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Felon Disenfranchisement: What Federal Courts Got Wrong and How State Courts Can Address It

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FELON DISENFRANCHISEMENT: WHAT FEDERAL COURTS GOT WRONG AND HOW STATE COURTS CAN ADDRESS IT

Lindsay Dreyer[‡]

I. INTRODUCTION

In recent years, the country's discourse around felon disenfranchisement has gained significant attention. Around the country, courts have addressed this issue in various forms. In nearly every case, felon disenfranchisement laws have been upheld.[1] This Paper joins the discussion regarding t constitutionality of felon disenfranchisement. While much of the litigation to date has centered on rights guaranteed by the United States Constitution, this Paper focuses on the Minnesota Constitution. In a recent Minnesota district court case, *Schroeder v. Minnesota Secretary of State*, the American Civil Liberties Union (ACLU) sued the Minnesota Secretary of State, Steve Simon, arguing that Minnesota's felon disenfranchisement statute violates the Minnesota Constitution.[2] The Ramsey County court dismissed the case on August 19, 2020.[3] This Paper argues that the district court erred in dismissing the case. In its order, the court relied on a narrow definition of fundamental rights, a selective historical analysis, and a national rather than international legal comparison.[4] The court ultimately held that the power to regulate felon disenfranchisement and re-enfranchisement lies exclusively with the legislative branch.[5] While this may be true to an extent, this Paper argues that the legislature's ability to regulate enfranchisement cannot go unconstrained. Indeed, it is the court's job to ensure that the legislative branch operates within its constitutional limits.[6]

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[1] Binderup v. Att'y Gen., 836 F.3d 336, 369 (3d Cir. 2016) ("[F]elons fall outside the scope of the fundamental right to vote."); Hayden v. Paterson, 594 F.3d 150, 170 (2d Cir. 2010) (quoting Baker v. Cuomo, 58 F.3d 814, 820 (2d Cir. 1995) ("[A]lthough the right to vote is generally considered fundamental, in the absence of any allegation that a challenged classification was intended to discriminate on the basis of race or other suspected criteria, statutes that deny felons the right to vote are not subject to strict judicial scrutiny."); Johnson v. Bredesen, 624 F.3d 742, 746 (6th Cir. 2010) ("Having lost their voting rights, Plaintiffs lack any fundamental interest to assert."); Shepherd v. Trevino, 575 F.2d 1110, 1114–15 (5th Cir. 1978) ("[S]elective disenfranchisement or reenfranchisement of convicted felons must pass the standard level of scrutiny applied to state laws.").

[2] Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendant's Motion for Summary Judgment at 1, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Aug. 11, 2020), https://www.minnpost.com/wp-content/uploads/2020/11/62-cv-19-7440-SMJ-order.pdf [https://perma.cc/DEK4-M8LL] [hereinafter Order].

[3] *Id.*

[4] *See* discussion *infra* Sections V.C–E.

[5] *See* discussion *infra* Sections V.C–E.

[6] Marbury v. Madison, 5 U.S. 137, 177 (1803).

Section II of this Paper outlines the history of felon disenfranchisement in ancient Greece and the United States, where these laws have been adopted and expanded upon. Section III provides an overview of felon disenfranchisement today, paying close attention to the current trends in Minnesota. Section IV introduces *Schroeder v. Minnesota Secretary of State*, detailing the procedural posture of the case, the facts, and a brief overview of the legal arguments on each side. Finally, Section V provides a critique of the court's decision. The court interpreted the Minnesota Constitution as granting the legislature virtually unchecked power over felon disenfranchisement and re-enfranchisement. This Paper analyzes the court's order and offers a more judicious interpretation of article VII of the Minnesota Constitution.

II. HISTORY OF DISENFRANCHISEMENT

A. European Roots

The idea of barring certain individuals from participating in politics due to their criminal actions can be traced back over two thousand years to ancient Greece and Rome.[7] In ancient Greece, those who committed certain serious offenses were "pronounced infamous" and barred from voting, making public speeches, and serving in the army.[8] In ancient Rome, convicted criminals were branded with *infamia* and were similarly barred from holding office and voting.[9] Additionally, those who "were convicted were exiled from society and carried their *infamia* with them as a badge of their dishonor."[10] *Infamia* was so damaging that some would "opt for exile over [a] trial" to spare themselves the public shame of being condemned with *infamia* before exile.[11]

This practice of isolating and shaming individuals with criminal backgrounds was continuously adopted by succeeding nations. During the Renaissance, criminals were labeled "outlaws" as they were deemed to be outside the protections of the law, and thus could be killed with impunity.[12] The isolation and humiliation that came with losing one's civil rights served

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[7] Alec Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002).

