Introduction

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Addressing graduates of Southern Cross University in New South Wales, Australia, in September 2007, Justice Michael Kirby of the High Court of Australia spoke of law, justice, and Australian citizenship. He also chose to talk about one recent case: *Roach v. Electoral Commissioner*. Earlier that same week, he told the gathering, his Court had taken "the always serious and solemn step of invalidating an Act of the Federal Parliament." The 2006 statute in question, Justice Kirby explained, had denied all serving prisoners the right to vote, extending the previous law barring from participation only those serving sentences longer than three years. As Justice Kirby said that day, in *Roach*, the Australian Court noted that Canada's Supreme Court had struck down a ban on prisoner voting in 2002, followed by a similar decision in the European Court of Human Rights (ECHR) in 2004. By contrast, the U.S. Supreme Court had let stand state laws that kept millions from the polls "for life." Kirby quoted Canada's court: In setting the rules for who may and may not vote, "a community takes a crucial step in defining its identity." In addition, he sharply criticized American law, saying that "[u]nlike the United States," Australia "would never tolerate excluding millions (or thousands) of citizens from the vote because of past convictions." Finally, Justice Kirby noted that Vicky Roach was an Aboriginal and had based part of her challenge to the disenfranchisement statute on its impact on indigenous citizens (Kirby 2007: 5, 6, 9).

Just one month earlier, in August 2007, a U.S. District Court in Massachusetts had issued a quite different ruling on the same type of law. Granting partial summary judgment for the state, Judge Mark L. Wolf rejected a challenge to a state constitutional provision enacted in 2000 removing the right to vote from all incarcerated felons. Tried and incarcerated before the new exclusion was put in place, the plaintiffs argued that it unlawfully imposed an additional penalty on them. However, Judge Wolf concluded that their

disenfranchisement was not actually a punishment at all; the sanction was "intended to be primarily civil and regulatory, rather than punitive, in nature." The court cited statements by the U.S. Supreme Court, lower courts, and academics in support of that conclusion but also noted evidence suggesting that it is not entirely clear whether removal from the franchise is ultimately a punishment, a mere nonpenal regulation, or a kind of "potential hybrid" (*Simmons v. Galvin*, U.S.D.C. Mass., Aug. 30, 2007, 12, 37).[1]

These two decisions draw together many of the themes and questions this book tackles. In writing about laws barring people with criminal convictions from voting – "criminal disenfranchisement" or "felony disenfranchisement" policies – our authors join contemporary debates over comparative constitutionalism, judicial power, and 21st-century understandings of the intersection between democracy and punishment. As Judge Wolf pointed out, to discuss the right to vote in the United States, it is also necessary to talk about race in the criminal justice system. Justice Kirby told us this was also true in Australia, where legal inquiry has helped bring to the surface the policy's impact on Aboriginals. Both rulings confronted, in different ways, the question of whether disenfranchisement is fundamentally meant to punish, to regulate the franchise in a nonpenal way, or both. And naturally, both courts were forced to face a central dilemma of any judicial review system: When should a court strike down popularly enacted laws, whether put in place through federal statute (as in Australia) or state constitutional amendment (as in the United States)?

At the beginning of the 21st century, the democracies of the world display considerable diversity in their policies regarding voting by incarcerated individuals. The liberal democratic constitutional model is today regarded as desirable around the world, and free elections are clearly among the essential elements of such a constitutional order (Geran Pilon 2007). However, elections can be structured and organized in very different ways, leaving it unclear just how comprehensive the allegedly hegemonic constitutional order really is (Goldsworthy 2006) – a fact amply illustrated by existing variation in inmates' voting rights. Dozens of countries, particularly in Europe, allow and even facilitate voting by prisoners, whereas many others bar some or all people under criminal supervision from the franchise. A very small number of countries and several states in the United States disqualify some convicts even after their

