

*Prisoner Voting in Canada and Australia: The Construction of Constitutional Decisions*

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In recent years, a great deal of scholarly attention has been paid to the issue of prisoner disenfranchisement (American Civil Liberties Union, 2006; Banfield, 2008; Behrens, 2004; Knopff and Morton, 1992; Manfredi, 1996, 1998; Rottinghaus and Baldwin, 2007). Much of the debate stems from recent high court rulings over the constitutionality of prisoner voting. Specifically, in countries with restrictive or blanket prisoner disenfranchisement, litigation has been used as a successful strategy to help broaden the franchise for prisoners. Countries which employed this technique include: South Africa, Canada, the United Kingdom, and Australia, among others (*Sauvé v. Canada (Chief Electoral Officer)* 2002; *Minister of Home Affairs v NICRO*, 2004; *Hirst v United Kingdom (no. 2)*, 2005; *Roach v. Electoral Commissioner*, 2007).

The judgments delivered by the respective Courts indicate there are two major trends developing in common law countries with respect to prisoner voting. First, there is an overwhelming rejection of blanket disenfranchisement, but significant division among the justices over whether less sweeping disenfranchisement passes constitutional muster. I examine two such cases in detail: the recently delivered opinions in Canada and Australia.

In this paper I attempt to do a couple of things. Using a game-theoretic model, I attempt to show the strategic interactions between Courts and legislatures in the recent prisoner voting cases in Canada and Australia. In doing so, I attempt to answer a broader question of how judicial involvement changes the policy process, specifically, whether reasonable compromises aided or undermined by judicial intervention. The findings suggest that in both bill of rights and non-bill of rights countries, courts and legislatures engage in strategic decision making often with surprising results. However, only in countries with bill of rights enhanced judicial power is the reasonable policy compromise inhibited, whereas judicial intervention without a bill of rights fosters the type of inter-institutional dialogue suggested by judicial advocates.

### **Prisoner Voting in Commonweal Countries**

In the late 20<sup>th</sup> century, there has been a movement to improve the conditions of prisoners. Much of this debate is facilitated by judicial involvement in the area of prisoner rights (Adlerstein, 2001; Branham, 2001; Mathews, 2002; Smith and Nelson, 2002). Of specific interest in this paper is the issue of prisoner enfranchisement where, in recent years, there has been a great deal of judicial activity. What follows is a brief survey of prisoner voting rights in common law countries, which help set the broader international debate.

The United States remains an anomaly in common law jurisdictions regarding prisoner voting. Since criminal law is a state matter, disenfranchisement policy varies widely from state to state. According to the *Sentencing Project*, 48 states and the District of Columbia prohibit inmates from voting for felony offences. Additionally, 35 states

prohibit felons from voting while they are on parole, and 30 states exclude felon probation voting. Two states, Virginia and Kentucky deny voting to all ex-offenders who have completed their sentences and nine others deny voting to certain types of offenders or institute a waiting period (e.g. two years in Nebraska) before restoring voting rights for felony offenders. Only two states – Maine and Vermont – allow prisoners to vote (Sentencing Project, 2008).

The case of *Richardson v. Ramirez* remains the landmark US Supreme Court case dealing with prisoner voting. Section 2 of the 14<sup>th</sup> Amendment threatened former slave states with reduction in Congressional representation if they denied otherwise eligible voters from voting except in cases of “participation in rebellion or other crimes” (Askin, 2007, 875). The loss-of-representation provision was never enforced, even in the face of overt racial discrimination by southern states. Things changed, however, in 1974 when Justice Rehnquist (as he was then) writing for the majority ruled that states could deny voting rights to any person convicted of a crime.

In the aftermath of the 2000 Election, three significant challenges emerged to the ruling in *Richardson*. Appeals in the Eleventh and Second Circuits resulted in split opinions and rejected such appeals. The Ninth Circuit endorsed the argument presented, and remanded it back to the State of Washington district court for additional hearings. The Supreme Court denied *certiorari* from the Second and Eleventh Circuits (for longer discussions see: Behrens, 2004; Branham, 2001; Handelsman, 2005). To date, no prisoner disenfranchisement law has been found unconstitutional for violating the *Voting Rights Act*. A number of states, however, have attempted to liberalize their prisoner enfranchisement laws via legislation. For example, in 2001 Connecticut amended their disenfranchisement laws to restore voting rights to convicted felons on probation (McMiller, 2008).

Prisoner disenfranchisement in the United Kingdom dates back to the 1870s. In 2001 a British High Court decision upheld the ban on prisoner disenfranchisement, concluding that Parliament and not the Court should change the law (*Hirst v. HM Attorney General*, 2001; White, 2007). Said Justice Kennedy, “parliament has taken the view that for the period during which they are in custody convicted prisoners have forfeited their right to have a say in the way the country is governed” (White, 2007).