[8] *Id.* at 1059.

[9] *Id. Infamia* was a form of censure, which "applied to a citizen who was awaiting trial and followed them from their conviction to exile. If the individual 'returned to Rome after exile, [they] could be killed on sight.' Additionally, [their] property was confiscated upon conviction and [they were] stripped of [their] political and civil rights." Shadman Zaman, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 264 (2015).

[10] Zaman, *supra* note 9, at 265.

[11] *Id.*

[12] Ewald, *supra* note 7, at 1159.

"both as a form of retribution and as a deterrent from crime."[13] Later, in medieval Europe, the principle of "civil death" was developed.[14] Those who "commit[ted] serious crime[s] against society forfeit[ed] their civic personhood."[15] The criminal was said to be "dead in law."[16] Although laws allowing for disenfranchisement were widespread in ancient and early European society, this harsh penalty was reserved only for the most severe crimes.[17] Furthermore, disenfranchisement was implemented on a case-by-case basis and only after judicial pronouncement.[18] It was not until the U.S. Civil War that a nation made disenfranchisement automatic and all-encompassing.

B. Pre-Civil War America

Early colonial disenfranchisement laws adopted the European concept of disenfranchisement and emerged in the 1600s.[19] The colonies limited the penalty to certain offenses, usually related to voting or "egregious violations of the moral code."[20] After the Revolutionary War, states began to incorporate disenfranchisement clauses into their state constitutions. The Kentucky Constitution of 1792 disenfranchised those convicted of "bribery, perjury, forgery, or other high crimes or misdemeanors."[21] Mirroring the language of the Kentucky Constitution, the Louisiana Constitution of 1812 barred those convicted of "bribery, perjury, forgery, or other high crimes or misdemeanors" from voting.[22] Similarly, the Ohio Constitution of 1802 limited disenfranchisement to crimes of "bribery, perjury, or otherwise infamous crime[s]."[23] Minnesota chose slightly different language when outlining its disenfranchisement clause. The original draft of Minnesota's Constitution in 1857 stated:

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[13] Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

[14] Christina Rivers, *A Brief History of Felon Disenfranchisement and Prison Gerrymanders*, ORG. AM. HISTORIANS, https://www.oah.org/tah/issues/2017/november/a-brief-history-of-felon-disenfranchisement-and-prison-gerrymanders/ [https://perma.cc/TJR6-9RKJ].

[15] *Id.*

[16] Ewald, *supra* note 7, at 1059.

[17] *Id.* at 1060.

[18] *Id.*

[19] George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 101, 103 (2005).

[20] JEAN CHUNG, THE SENT'G PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 3 (Dec. 2019).

[21] KY. CONST. of 1792, art. VIII, § 2.

[22] LA. CONST. of 1812, art. VI, § 4.

[23] OHIO CONST. of 1802, art. IV, § 4.

> No person shall be qualified to vote at any election who shall be convicted of treason—or any felony—or of voting, or attempting to vote, more than once at any election—or of procuring or inducing any person to vote illegally at any election; *Provided,* That the Governor or the Legislature may restore any such person to civil rights.[24]

The Minnesota Constitution was one of the first constitutions to use the word "felony" in its disenfranchisement clause.[25] Of course, in the nineteenth century, the word "felony" had a notably different meaning than the modern understanding of the word.[26] Thus, while the language of the clause differed from other states' constitutions, the essence of the law was the same: disenfranchisement was reserved for egregious crimes and crimes related to dishonesty and voting. Moreover, despite the prevalence of disenfranchisement laws in the nineteenth century, the laws were poorly enforced prior to the Civil War.[27] Given the nature of voting in the nineteenth century, it was difficult to verify if someone had been disqualified by a criminal conviction unless those attending the polls knew the disqualified person personally.[28] Furthermore, there were few reported instances of voting crimes during this time.[29] It was not until the Civil War that states became more concerned with monitoring the polls.[30]

C. Post-Civil War

The post-Civil War expansion of voting rights threatened the power

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[24] T.F. ANDREWS, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION FOR THE TERRITORY OF MINNESOTA 540 (G.W. Moore ed. 1858).