[1] Meanwhile, the U.S. court refused to throw out a challenge focusing on the Voting Rights Act (VRA). The challengers argued that because Massachusetts' disenfranchisement policy has racially discriminatory effects, it violates the VRA's ban on policies restricting the right to vote "on account of race." Judge Wolf took no position on the merits of the question, but he noted that "racial bias in the criminal justice system" is relevant to judicial evaluation of whether disenfranchisement is compatible with federal voting rights law. Id.

sentences have been completed entirely. As part of the contemporary "rights revolution" (Epp 1998), some courts have regarded voting rights as universal, fundamental, and inalienable. Meanwhile, however, many countries are simultaneously moving toward more restrictive and punitive criminal justice policies. The ballot access of convicts hangs in the balance, a policy at the nexus of punishment, democracy, and citizenship.

Despite rapidly growing interest in such policies, until recently, we knew very little about how the countries of the world address voting by inmates and former prisoners. This collection of original essays by leading scholars and advocates represents the first broad, international examination of the nature, causes, and effects of laws regulating voting by people with criminal convictions. Among academics, attention to these policies is part of a renewed interest in the vital questions raised by the rise of the modern "carceral state" (Gottschalk 2006). At the same time, scholars in political science and related fields have become increasingly devoted to the study of comparative law. Comparative constitutionalism is as old as Aristotle, but it has taken on new energy in the last two decades. Early works sometimes began from a frankly U.S.-centric position (Henkin and Rosenthal 1990), but the field has quickly become more empirical, more genuinely comparative, and more closely focused on judicial power (Tate and Vallinder 1995; Epp 1998; Hirschl 2004; Koopmans 2003; Choudhry 2006).

Questions about how a nation defines itself through election law, conceives and confronts discrimination against racial and ethnic minorities, and balances an independent judiciary against legislative sovereignty are common to most modern democracies. So it should not surprise us that the Australian *Roach* decision (and Justice Kirby's commencement address account of the case) emphasized the international context and listened closely to how other countries' constitutional courts had analyzed these policies. As several chapters of this book make clear and as Justice Kirby understood, constitutional courts in Israel, Canada, and South Africa, as well as the ECHR, have looked abroad – including to the United States – as they grappled with these policies in the last decade. Thus the ongoing debate over disenfranchisement law offers an example of what one recent volume calls "the migration of constitutional ideas" (Choudhry 2006), and several chapters in this book examine that movement. By contrast, the U.S. District Court made no mention of any foreign case. By doing so, Judge Wolf may have been heeding cues from above: The U.S. Supreme Court is "perhaps the last bastion of parochialism among the world's leading constitutional courts" (Hirschl 2006: 39). However, even the U.S. Supreme Court has occasionally cited foreign cases in recent years, and legislators, judges, and scholars in the United States are now engaged in a rich

debate over how much attention U.S. courts should pay to the work of courts abroad.

The U.S. Presidential Election of 2000 brought new levels of attention to American criminal disenfranchisement law. That election was effectively decided by 527 votes in the state of Florida; the voting rights of people with felony convictions vary by state in the United States, and two different aspects of Florida's disenfranchisement policy received scrutiny after that election. First was Florida's botched attempt to clean up counties' voter rolls, removing from the lists those who had died, moved away, or been convicted of a felony. State and county elections officials, together with a private company hired to help with the job, failed to communicate about the need to double-check a draft list and purged everyone on it; in the process, any number of live, local, nonfelonious citizens lost the right to vote (Carter 2002; Abramsky 2002). Disenfranchisement law also shaped Florida's 2000 election results in a more profound way. Although only 527 votes decided the Presidential Election in Florida, approximately half a million *non-incarcerated* Floridians could not vote because of a felony conviction due to the indefinite post-sentence disenfranchisement law then in effect (Manza and Uggen 2004: 498). Such numbers and such a striking ability to shape electoral outcomes helped spark a dramatic increase in the number of academic and popular press articles examining disenfranchisement law.