The British decision was appealed to the European Court of Human Rights (ECHR) and judgement was delivered in 2004. In *Hirst v. United Kingdom (no. 2)*, a 12-5 majority held “the severe measure of disenfranchisement must ... not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned” (*Hirst v United Kingdom (no. 2)*, 2005). Interestingly, the ECHR relied on comparative international law, specifically Canada and South Africa, when deciding that blanket disenfranchisement was a violation of the European Convention on Human Rights. They concluded that a “blanket disqualification [of prisoners], irrespective of sentence length and gravity of their offence” was unacceptable under Article 3 [right to free elections] of Protocol No. 1. The decision, however, left the door open for Westminster to pass a more narrowly

tailored prisoner disenfranchisement provision. The Court acknowledged that some abuses are so gross as to warrant disenfranchisement (ibid at 77).

Former British colonies have also engaged the constitutional validity of prisoner enfranchisement. In 1999, the Constitutional Court ruled that the state must provide the ability for prisoners to register and vote in the absence of preventative legislation. By not providing the ability to register, the state, “effectively disenfranchise[d] all prisoners without constitutional or statutory authority” (*August v. Electoral Commission*, 1999, at 22). The Court flagged this as an issue for the South African Parliament to consider noting, “Parliament cannot by its silence deprive any prisoner of the right to vote. Nor can its silence be interpreted to empower or require the Commission or the Court to decide which category of prisoners, if any, should be deprived of the vote” (ibid. at 33). Parliament responded by amending the 1998 *Electoral Act* disenfranchising anyone serving a “sentence of imprisonment without the option of paying a fine” (“Electoral Laws Amendment Act 34,” 2003). The amendment disenfranchised those prisoners who were serving a sentence, except those who were incarcerated in lieu of the inability to pay a fine. In 2004, the South African Court revisited the issue of prisoner disenfranchisement. In a 9-2 decision, they significantly broadened the 1999 *August* decision, rejecting disenfranchisement of any prisoner. The Court found there was no rational connection between the government’s objectives and the disenfranchisement of prisoners. The majority concluded “prisoners [have] the constitutional right to vote, and the Commission had no power to disenfranchise them by failing to make adequate provisions for this vote” (*Minister of Home Affairs v NICRO*, 2004, at 42).

New Zealand most recently addressed in the *Election Act 1993*. Prior to this the Electoral Act 1956 disenfranchised “any person detained in any penal institution pursuant to a conviction.” With the adoption of the *Bill of Rights Act 1990 (BORA)*, questions of compatibility between *BORA* and prisoner enfranchisement emerged. As a statutory bill of rights, legislation cannot be struck down by the High Court of New Zealand using *BORA*. Instead, a writ of inconsistency is issued and Parliament must decide whether to amend or repeal the offending statute (Hirschl, 2004, esp. 24-27). Prior to the debate in 1993, the Law Reform Division (the division in charge of bringing statute in line with *BORA*) requested an opinion on whether blanket disenfranchisement of prisoners was inconsistent with *BORA*. The Solicitor-General John McGrath (who later became a Supreme Court Justice), ruled that blanket disqualification of prisoners was a violation of Section 12 of *BORA*, and thus, must be amended by Parliament.<sup>1</sup> He suggested that “some differentiation on the basis of the seriousness of the offence [would] avoid the problem... That is, prisoners who following conviction have been sentenced to a term of three years or more should not be allowed to vote” (McGrath, 1992). This was the position adopted by the New Zealand Parliament and to date the constitutionality of prisoner disenfranchisement has not been addressed by the New Zealand High Court.

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<sup>1</sup> Section 12 [Electoral Rights] of the *Bill of Rights Act* reads *in toto*: Every New Zealand citizen who is of or over the age of 18 years: a) Has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and b) Is qualified for membership of the House of Representatives. (<http://www.hrc.co.nz/index.php?p=453>.)

It is clear from the cases above there are two international trends emerging. First, there is a trend by courts to broaden the franchise to include prisoners (except in the US). Second, there is a great deal of disagreement among justices as to where to draw the line for prisoner disenfranchisement. A substantial majority on the South African Court suggest no prisoner disenfranchisement is able to meet the constitutional threshold. Yet, a majority of 12 (of 17) of the European Court think a more finely tailored approach – something between blanket disenfranchisement and complete enfranchisement would be constitutional. Clearly there is reasonable disagreement over where to draw the line for the disenfranchisement of prisoners. In this regard, Canada and Australia are no exception.

Discussed below, prisoner voting in Australia has been a political football dating back to the late 1960s. In particular, prisoner disenfranchisement was a pet policy of the Howard government, with numerous failed attempts at blanket disenfranchisement. Similarly, in Canada the issue of prisoner voting has been before the Courts since the late 1990s with two high profile Supreme Court cases punctuating the debate. Before turning to that debate, some methodological considerations are addressed.

### **Methodological Considerations**

In a widely cited paper, Peter Hogg and Allison Bushell claim that the perceived power play by the Courts is not as bad as it seems. In fact, the claim that courts and legislatures are engaged in a type of “dialogue” which dates back to the times of the American founding grounded in checks and balances theory (Hogg and Bushell, 1997). Spawning a virtual sub-discipline in law and politics critics and supporters alike aligned themselves with the flaws and the merits of the metaphor (Hennigar, 2004; Hogg and Bushell, 1999; Hogg et al., 2007; Manfredi, 2004; Manfredi, 1999; Morton, 1999; Morton and Knopff, 2000). The Supreme Court of Canada endorsed this metaphor in the 1999 *Mills* decision (*R v. Mills*, 1999, at 57).

