members of the *Roach* Court likewise operated on the assumption that Parliament could disenfranchise whole classes of society without affecting the universality of the franchise.

This reasoning, of course, conceptually places the exclusion of groups and classes at the heart of democracy itself. At its most inclusive, it excludes all foreign nationals living within domestic borders. As we have already suggested, this problematizes (at least to some extent) any claim that the law in democratic societies has a special claim to legitimacy which the law in non-democratic societies lacks.<sup>155</sup>

As we have seen, the exclusion of foreign nationals from the franchise on the basis of their non-membership in the political community anticipates the exclusion of some citizens on the basis of their own lack of membership (at least, in some thicker sense than mere possession of citizenship). The judges that have acknowledged the legitimacy of that kind of disenfranchisement have done so on the basis that some citizens do not belong to the political community of the country in question. Obviously, though, reasonable people can disagree about the sorts of values and attitudes that a member of the political community should be expected to have. Presumably, given that the four cases we have reviewed all arose in *liberal* democratic societies—meaning that they are ostensibly neutral as to competing conceptions of the good life—membership cannot be premised on the endorsement of a particular lifestyle.<sup>156</sup> At the same time, however, it must involve something more than mere acquiescence to the law's authority since, as we suggested earlier, a person may experience law as capable of creating obligations for her even if she had no part in the law-forming process. We would not, without substantially more theoretical engagement, claim that this tension is irresolvable. It is, however, real.<sup>157</sup>

## VI.

### CONCLUSION

Together, the four decisions we have reviewed show an intriguing cross-section of judicial attitudes towards the nature of democracy, the structure of rights and obligations in a democratic society, and the role of legislatures in fashioning and maintaining democratic institutions. They also reveal varying

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155. See our above discussion of *Sauvé*.

156. Thus, both Ronald Dworkin and John Rawls have justified their respective brands of liberalism by ostensibly appealing to values that do not presuppose a particular conception of the good. See JOHN RAWLS, *POLITICAL LIBERALISM* (1996); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000). See also Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 *YALE L.J.* 1197 (1997) (discussing the tension between liberal toleration and the practice of exclusion).

157. See Heather Lardy, *Citizenship and the Right to Vote*, 17 *O.J.L.S.* 75 (1995).

levels of intellectual engagement with theoretical and historical questions. Although there are grounds for criticizing this limited engagement, the reasons for it are clear. Courts confronted with prisoner disenfranchisement claims face two challenges. The first and most obvious is the need to provide reasons for their decisions which connect the relevant democratic ideas and practices to constitutional doctrine. In this respect the task they face is the same as that confronted in any case involving a constitutional right practiced in the political sphere. The cases reviewed demonstrate the courts' limited success in framing such reasons. The second challenge is less obvious and more difficult; it is also specific to the jurisprudence of the right to vote. Prisoner disenfranchisement is an aspect of democratic practice which poses a challenge for political theory as well as for constitutional law. Courts trying to resolve the constitutional questions are generally aware of the need to conceptualize the issues in terms which accommodate the reflections of political philosophy, even if those ideas are not fully or satisfactorily explored in their judgments. The problem the courts face is that disenfranchisement is a practice that is poorly defended by political theory. The accounts of reasons for excluding some groups from the franchise tend to be hazardously indeterminate, where they are offered at all. The model of universal suffrage is generally proffered either as an uncontentious description of an attained goal, or as a standard to which democracies unquestioningly aspire.<sup>158</sup> It is in this atmosphere of casual disregard of the need to conceptualize disenfranchisement as a problem about how democracy is understood—and not just about how it happens to be practiced—that courts are expected to determine whether and how its use can be constitutionally limited.

Legislatures may be better-suited to addressing these practical and theoretical questions, but vested interests, limited parliamentary time, and other political pressures make that unlikely.<sup>159</sup> The disenfranchised may have more opportunity to start a meaningful, principled debate about suffrage and democracy by engaging in constitutional litigation. Yet, despite the personal victories for the claimants in the cases we have discussed, the courts are clearly reluctant to hold that prisoners are entitled to exercise the franchise. This can largely be attributed to the slipperiness of “universal suffrage.” The “universe” to which it refers is not the universe of people affected by the law in a given jurisdiction, but the universe of people who have a moral claim on others in a particular political community. It follows that the courts cannot identify

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158. See Ludvig Beckman, *Who Should Vote? Conceptualizing Universal Suffrage in Studies of Democracy*, 15 DEMOCRATIZATION 29 (2008) (suggesting a basis for normative analysis of suffrage distribution to counter this tendency).

159. The UK Government has clearly been reluctant to propose reforms in response to the *Hirst* judgment. It has so far failed to move the process beyond “consultation.” See Susan Easton, *Electing the Electorate: The Problem of Prisoner Disenfranchisement*, 69 MODERN L.R. 443 (2006); Robert Jago & Jane Marriott, *Citizenship or Civic Death? Extending the Franchise to Convicted Prisoners*, 5 WEB JCLI (2007).

violations of the right to vote without making some kind of statement about the conditions under which individuals have requisite “moral standing.” Because the laws that construct the electorate also purport to define the political community—to define the class of moral claimants—they do not only threaten the right to vote. They can delimit the circumstances under which the right to vote applies in the first place. The courts’ challenge is to lay down constitutional principles capable of circumscribing the power of legislatures to define the right to vote itself, without impugning the legislatures’ legitimate authority over matters of social policy. The four cases discussed here engage with this task to varying degrees, but there is more work to be done.