But academic and reform community interest in these policies began long before the election of 2000. Intriguingly, the first issue of the *American Political Science Review*, published in 1906, referred to possible racial motives behind post-Reconstruction changes to felony disenfranchisement laws, observing that those changes "may have been inspired, in part at least, by the belief that they were offenses to the commission of which negroes were prone, and for which negroes could be much more readily convicted than white men" (Rose 1906: 25). (That hypothesis would be amply confirmed by evidence brought to the federal courts through the 20th century.) There were occasional legal challenges to disenfranchisement law in the early decades of the 20th century, efforts that picked up steam in the 1970s and 1980s. The U.S. Supreme Court in this period handed down two rulings on the constitutionality of laws barring people with criminal convictions from voting – *Richardson v. Ramirez*, in 1976, and *Hunter v. Underwood*, in 1984 – both of which continue to shape debate over the issue. In *Richardson*, the Supreme Court held that state laws barring people convicted of crime from voting can claim an explicit constitutional warrant in an obscure phrase in the second section of the Fourteenth Amendment and are therefore presumptively constitutional. In *Hunter*, the Supreme Court identified a single exception to the *Richardson* rule: state laws

written with explicit discriminatory racial intent, which are unconstitutional.[2] A major new legal campaign challenging disenfranchisement began in the early 1990s, with a prominent law review article and a lawsuit charging that New York's disenfranchisement law violates the Voting Rights Act (Shapiro 1993). That challenge failed, and to date, the Voting Rights Act argument has not prevailed in the U.S. federal courts.

An important study of disenfranchisement law published in 1998 by Human Rights Watch and the Sentencing Project and featuring a section on international law drew the attention of many advocates and academics to the issue. The report summarized the history of such laws, their heavy impact on racial and ethnic minority groups, and the potential for legal challenges focusing on various international legal instruments (Fellner and Mauer 1998). Meanwhile, three of the contributors to this volume either had already published academic studies on the topic before the 2000 Presidential Election or were well under way with research (Manfredi 1998; Demleitner 2000; Uggen and Manza 2002). Historian Alexander Keyssar's *The Right to Vote*, published in 2000, offered the most comprehensive and analytical history of U.S. criminal disenfranchisement law to date (Keyssar 2000). Finally, a landmark article published just after the election of 2000 (but based on research conducted before that contest) showed that basic American voter turnout figures need recalibration because the voting age population on which those figures are based includes so many people who are actually *ineligible* to vote, either because of felony conviction or noncitizen status (McDonald and Popkin 2001).

Although scattered and limited in scope, some comparative work did describe and analyze disenfranchisement policies well before 2000. Surveying democracies in 1958, W. J. M. Mackenzie found that after the disqualification of "mental defectives," the removal of imprisoned convicts from the rolls was the most common suffrage restriction. Certain electoral offenses, Mackenzie noted, sometimes brought even permanent disqualification, "either automatically or at the discretion of the court" (Mackenzie 1958: 23). Mackenzie was among the first modern comparative electoral scholars and deserves credit for what he accomplished. Unfortunately, however, his book does not include a country-specific listing, so it is impossible to know precisely which countries he was referring to. A decade later, Mirjan Damaska authored a major two-part study of the "adverse legal consequences of conviction" in countries around the world, examining not just disenfranchisement but also the loss of other political and civil rights and access to various professions. Several of

[2] Because these decisions are discussed in several different chapters in this volume, we do not devote further time to them here.