Tom Flanagan observes, “beyond the dialogue debate, which involves a large component of value judgment about judicial activism, lies the empirical task of understanding the relationship between Canadian Court and legislatures” (Flanagan, 2002, 139). This paper takes that challenge one step further, attempting to understand not only the relationship between Canadian courts and legislatures, but also Australian courts and legislatures.

Using a game theory approach, I employ a spatial model devised by American political scientists seeking to uncover the decision-making processes of Congress (Shepsle, 1997). Shepsle and Bonchek suggest a model called “legislators in robes” where, “judges, like other politicians have policy preference they seek to implement” (ibid. 422). To begin it is assumed that all policy preferences (in this case prisoner voting), can be arranged along a unidimensional interval (e.g. 0-100). We can assume that policies near 0 can be thought of as the extreme “liberal” position, whereas policies which near 100 can be thought of as the extreme “conservative” position. Over this interval all actors – legislative and judicial – have single peaked policy preferences. Although each chamber of the legislature has a complex internal organization, for simplicity, I assume each

institution is governed by simple majority rule. Critics of this approach suggest that in order to apply this theory, monumental leaps of faith have to be made because of assumed perfect information (Green, 1994). In the American system this is true however, because the case studies are Canada and Australia, a number of simplifying assumptions can be made.

Since lower parliamentary houses are dominated by the executive researchers only have to identify the ideal point of the Prime Minister ( $X_p$ ). This can be reasonably approximated through media reports, or recorded votes in Hansard. Similarly, because Supreme Courts are majority-rule institutions we can focus on the majority decision ( $X_j$ ) and the minority dissent (if there is one) ( $X_{jm}$ ). There is also the start point of the game, which in this case would be the policy status quo, or where the policy currently rests on the continuum ( $S_q$ ). In this simple setting then, we can see the impact of judicial oversight on what I call moderate policy compromise.

At the beginning of the game, we assume that the legislative status quo is in place. The legislature (Prime Minister) moves to change the act implementing policy  $X_p$ . The Court then decides whether to strike the policy on either constitutional or statutory grounds (for the purposes of this paper I focus on the former). If the Court decides that the policy is unconstitutional, the Court may either a: strike the legislation returning it to  $S_q$  or legislate resulting in  $X_j$ . If the legislature is dissatisfied with the outcome of the Court proceedings they can propose new legislation ( $X_p^*$ ). This allows the long-term study of policy evolution through multiple iterations of the game sequence (Shepsle, 1997, 425).

The other major methodological issue concerns how to operationalize the concept of policy moderation. The assumption of a unidimensional policy continuum makes this roadblock manageable. Issues like prisoner voting typically exhibit a well defined polar opposition between two ends, making it relatively easy to identify middle-ground positions that plausibly qualify as “moderate.” Applying this operationalization to the issue of prisoner voting rights, we find at one end of the policy continuum a blanket disqualification of anyone who is imprisoned for any purpose and for any length of time. This includes both the murderer and the petty offender serving a few days in jail in lieu of paying a fine. At the opposite end of the continuum is the enfranchisement of all prisoners, however serious the crime and however long the incarceration. In the “moderate middle” are politics that disqualify only “more serious” offenders as defined by their length of incarceration. The more or less contemporaneous treatment of this issue in Canada and Australia provides a convenient laboratory in which to conduct one test of the moderating influences of the respective high courts (for longer discussions of operationalizing moderation see: Banfield, 2007; 2008).

### **Prisoner Voting In Australia**

Since Federation, the Commonwealth Government has reserved the right to disenfranchise certain individuals. For example, in the 1902 *Franchise Act*, disenfranchised anyone “attained of treason ... under sentence or subject to be sentenced

for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer.” Beginning in 1968, there were several attempts to liberalise this law, including unsuccessful attempts to entrench a right to vote in the Australian constitution. The disenfranchisement of prisoners oscillated between one and five years, with both blanket disenfranchisement and complete enfranchisement proposed and defeated (Banfield, 2008).

Following the Howard Government’s successful 2004 re-election, in which they gained control over the Senate by one member, the issue of prisoner voting would again rise to the surface. In September 2005 the Joint Standing Committee on Electoral Matters (JSCEM) delivered its report entitled *Conduct of the 2004 Federal Election and Matters Related Thereto* (Smith, 2005). Among the recommendations of the Committee, was the recurring theme of prisoner disenfranchisement. The Committee recommended “that persons sentenced to a period of full-time imprisonment should not be allowed to a vote during that time and urges the Government to pursue this through legislative change as soon as possible” (ibid. 129).