[25] MINN. CONST. art. VII, § 1.

[26] In 1858, a Minnesota statute defined "felony" as "a public offense punishable with death, or which is, in the discretion of the court may be, punishable by imprisonment in the penitentiary or territorial prison." MINN. STAT. § 87.3 (1858) (abrogated and presently codified at MINN. STAT. § 609.02 (2020)). Therefore, felonies were reserved for crimes punishable by death.

[27] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 56 (2006).

[28] *See id.* at 53.

> In the town hall meeting, the disenfranchisement of offenders was enforceable through direct social means: the offender was known to the community, and easily barred from attempting to participate. The transition to a modern democratic regime . . . made direct (and systematic) enforcement more difficult because offenders could not necessarily be identified by sight.

Id.

[29] *Id.* at 32.

[30] *Id.* at 55. "The most notable of these concerns was a fear of fraud, as well as more obscure fears on the part of some that the integrity of the ballot box would be tainted by the participation of unworthy electors." *Id.* at 53.

dynamics of the South. The ratification of the Fourteenth and Fifteenth Amendments granted citizenship to an estimated four million formerly enslaved people.[31] It also gave Black men the right to vote.[32] More than a half-million Black men became eligible to vote in the South in the 1870s.[33] In some states, such as Mississippi, more than half of the state's population was Black.[34] In order to curtail the power of these new voters, practices were quickly put in place to prevent eligible Black voters from voting.[35] For example, poll taxes and literacy tests were established to inhibit Black citizens from voting.[36] Grandfather clauses restricted voter registration only to those whose grandfathers were qualified to vote before the Civil War, similarly targeting black voters.[37] In Mississippi, the percentage of Black voting-age men registered to vote fell from 90% during Reconstruction, to 6% in 1892.[38] However, the law with the most long-lasting discriminatory impact on voting rights was the Thirteenth Amendment, which "carved out an exception allowing states to impose involuntary servitude on those who were convicted of crimes."[39] In the years following Reconstruction, 90% of those forced into convict leasing arrangements were Black.[40] In Alabama, the percentage of nonwhite prisoners increased from 2% in 1850, to 74% in 1870.[41]

Unsurprisingly, felon disenfranchisement laws were expanded upon and heavily enforced in the years following the Civil War. Alabama offers one notable example. In 1819, Alabama's Constitution excluded those "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors" from voting.[42] This clause mirrored other disenfranchisement clauses during this period. However, in 1901, Alabama adopted a new constitution, which greatly expanded the scope of its disenfranchisement clause. The clause explicitly disenfranchised:

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[31] This number is approximate, based on data collected in the 1860 census. *See* U.S. CENSUS BUREAU, POPULATION OF THE UNITED STATES IN 1860, at viii (1860).

[32] *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[33] *Race and Voting in the Segregated South*, CONST. RTS. FOUND., https://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south [https://perma.cc/5VLR-NEST].

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] ERIN KELLEY, BRENNAN CTR. FOR JUST., RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1 (May 9, 2017).

[40] *Id.* at 2.

[41] *Id.*

[42] ALA. CONST. of 1819, art. VI, § 5.

> All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.[43]

The president of Alabama's Constitutional Convention made the purpose of the new provision clear, proclaiming the need to avert the "menace of Negro domination."[44] One official noted that "[t]he crime of wife-beating alone would disqualify 60 percent of the Negros."[45]

In 1890, Mississippi followed suit during its Constitutional Convention. The Convention expanded the disenfranchisement provision from "bribery, perjury, or other infamous crime[s],"[46] to "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy, and [those] who [had not] paid . . . all taxes."[47] The delegates at the Convention made it clear that crimes added to the list were offenses "to which its weaker member [of society] were prone."[48]

Post-Civil War America marked the beginning of modern felon disenfranchisement. Many states amended their constitutions to expand the reach of disenfranchisement. But Minnesota's provision was unique.[49] The

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[43] ALA. CONST., art. VIII, § 182 (repealed 1996).