Damaska's conclusions remain accurate 40 years later. For example, he found that although loss of the right to vote was very common, "its scope is somewhat ambiguous" (Damaska 1968a: 357). Damaska noted various justifications on offer, including stigmatizing convicts and stripping them of political influence. Some countries imposed the sanction automatically, whereas others imposed it at the discretion of a judge; some nations disenfranchised all serious offenders, where others disenfranchised only those who committed certain offenses; and France, at least then, disqualified criminals from voting permanently, whereas most nations did not (Damaska 1968a: 357–8). In Europe, this variation survives, and anyone who has studied such policies will nod ruefully at Damaska's second sentence: "[t]he relevant provisions are scattered all over the body of law, so much so that they are almost untraceable" (Damaska 1968a: 347). Damaska concluded that "the sweeping penalty of loss of civil rights seems to be slowly passing to the museum of judicial antiquities" (Damaska 1968b: 567) – a judgment that may have been a bit premature in global context but has proved to be true in many European nations.

European courts had already heard a few legal challenges to collateral sanctions at that time, but subsequent scholarship has not paid much attention to these policies. Even some of the best recent comparative work on electoral structures has touched only briefly on the voting rights of people with criminal convictions, usually providing partial classifications based only on constitutional or statutory text (Katz 1997; Massicotte, Blais, and Yoshinaka 2004). Most of the burgeoning comparative literature on the power of constitutional courts deals with voting rights only in passing, if at all. Ginsburg's *Judicial Review in New Democracies*, for example, does note ballot access and apportionment cases from Mongolia, Korea, and Japan, but only quite briefly (Ginsburg 2003: 196, 228, 98). Katz' *Democracy and Elections* includes disqualification based on criminal conviction in its tabular tally of national suffrage laws, but there are important gaps in the data. Moreover, Katz does not integrate analysis of criminal disenfranchisement law into his insightful analysis of three basic theoretical principles underlying suffrage restrictions: having a stake in the community, being competent, and possessing autonomy (Katz 1997: 218–29). Some recent articles have examined the international context but have tended to analyze one or two countries (Demleitner 2000), summarize leading cases (Ewald 2004: 133–9), or assess a single case in depth (Powers 2006). Empirical work testing systematic explanations of variation in prisoner voting laws has been almost nonexistent, although Rottinghaus has recently explored the impact of a variety of historical, structural, and legal variables (Rottinghaus and Baldwin 2007). This volume begins to fill in some of these gaps in the literature on suffrage and comparative law.

JUDICIAL REVIEW AND CONSTITUTIONAL "MIGRATION"

Criminal disenfranchisement law is intimately connected to questions of judicial power and democracy, so every chapter touches these questions directly or indirectly. In the global context, we do seem to be in the midst of what a Canadian federal court called "the continuing dialogue between courts and legislatures on the issue of prisoner voting" (Federal Court of Appeal 2000: para. 56). As Christopher P. Manfredi's chapter in this volume (Chapter 10) explains, "the dialogue metaphor" is an important part of Canadian constitutional law doctrine proper (Hogg and Bushell 1997). That metaphor also captures nicely the key question of the relationship between legislatures and constitutional courts. To be sure, in some countries, courts have recently played crucial roles in either *changing* the voting rights of people with criminal convictions or *sustaining* such rights against challenge. These countries are Israel, Canada, South Africa, Australia, and the United Kingdom; domestic court rulings were key in the first four, while the United Kingdom's disenfranchisement policy was found to violate the European Convention by the ECHR. As this book went to press, potential policy change was still unfolding in the United Kingdom. In November 2008, parliament's Joint Committee on Human Rights warned the Labour government that the United Kingdom's next election could be illegal under European law if the United Kingdom did not enact legislation responding to the 2005 ECHR decision (Doward 2008).

These important rulings have already won a fair amount of attention, and they receive a good deal of analysis in this volume. However, in thinking about disenfranchisement and judicial review, it is important to provide a few crucial contextual points. First, although all of these decisions have either sustained or expanded the voting rights of prisoners, only *two* constitutional courts have held that *any* conviction-based franchise restriction violates the national constitution – those of Canada and South Africa. Second, in the vast majority of the countries of the world – including dozens in which inmates routinely vote from prison – courts simply have not shaped prisoners' voting rights. Indeed, in many countries in which prisoners vote (such as the Scandinavian states and the Netherlands, where prisoners seem to have been voting at quite high rates for decades), constitutional texts themselves are not very protective of voting rights.