On May 10 2006, in response to the JSCEM report, the Howard Government introduced the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*. During second reading Special Minister of State Gary Nairn outlined the government’s position: “[w]ith respect to prisoner voting, the government remains firmly of the view that people who commit offences against society sufficient to warrant a prison term should not, while they are serving that prison term, be entitled to vote and elect the leaders of the society whose laws they have disregarded” (Commonwealth of Australia, 10 May 2006). Blanket prisoner disenfranchisement was enshrined in the *Electoral and Referendum Amendment Act*, was assented to on June 22<sup>nd</sup> 2006, and disenfranchised approximately 20,000 prisoners (Hughes, 2006).

The Howard government’s amendment to disenfranchise all prisoners goes clearly goes against the international trend of broadening the franchise. Moreover, the blanket disqualification of prisoners is a position which receives little judicial support, but also ignores the long history of sentence-based disenfranchisement in Australia. The High Court challenge was brought by Vickie Lee Roach, a 49 year old aboriginal woman who was serving a sentence for negligently causing serious injury in a car accident. She was entitled (and required) to enrol on the electoral role, but because of her incarceration, she was unable to vote. She claimed this was a violation of sections 7 and 24 of the Constitution that members of the House of Representatives and the Senate are “directly chosen by the people.”

Constitutional case law had cultivated two rival conceptions of what Parliament could do in relation to the franchise. The first theory emphasized parliamentary supremacy in relation to the franchise. The alternative theory underscored the evolutionary nature of the constitution, in which changes become manifest over time through convention. Both conceptions focussed on sections 7, 24, 8, 51 (xxxvi), and 30 of the Constitution. Sections 7 and 24 require that members of the House of Representatives and the Senate, respectively, be chosen “directly by the people,” whereas sections 8, 51 (xxxvi), and 30

outline that Parliament has the responsibility for making the laws for the qualification of electors.

The first interpretation emphasizes the provisions that point to parliamentary sovereignty in relation to the franchise. In particular this interpretation focuses on the recurring constitutional phrase “until Parliament otherwise provides.”<sup>2</sup> Supporters of this view argue that it is clearly in the purview of the Commonwealth Parliament to broaden and restrict the franchise as the government sees fit. Indeed, the most important advances in the history of the Australian franchise were driven by the Commonwealth Parliament. For example, the most important features of Australian democracy: compulsory voting, preferential balloting, proportional representation in the Senate, are not constitutionally entrenched, but rather a function of legislative action (Galligan, 1995; Norberry, 2002; Uhr, 1998).

Constitutional case law underlines this point. In *Lange v Australian Broadcasting Corporation* (*Lange v Australian Broadcasting Corporation*, 1997) the High Court observed that the Constitution provides the “fundamental features of representative government,” but cautioned that a great deal of latitude is given to Parliament to fill in the details. In *McGinty v Western Australia* Chief Justice Brennan considered the phrase “directly chosen by the people” as admitting a requirement “of a franchise that is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them” (*McGinty v. Western Australia*, 1996, at 14). Finally, in *Mulholland v Electoral Commissioner* Chief Justice Gleeson remarked that the constitution has requirements for senators and members of the House of Representatives to be chosen “directly by the people.” However, this constitutional requirement only “imposes a basic condition of democratic processes but leaves substantial room for parliamentary choice and for change from time to time” (*Mulholland v Australian Electoral Commission* 2004, at 14). Taken as a whole, case law suggests that Parliament should be given substantial latitude in relation to the franchise.

The alternative interpretation relies on the evolutionary nature of the Constitution. To borrow a phrase from Canadian case law, “the constitution is a living tree capable of growth and expansion within its natural limits” (*Edwards v. A.G. of Canada*, 1930).<sup>3</sup> In this interpretation the Australian constitution has evolved in such a way as to entrench an implied right vote. This is not to suggest that the Justices have “read in” such a constitutional right, but rather the language of the constitution itself was broad enough to cultivate the development of the right.

Again, Australian public law had developed in such a way as to support this second view. In *McKinlay*, Justices McTiernan and Jacobs argued “the long established universal adult suffrage may now be recognized as a fact” (*McGinty v. Western Australia*, 1996, at 6). Moreover, the words “chosen by the people of the commonwealth” in section 24 were to be applied to different circumstances at different times (*ibid*, at 6). They concluded that

<sup>2</sup> By my count, the phrase “until Parliament otherwise provides” appears in the Australia Constitution 21 times. For the purposes of this paper, we are most interested in sections 7, 24, 30 and 51.

<sup>3</sup> I’m indebted to Rainer Knopff for drawing this line of constitutional thought to my attention.

universal adult suffrage was a long established fact, and anything less could not be described as choice by the people (ibid.). Justice Toohey in *McGinty* expressed a similar view:

[i]n 1900, the popular perception of what this entailed was certainly different to the current perceptions. For instance, the franchise did not include all, or even a majority, of the population. But according to today’s standards, a system which denied universal adult franchise would fall short of a basic requirement of representative government (ibid, at 29).

So, coming down to *Roach v Electoral Commissioner*, questions remained over the ability of Parliament to place legislative limits on the franchise. No one denied that universal franchise had become the accepted norm. However, since confederation Parliament had been able to expand and limit the franchise. Clearly, the lines were drawn: is there an implied constitutional right to vote in the Australian constitution or does Parliamentary supremacy permit the disenfranchisement of a group of people who are serving time in prison? When the Howard Government passed the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006*, these constitutional questions took on more than a passing importance.