[44] Brent Staples, Opinion, *The Racist Origins of Felon Disenfranchisement*, N.Y. TIMES (Nov. 18, 2014), https://www.nytimes.com/2014/11/19/opinion/the-racist-origins-of-felon-disenfranchisement.html [https://perma.cc/U486-PRL2].

[45] *Id.*

[46] MISS. CONST. of 1868, art. IV, §17.

[47] MISS. CONST., art. XII, § 241 (amended 1972).

[48] KELLEY, *supra* note 39, at 3.

[49] Unlike in the South, where states prohibited discreet crimes, *see, e.g.*, ALA. CONST. of 1819, art. VI, § 5; MISS. CONST. of 1868, art. IV, §17, Minnesota's constitutional prohibition was written broadly, which allowed the state to apply its prohibitions more

state's disenfranchisement provision did not need to change as it had in other states around the country. Rather, the language was already sufficiently broad so as to allow for a gradual expansion. The word "felony" could encompass whatever crimes the legislature wanted. While its language may have remained the same, the pervasiveness of disenfranchisement, its widespread application, and its impact on minority communities made Minnesota's provision effectively identical to those in the South.

III. DISENFRANCHISEMENT TODAY

A. Modern Felon Disenfranchisement

Today, in the United States, there are six categories of felon disenfranchisement: (1) permanent disenfranchisement for all felons;[50] (2) permanent disenfranchisement for some felons, depending on the offense;[51] (3) restoration of voting rights after completion of one's sentence, including parole or probation;[52] (4) restoration of voting rights after completion of one's prison sentence and parole;[53] (5) restoration of voting rights after release from prison;[54] and (6) no disenfranchisement[55] regardless of the offense.[56]

Approximately 2.5% of the United States' voting age population, or 6.1 million people, is disenfranchised due to a felony conviction.[57] Of those disqualified from voting, 77% "live in their communities, either under

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flexibly. *See* MINN. CONST. art. VII, § 1 ("The following persons shall not be entitled or permitted to vote at any election in this state: . . . a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.").

[50] Currently, only Kentucky and Virginia permanently disenfranchise people with felony convictions. *Felony Disenfranchisement Laws (Map)*, AM. C.L. UNION, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map [https://perma.cc/BU2U-VHZL].

[51] Iowa, Colorado, Arizona, Tennessee, Mississippi, Alabama, and Florida permanently disenfranchise some felons, depending on the offense. *Id.*

[52] Nineteen states, including Wisconsin, Washington, Idaho, and Georgia, restore voting rights after completion of one's sentence. *Id.*

[53] New York and Connecticut restore voting rights after completion of one's prison sentence and parole. *Id.* People on probation in these states can vote. *Id.*

[54] Eighteen states, including California, Illinois, North Dakota, and Michigan, restore voting rights after release from prison. *Id.*

[55] Only Maine and Vermont have no felon disenfranchisement laws. *Id.*

[56] John Ghaelian, *Restoring the Vote: Former Felons, International Law, and the Eighth Amendment*, 40 HASTINGS CONST. L.Q. 757, 764 (2013).

[57] Christopher Uggen, Ryan Larson & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [https://perma.cc/P3WW-JBEU].

probation or parole supervision or having completed their sentence."[58] Felon disenfranchisement policies disproportionately impact communities of color, with voting age Black Americans being four times more likely to lose their voting rights than the rest of the adult population.[59] Furthermore, one in every thirteen Black adults is disenfranchised nationally, and, in several states,[60] more than one in five Black adults is disenfranchised.[61]

B. Felon Disenfranchisement in Minnesota

In Minnesota, the numbers are worse than the national average. One out of every eight Black Minnesotans is prohibited from voting due to a felony conviction.[62] Currently, 53,000 Minnesotans outside of jail or prison cannot vote because of a felony conviction.[63] Although Black citizens comprise 4% of Minnesota's voting-age population, they account for more than 20% of disenfranchised voters living in the community.[64] Comparably, Indigenous people make up less than 1% of Minnesota's voting-age population but comprise nearly 7% of those disenfranchised.[65] Minnesota's probation and supervised release policies only exacerbate these numbers. Minnesota has the seventh-highest supervised population per capita in the country.[66]

While the language of the disenfranchisement provision in the Minnesota Constitution has remained the same since 1857, its purpose and application have drastically changed. This Paper argues that article VII can no longer be used to justify modern disenfranchisement in Minnesota. As applied today, felon disenfranchisement under Minnesota Statutes section 609.165 violates the Minnesota Constitution.