Although each recent court decision has represented a victory for advocates of prisoner voting, each is also very much subject to varying interpretations, as the chapters in this volume indicate. Some analysts interpret these decisions as sweeping affirmation of the universality of the right to vote, ringing and definitive rejections of legislative restrictions on prisoners' suffrage rights. In this

volume, Laleh Ispahani and Richard J. Wilson tend to take this view. But Lukas Muntingh and Julia Sloth-Nielsen read the two pro–inmate voting South African rulings as quite narrow, even fragile, and subject to both legislative and judicial revision should political conditions change. Meanwhile, Nora V. Demleitner interprets the ECHR's *Hirst* decision, which attacked the United Kingdom's automatic, blanket ban on voting by prisoners, as actually *endorsing* disenfranchisement – as long as such a restriction is judicially imposed, targeted to certain offenses, and based on clear legislative deliberations.

One central conclusion of the literature on comparative constitutionalism is that judicial "assertiveness" – particularly courts' willingness to strike down legislation – cannot be understood merely from the study of judicial texts. We must attend to the political context in which those courts operate (VonDoepp 2006). This may be particularly true in new democracies, where judges focused on protecting the legitimacy and power of judicial institutions may avoid deciding cases directly against the wishes of the parliamentary and executive branches (Ginsburg 2003).

Political scientists now increasingly reject the idea that constitutional courts are the "counter-majoritarian" institutions they were long thought to be (Bickel 1962). In truth, even in established constitutional orders, legislators sometimes enjoy insulating themselves from difficult, unpopular, or politically divisive decisions by allowing those questions to be resolved by judicial review and then pinning blame on the courts for the outcome (Whittington 2005; 2007). As Ran Hirschl has noted, even active high courts can "pose only a minimal threat to the interests and ideological preferences" of political power holders (Hirschl 2004: 65).

Meanwhile, American scholars now devote increasing attention to the influence of nonjudicial actors on constitutional values (Devins and Fisher 2004; Graber 2006). The essays that comprise this volume show that laws regulating voting by people with criminal convictions are deeply contingent, resting on partisan conflict, popular ideas about criminal justice and suffrage, the quality of the voting rights bar, and the inescapably fuzzy variable political scientists call "political culture" as much as on constitutions, statutes, and judicial doctrine.

As we have noted earlier, many scholars are intrigued by the way constitutional ideas can migrate from one nation and court to another. In disenfranchisement law, such intellectual movements have taken place in quite specific ways, including direct citations to decisions in other countries. In its 2004 *Hirst* decision, for example, the ECHR relied heavily on the Canadian *Sauvé* cases, which it called "detailed, and helpful" (ECHR 2004: 15). South Africa's Constitutional Court also discussed *Sauvé* in its 2004 *NICRO* decision (*Minister of Home Affairs v. NICRO*: 28–34). Australia's 2007 *Roach* decision

repeatedly cited the Canadian, South African, and ECHR cases (*Roach v. Electoral Commissioner*, [2007] HCA 43, *passim*). And in its 1996 *Hilla Alrai* decision, Israel's Supreme Court quoted from the U.S. Supreme Court's decision in the 1958 case *Trop v. Dulles* (*Hilla Alrai*: 23). The words of Chief Justice Earl Warren, set out in block quotation form in English amid the Israeli high court's Hebrew, make a striking "migration" illustration indeed.