The spatial modelling of preferences before the Court delivered its decision looks something like the Figure 1. Sq\* is the policy status quo (three-year ban) in place, before the Howard Government implemented the *Electoral and Referendum Amendment*. Xp is the new blanket disqualification, and preferred policy position implemented by Howard. Xa is the position preferred by Roach and her lawyers, a decision banning all prisoner disenfranchisement. Xhj is the perceived position of the median justice on the Court by Howard, well within his winset and probably near his ideal position. Sq\* represents the extreme liberal side of Howard’s preferences, whereas Sq\* represents the extreme conservative side of Roach’s policy preferences. However, any liberalization of prisoner disenfranchisement would be seen as a “win” for Roach and a “loss” for Howard.



The Court was split 4-2 with the judgement of the Court delivered by Chief Justice Gleeson with Justices Gummow, Kirby, and Crennan offering a separate concurring opinion. Justices Hayne and Heydon delivered separate dissenting judgements, and the seventh judge, Justice Callinan, did not hear the case because of impending retirement. The majority found the blanket disqualification of prisoners unconstitutional, and declined to answer the question about the implied rights (communication and participation). Finally on the constitutional viability of the previous 3-year ban, the Court found that the provisions were constitutionally valid and in force and effect.

The Chief Justice delivered the reasons of the Court and concluded that sections 7 and 24 of the Constitution [directly by the people] have, over time, “come to be a constitutional protection of the right to vote” (*Roach v. Electoral Commissioner*, 2007, at 7). However, he observed this does not extinguish the fact that exceptions to universal franchise may be accepted, and the Constitution leaves it to Parliament to define “the nature and extent of those exceptions.” He concludes that since the franchise is central to the notion of representative government “disenfranchisement of any group of adult citizens on the basis that does not constitute a substantial reason for exclusion... would not be consistent with choice by the people” (*ibid.*). In short, a blanket disqualification of any group, including prisoners, is unconstitutional. However, the Constitution leaves it to Parliament to determine what, if any, limitations can be placed on the franchise.

The question then, is what would constitute a “substantial reason”? The Chief Justice suggests there needs to be a “rational connection” between the definition of the excluded class and either capacity to exercise free choice or the demonstrated commitment to the community. He concludes that the rational connection for prisoner voting may be found in “exclusion and the identification of community membership [and the] conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right” (*ibid.*, at 8).

He endorses an idea that it “is consistent with [the] constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences” differently (*ibid.*, at 19). Thus, prisoner disenfranchisement can be justified, but the 2006 amendments had gone too far in not “attempt[ing] to identify prisoners who have committed serious crimes by reference to either the term of imprisonment imposed or the maximum penalty for the offence” (*ibid.*, at 24).

The concurring judgement of Justices Gummow, Kirby, and Crennan (the joint majority) began with a detailed history of enfranchisement from the federation debates to current times. They paid particular attention to the perceived incongruity between sections 41(ii) of the Constitution, which provides “that an MP or candidate is disbarred whilst under a sentence for an offence punishable by one year or more, and the ban on prisoners merely voting even if their sentence is short” (*Ibid.*, at 52).

Like the Chief Justice’s decision, the joint majority emphasised that the central tenet of representative government is the franchise. They conclude, however, that it may be suspended only for a “substantial reason.” Rather than defining substantial reason in relation to rational connection like the Chief Justice, the joint majority defined “substantial” as being a disqualification that is “reasonably appropriate and adapted.” In short, the justification must be proportionate (*ibid.*, at 85). In this case, the joint majority concluded that the blanket disenfranchisement was not substantial because it “operates without regard to the nature of the offense committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender” (*ibid.*, at 90). In short, “the net of disqualification is cast too wide” (*ibid.* at 95).



in countries without an entrenched bill of rights, courts may react strategically, taking in to account the preferences of the other actors involved.

A question remains about whether judicial involvement in policy questions promotes or inhibits policy compromise. Dialogue theorists (in Canada) suggest that judicial intervention is another manifestation of checks and balances theory which dates back to the very founding of liberal thought. The dialogists claim that the Court provides a reasoned check when otherwise well-intentioned legislatures let passion cloud their judgement. Critics by contrast claim that far from cooling the impassioned fires, courts tend to exacerbate rather than dampen passionate extremism.

In the Australian case, we see the Court play this reasoned check on the legislature when it passed a blanket disenfranchisement law that clearly went against the international trends (and Australian history). The Court ruled that there was an implied constitutional right to vote for prisoners while reconciling this with the admission that Parliament does have the right to disenfranchise those individuals who violated the law. It would appear, at least in the Australian case, that the dialogue theorists have it “right”.

### **Prisoner Voting in Canada**

Unlike Australia, the issue of prisoner voting in Canada was established at Confederation as a blanket disqualification and lasted well in to the 20<sup>th</sup> century. For example in the *Canada Elections Act R.S.C. 1985*, affirmed the enfranchisement of all members of society with the exception of “every person undergoing punishment as an inmate in any penal institution for the commission of any offence” (Canada, 1985, section 51(e)).