IV. SCHROEDER V. MINNESOTA SECRETARY OF STATE

In October 2019, the ACLU brought the issue of felon disenfranchisement to Ramsey County Court, challenging the constitutionality of Minnesota Statutes section 609.165.[67] In response to the

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[58] CHUNG, *supra* note 20, at 2.

[59] *Id.*

[60] The states are Florida, Kentucky, Tennessee, and Virginia. *Id.*

[61] *Id.*

[62] *Voting Rights Restoration*, AM. C.L. UNION: MINN., https://www.aclu-mn.org/en/campaigns/voting-rights-restoration [https://perma.cc/S28V-GHDN].

[63] *Id.*

[64] *ALCU-MN Sues to Restore Voting Rights in Minnesota*, AM. C.L. UNION: MINN. (Oct. 21, 2019), https://www.aclu-mn.org/en/press-releases/aclu-mn-sues-restore-voting-rights-minnesota [https://perma.cc/AZD6-LQJ2].

[65] *Id.*

[66] *Id.*

[67] Complaint for Declaratory and Injunctive Relief at 1, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Apr. 3, 2020) [hereinafter Complaint].

complaint, both the state and the court narrowly defined the fundamental right to vote and applied a selective historical analysis. The court ultimately held that the power to regulate re-enfranchisement lies exclusively with the legislative branch.[68] While this may be true to an extent, the legislature's ability to regulate re-enfranchisement cannot go unconstrained. Indeed, it is the court's job to ensure that the legislative branch operates within its constitutional limits.[69] In *Schroeder v. Minnesota Secretary of State*, the court interpreted the Minnesota Constitution in a manner that gave the legislature virtually unchecked power over felon disenfranchisement and re-enfranchisement.

A. Facts and Procedural Posture

On October 21, 2019, the plaintiffs in *Schroeder* filed a complaint against the Minnesota Secretary of State seeking declaratory and injunctive relief in Ramsey County, Minnesota.[70] The complaint was written on behalf of four plaintiffs, each of whom were on parole, probation, or some other form of supervised release.[71] As such, they were unable to vote.[72] The complaint alleged that section 609.165,[73] which outlines Minnesota's system of re-enfranchisement after a felony conviction, violates the plaintiffs' right to vote and equal protection under the Minnesota Constitution.[74]

The first plaintiff, Jennifer Schroeder, was convicted of drug possession in 2013.[75] She was sentenced to one year in county jail and forty

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[68] Order, *supra* note 2, at 12.

[69] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[70] The Minnesota Voter Alliance, a self-identified election security group, sought limited intervention, contending that, as taxpayers, the organization had an interest in "meritless lawsuit[s]." *See* Notice of Limited Intervention to Assert the Defense of Lack of Private Cause of Action at 1, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Apr. 3, 2020). Both the district court and the Minnesota Court of Appeals concluded that the organization failed to meet the factors necessary for both intervention of right and permissive intervention. *See* Schroeder v. Minn. Sec'y of State, 950 N.W.2d 70 (Minn. Ct. App. 2020).

[71] *Schroeder*, 950 N.W.2d at 74.

[72] *Id.*

[73] Adopted into law in 1963, the statute states the following:

> When a person has been deprived of civil rights by reason of conviction of a crime and is thereafter discharged, such discharge shall restore the person to all civil rights and to full citizenship, with full right to vote and hold office, the same as if such conviction had not taken place, and the order of discharge shall so provide.

MINN. STAT. § 609.165, subdiv. 1 (2020).

[74] Complaint, *supra* note 67, at 2.