Yet the Israeli *Hilla Alrai* decision protected the right to vote of the man who had killed Prime Minister Yitzhak Rabin, whereas *Trop* tacitly endorsed disenfranchisement, and American federal courts have continued to allow states to disenfranchise anyone convicted of any crime for any reason (except explicit racism). That contrast highlights the particular place of the United States in this ongoing migration of constitutional ideas about prisoners' voting rights. Although the details of the cases vary, the constitutional courts of Israel, South Africa, and Canada, as well as the ECHR, have all insisted that legislatures may only deprive a convicted person of the right to vote when the state can show that such a restriction is the only way to achieve some vital, practical objective. In its *Richardson* and *Hunter* decisions, though, the U.S. Supreme Court reached a very different conclusion, ultimately because the Court's majority read an idiosyncratic constitutional passage in a textual, formalist way. In essence, the U.S. Supreme Court is the only high court that has examined the constitutionality of disenfranchisement law *without* employing what Americans call "strict scrutiny." The U.S. Supreme Court's refusal to do so is at least somewhat ironic, particularly when we recall that the American model of stringent judicial protection of individual rights is often thought of as an American export (Finer 1971; Koopmans 2003: 41).

AMERICAN EXCEPTIONALISM?

Many chapters in this volume directly or indirectly address the severity of disenfranchisement law in the United States, asking why American laws have come to be so harsh, what the effects of such policies are, and how evolving international legal norms might be used to challenge them. Beyond their severity, American disenfranchisement policies are distinctive in several ways, and it is important to preview these differences as part of our introduction to the volume. In addition to the interpretive approach used by the Supreme Court in interpreting such laws, U.S. disenfranchisement policies are unusual for their diversity, for their demonstrable effects on partisan elections, and for their striking racial dimension.

At least 15 American states have changed their disenfranchisement laws since 2000, most making the laws less restrictive in one way or another (King 2008). Still, the United States is almost certainly the only country in the world

that disenfranchises a significant number of people who are either no longer incarcerated or were never in prison at all. In nine states, some people are disqualified from voting even after all aspects of their sentences have been discharged, although only two states still automatically disenfranchise all first-time felons indefinitely (Sentencing Project 2008). All told, of the approximately 5 million Americans who lack the right to vote because of a felony conviction, the majority are not incarcerated, and over 1 million have completed their sentences entirely (Manza and Uggen 2004).

But this is only part of the story. As with many areas of American election law, disenfranchisement law varies by state, and U.S. policies range across the extremes and include just about everything in between. In two states, Maine and Vermont, incarcerated felons retain the right to vote and routinely vote by absentee ballots (Belluck 2004). Approximately one-fifth of the states disqualify only those currently serving time in prison. The largest group of states allows everyone who has completed their sentence entirely to vote but disqualifies felons in prison and those sentenced to probation and/or on parole after release from prison. Meanwhile, some states disqualify those convicted of crimes of "moral turpitude" or "infamous crimes" (instead of using felony conviction as the disenfranchisement threshold), a few disqualify misdemeanants serving time in jails, and two others allow some incarcerated felons to vote, while disqualifying most people in prison. Finally, because restoration and eligibility rules are complex and because local officials dominate election administration in the United States, the practice of disqualification and restoration in the United States varies by locality and rests ultimately on the competence and knowledge of local officials (Ewald 2005; Fields 2008). Voting rights historian Morgan Kousser refers to the obscurities and difficulties of some state restoration procedures as "the bureaucracy of disfranchisement" (Kousser 2007: 112).

Although naturally offenders are very diverse, as a class they do tend to share many of the socioeconomic characteristics of Democratic Party voters, and criminal disenfranchisement laws have affected the American partisan landscape. Sociologists Jeff Manza and Christopher Uggen conclude that restrictive laws have helped Republicans win several close elections over the last 30 years, including not only the 2000 Presidential Election but also earlier contests that determined partisan control of the U.S. Senate (Uggen and Manza 2002; Manza and Uggen 2005). Although research on the exclusion's electoral effects certainly helps scholars and citizens better understand disenfranchisement, it may also make reform more difficult by hardening partisan positions. For example, as several states have relaxed their exclusionary rules in the last several years, media coverage routinely speculates about the