Three years prior to that amendment, however, Canada adopted the *Charter of Rights and Freedoms*, in which section three serves outlines the democratic rights for Canadians.<sup>4</sup> The late Donald Smiley has written that “some of the rights contained in the Charter are stated so explicitly that there is little doubt of their meaning and effect,” and that “Section three is one of those Sections” (Smiley and Ontario Economic Council, 1981). The reason for such little fanfare over Section three is based on the fact that the franchise has been extended through successive waves of parliamentary reform over the past century, leaving only a very few restrictions. The restrictions that were left, such as age limits and prisoner disqualifications, did not seem to be contentious. Said Sterling Lyon, former Premier of Manitoba at the time of the Charter’s adoption, and later a respected judge on the Manitoba Court of Appeal, “if anyone had said to [the First Ministers] in 1981 that the Charter would be used to win voting rights for prison inmates, we never would have believed it” (Brunner, 2005).

The acceptance of prisoner disenfranchisement was short-lived after the adoption of the Charter. A number of challenges emerged during the 1980s from prisoners claiming their right to vote was guaranteed in the Charter. These challenges generally demanded the

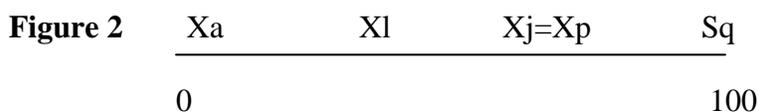
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<sup>4</sup> Section three of the Charter “Democratic rights” in toto: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified to membership therein.

complete enfranchisement of prisoners, which would place Canada at the extreme liberal end of the policy continuum. Some, but not all of the lower court decisions in these cases succeeded and the issue was winding its way to the Supreme Court of Canada by the early 1990s. The case that was successful at reaching the top court was brought by Richard Sauvé, who was serving a life sentence for murder.

At approximately this time, the *Royal Commission on Electoral Reform and Party Financing* (hereafter the Lortie Commission), tabled in 1989, addressed the issue of prisoner voting. They acknowledged that the complete blanket disenfranchisement in Section 51(e) of the *Canada Elections Act* was too broad (Government of Canada, 1991, 40), but maintained that disqualification was justified “where the offences committed constitute the most serious violations against the community or against the basic rights of citizens to life, liberty and the security of person” (ibid. 45). Such a disqualification, the commission argued, “is rationally connected to the specific limitation on an individual’s right to vote, because persons convicted of these crimes have offended the very foundations of a civilized personal community” (ibid, 45). Accordingly, they argued for the disqualification of anyone convicted of an “offence punishable by a maximum of life imprisonment and a minimum sentence of 10 years or more to be disqualified from voting during the time they are in prison” (ibid, 45).

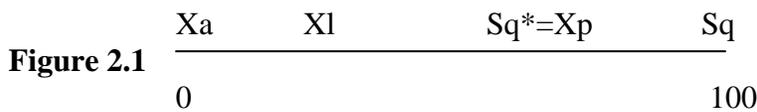
In May 1993, just prior the Supreme Court’s ruling on the issue in *Sauvé I*, the government passed Bill C-114 which replaced the blanket disenfranchisement of prisoners with a disqualification of only those prisoners who were serving sentences of two-years or more. Clearly, the Charter and the resulting court challenges played a role in stimulating this change. Spatial modelling of the Canadian situation looks something like the following in figure 2. Sq represents the challenged blanket disqualification, Xp represents the new 2 year ban on prisoner voting passed by Parliament before the decision in *Sauvé I*, Xa is the preferred policy position of Roach’s lawyer (complete enfranchisement) and Xj is the ideal point of median voter on the Court as perceived by Prime Minister Mulroney. Xl represents the option provided in the Lortie Commission (minimum of 10 years in prison). While we cannot know for sure, Xj may be equal to or just to the left of Xp (the new two-year ban). Thus, Xp would be the right side of the government winset and Xl would be the extreme left side. For Sauvé, the Xp would be the extreme right side, but Xl would fall within his winset.



Shortly after the law came into effect, the Supreme Court decided Richard Sauvé’s challenge to the previous blanket disqualification. The Court issued a very short oral judgement finding that the previous blanket disqualification violated Section 3 of the Charter, without addressing the constitutionality of the new two-year limit. Justice Iacobucci spoke for the unanimous majority, “In our view, s. 51(e) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court” (*Sauvé v. Canada*

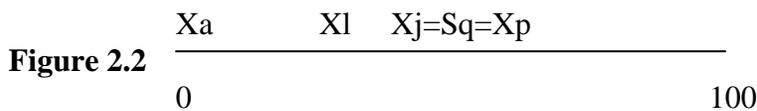
(Attorney General) 1993). Interestingly, the Supreme Court did not mention the new two year disqualification, or the options outlined in the Lortie Commission.

Thus, the spatial model after the *Sauvé I* decision shows that Sq (blanket disqualification of prisoners) is unconstitutional and Xp (new two-year ban) is the new status quo (Sq\*). It is still unknown where the ideal position of the median justice (Xj) would lie on the continuum. Like the Australian situation, the winsets of the Government and Sauvé do not overlap. Rather, Sq\* (the new two year ban) clearly lies in the winset of the government and also lies at the far right edge of Sauvé’s winset. This may suggest that there were additional strategic considerations at play when the Justices reached the decision in *Sauvé I* (for a longer discussion see: Knopff, 2006).



It would appear from the ruling in *Sauvé I* that the Court was encouraging inter-institutional dialogue between courts and legislatures. Ruling that the previous legislation failed the Section 1 minimal impairment portion of the *Oakes* Test certainly suggests that legislation more narrowly tailored to achieve the desired outcomes, short of complete disenfranchisement, might pass constitutional muster. This was indeed the middle ground type of dialogue suggested by dialogue theorists.

Sauvé renewed his constitutional challenge, since he was serving a sentence longer than the new two-year ban imposed by the new law, which remained unaddressed by the Court. Figure 2.2 shows a modified spatial model for voting in Canada as a result of the litigation in *Sauvé I*. The ideal position of Sauvé has not changed his ideal is still blanket enfranchisement for all prisoners. The policy status quo (Sq) now equals the ideal position of the Prime Minister (Xp), the previously passed two-year prisoner disenfranchisement. Xj is the perceived position of the median voter on the Supreme Court (based on *Sauvé I*) as assumed by Prime Minister Chretien based on the *Sauvé I* ruling. Based on this model, any liberalization of the new two year ban would be considered a “win” for Sauvé and any anything to the right of or encompassing Xl would be considered be considered a “win” for the government.



In December 1995, in the case of *Sauvé v. Canada* (hereafter *Sauvé II*), the Federal Court Trial Division found that the new provisions contained in Bill C-114 were unconstitutional (*Sauvé v. Canada (Chief Electoral Officer)* 1995). The court accepted the proffered dual purpose of prisoner disenfranchisement, “the enhancement of civic responsibility and respect for the rule of law; and the imposition of an additional sanction on prisoners who had committed serious anti-social acts” (ibid.). The Federal Trial Court

found, however, that the new law failed the minimal impairment requirement of the Charter's Section 1. Interestingly, the Court did not argue that a longer sentence limit, such as Lortie's 10-year suggestion, was required. Instead, it decided that Parliament had not considered the alternative of case-by-case disqualification by the sentencing judge, using criteria set by Parliament.

On appeal, the Federal Court of Appeal, came to a different conclusion. The Appeal Court overturned the trial decision on the grounds that the denial of the right to vote to those imprisoned for more than two years was a reasonable limit under Section 1 of the Charter. The court found that the new law "was significantly different from its predecessor, which provided for a total disenfranchisement, to warrant a fresh consideration under Section 1" (*Sauvé v. Canada (Chief Electoral Officer)*, 1999). The objectives of prisoner disenfranchisement, civic responsibility, respect for the rule of law, and enhancement of penal sanction, were sufficiently pressing and substantial to warrant a Charter infringement. Moreover, the legislative means chosen, namely the two-year limit, were both rationally connected to that purpose and only minimally impaired the Charter right to vote. Indeed, in contrast to the previous law, the new law disenfranchised only the most serious offenders. The court concluded, "that there was no reason for the court to declare invalid the balancing in which Parliament had engaged" (*ibid*, at 419). Once again, we see the court leaning back towards the middle ground. But the final court of appeal had not yet spoken.

When it did speak, the Supreme Court ruled that the new law containing the two-year ban was unconstitutional. The decision was not unanimous, with the majority having only a narrow 5-4 victory. The majority, led by Chief Justice McLachlin, argued that there was no "rational connection between denying the vote to penitentiary inmates, and [the laws] states goals (*Sauvé v. Canada (Chief Electoral Officer)* 2002, at 19). McLachlin explicitly recognizes that striking down the law on rational connection grounds effectively cuts off any "dialogue" arguing that:

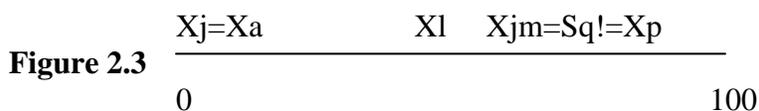
The challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial does not mean that the Court should defer to Parliament as part of a "dialogue." Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of if at first you don't succeed, try, try again (*ibid*, at 17).

Earlier, it was intimated that the ruling in *Sauvé I* seemed to emphasize minimal impairment and thus appeared to invite dialogue about some appropriate outcome in the middle ground of the continuum. This is how the four justice dissenting minority in *Sauvé II* read the earlier judgment. Writing for the *Sauvé II* dissenters, Justice Gonthier notes that the "language of [Justice] Iacobucci's reasons in [*Sauvé I*] seem to imply that ... Parliament was free to investigate where an appropriate line [of prisoner disenfranchisement] could be drawn" (*ibid*, at 161). Indeed, Gonthier prefers to treat this case as:

another episode in the continuing dialogue between courts and legislatures on the issue of prisoner voting. Parliament responded to [the 1993] judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the Charter (ibid, at 104).

Yet, Gonthier’s was the dissenting opinion. When McLachlin’s majority read the *Sauvé I* assertion that the previous blanket disqualification failed the “proportionality test, particularly the minimum impairment component of that test (emphasis added),” they minimized the emphasized portion and, relying on the fact that the entire proportionality section of the reasonable limits test had been mentioned, chose to emphasize the rational connection component. The result was the admitted end of ‘dialogue’ about fine-tuning within the moderate middle of the policy continuum, and a more zealous insistence on one of its poles. This was so especially because the section 33 notwithstanding clause, other route to “dialogue,” was not available to override a decision based on section 3 of the Charter.

The decision in *Sauvé II* is a win for Richard Sauvé and a clear loss for the Government. Figure 2.3 shows the final spatial model in the prisoner voting decision. Xj (the position of the majority) was the surprising decision taken by the majority on the Supreme Court ruling any disenfranchisement of prisoners unconstitutional. By contrast, the minority (Xjm) on the Court ruled that a 2 year ban (Sq!) would pass constitutional muster. While there is no way to know with certainty, it appears that once again the Court acted in a strategic manner. As Knopff and Baker (2006) illustrate, there may have been issues of internal coalition building at play before the *Sauvé II* was passed. More interestingly, this decision affirms the international trend of reasonable disagreement over the disenfranchisement of prisoners. The majority found that *all* prisoner disenfranchisement was unconstitutional, but the minority found that some prisoner disenfranchisement would be constitutional.



Obviously *Sauvé II* was very narrowly decided and could easily have gone the other way. If they had, the weight of evidence in this case study would have supported the claim that both Canadian and Australian courts have similar policy influence, contributing, just as checks and balances theory envisages, to a policy outcome in the moderate middle. In the case of Canada, the courts clearly stimulated a move away from the most restrictive pole into the middle ground and seemed, on balance, to invite a dialogue of “fine tuning” within that moderate middle. At the last moment, however, by a very narrow majority, the Supreme Court tilted the weight of evidence toward those who claim courts are more apt to polarize than to moderate.

From the evidence presented, it seems that both Canadian and Australian Court engaged in strategic decision making in their respective prisoner voting cases. In the Australian

case we see the Court engage in Rainer Knopff calls the “delicate dance” between courts and legislatures (Knopff, 2001). The court was forced to strike a balance between overtly “writing in rights” and their normal deference to Parliament. I suggest this subtle gamesmanship engaged by the Court demonstrates that Australian justices are keenly aware of their external audiences when they are thrust in to the policy spot light. I further hypothesize that because they are not protected politically by a bill of rights, this forces them to find a walk a fine line between what the Constitution implies and the traditional notions of Parliamentary sovereignty. This leads them to strive to find the “moderate” compromise when they are forced to engage contentious policy issues like prisoner voting. On the whole, Australian justices are less adventurous in rights litigation, less prone to judicial activism because they don’t have the benefit of constitutional “cover.”

Canadian Justices are similarly engaged in the dance. The Courts clearly stimulated a change in the blanket disqualification after the adoption of the Charter. The dance between Parliament and the Courts was on. Adopting a deferential approach early we see the Court rule without commenting on the newly minted liberalized policy position. In the subsequent challenge we see all three levels of Court adopt different position on the constitutionality of prisoner voting, with a narrow majority on the Supreme Court tipping the balance toward the most liberal pole on the continuum. I suggest this can be attributed to the political cover afforded to the Canadian Court by the Charter of Rights. Unlike the Australian justices who are politically vulnerable without the protection of a bill of rights, their Canadian counterparts are able to defer to the constitution arguing it is “what the Charter demands”. This allows them to be more adventurous when dealing with contentious policy issues, allowing them not to seek cover behind the “moderate” position.

## **Conclusion**

The weight of evidence presented in this paper suggests that there are two main lessons to be learned in cases of prisoner voting. First, there are two international trends emerging in common law countries. There is an overwhelming rejection of blanket disenfranchisement of prisoners, and two, there is substantial disagreement over whether sentence-based disenfranchisement passes as constitutional. I demonstrate that Canada and Australia are no exception in this regard. Second, I show that in countries where justices are politically protected by a bill of rights they are less likely to promote “moderate” policy position when dealing with contentious policy issues like prisoner voting. I suggest this has to do with strategic calculations employed by the justices in dealing with internal and external audiences.

Of course, nothing suggests that there is something essentially polarizing about Charter enhanced judicial power indeed it may al be a matter of chance. Moreover, this may be a symptom of a larger issue when trying to legislate issues of public contention. Here, the usual plea for more research can be entered. It would be immoderate on the basis of this single case study to claim that Charter-enhanced courts and legislatures *always* hue towards the extreme policy position, and non Charter-enhanced justices hue toward moderation. If the claimed difference exists, it will undoubtedly turn out to be a matter of

degree or tendency. And tendencies or matters of degree cannot be established by any one case study. By way of conclusion a final thought. I observed in the introduction that a great deal of scholarly ink had been split over the issue of litigating prisoner disenfranchisement. From the findings in this paper, it may be safe to suggest that the well will not run dry any time soon.

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