[75] *Id.* at 3.

years of probation.[76] Due to her felony conviction and probation, she will be unable to vote until 2053.[77] Ms. Schroeder is now a drug and alcohol counselor and works with those struggling with addiction.[78] The second plaintiff, Elizer Eugene Darris, served seventeen years in prison due to a second-degree homicide conviction.[79] He was released from prison in 2016 and will remain ineligible to vote until 2025.[80] Since his release, Mr. Darris has worked on several political campaigns and volunteered as a mentor and re-entry coach.[81] The third plaintiff, Christopher James Jecevicus-Varner, was convicted of a drug offense in 2014.[82] He is currently serving twenty years on probation and will be unable to vote until 2034.[83] Mr. Jecevicus-Varner successfully completed drug treatment and is now working as an electrician.[84] The final plaintiff, Tierre Davon Caldwell, was convicted of assault in 2010 and remains ineligible to vote due to his ongoing probation.[85] He is now a concrete laborer and has become involved in local politics.[86]

B. The Court Order

On August 11, 2020, Judge Laura Nelson granted the defendant's motion for summary judgment.[87] The order began with a discussion of the history of felon voting, borrowing most of the sources found in the defendant's motion for summary judgment.[88] The court noted that twenty-four states practiced disenfranchisement during the pre-Civil War period.[89] Additionally, the court laid out Minnesota's history of felon disenfranchisement.[90] The court indicated that there had been several versions of disenfranchisement statutes before the current version, section 609.165, was passed.[91] Again appearing to borrow from the defendant's

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[76] *Id.*

[77] *Id.*

[78] *Schroeder v. Minn. Secretary of State*, AM. C.L. UNION: MINN. (Oct. 21, 2019), https://www.aclu-mn.org/en/cases/schroeder-v-mn-secretary-state [https://perma.cc/T2LF-58NT].

[79] Complaint, *supra* note 67, at 3.

[80] *Id.*

[81] Plaintiffs' Memorandum of Law in Support of Their Motion for Summary Judgment at 22, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Feb. 25, 2020) [hereinafter Plaintiffs' Memorandum in Support of Summary Judgment].

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 3–4.

[86] *Id.*

[87] Order, *supra* note 2, at 13.

[88] *Id.* at 1.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 2–3.

motion, the court concluded that section 609.165 was created with a clear governmental purpose: "to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen."[92]

Next, the court analyzed the equal protection claim. The court held that because Minnesota's Constitution explicitly limited the right to vote, persons convicted of a felony lacked any fundamental right to vote under the state Constitution.[93] Thus, a fundamental right was not at issue. The court noted that while a heightened rational basis review is, at times, used when a statutory classification adversely affects one race more than another, that basis of review was not appropriate in *Schroeder*.[94] The court reasoned that the heightened rational basis review had not been applied by the Minnesota Supreme Court since 1991,[95] and the court stated that any right or restriction triggered by a criminal conviction would have a similar disproportionate impact on minority communities.[96] Thus, the court concluded, a heightened basis of review was not practical. Therefore, the court applied rational basis review.

Under regular rational basis review, the court found that a legitimate government interest existed and concluded that the law did not violate the state's Equal Protection Clause.[97] The court used a similar analysis in evaluating the due process claim. Since a fundamental right was not at issue, rational basis review again applied.[98] The court held that the means used to achieve the governmental purpose of rehabilitation under section 609.165 were reasonable.[99]

The district court then granted summary judgment for the defendant.[100] On September 30, 2020, the plaintiffs served a notice of appeal to the Minnesota Court of Appeals,[101] which the appellate court affirmed on May 24, 2021.[102] On August 10, 2021, Minnesota Supreme Court granted Schroeder's petition for review.[103] Oral arugments are scheduled for November 30, 2021.[104]

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[92] *Id.* at 2 (citing ADVISORY COMM. ON REVISION OF THE CRIM. L., PROPOSED MINNESOTA CRIMINAL CODE 60–61 (West 1962)).

[93] *Id.* at 6–7.

[94] *Id.* at 8–9.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 9–10.

[98] *Id.* at 11.

[99] *Id.*

[100] *Id.* at 13.

[101] Notice of Appeal to Court of Appeals at 1, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Apr. 3, 2020).

[102] Schroeder v. Simon, 962 N.W.2d 471, 487 (Minn. Ct. App. 2021).

[103] Schroeder v. Simon, No. A20-1264 (Minn. Aug. 10, 2021) (order granting petition for review).

[104] Schroeder v. Simon, No. A20-1264 (Minn. Oct. 26, 2021 (order scheduling oral

V. ANALYSIS

A. The Court's Reliance on the Federal Standard

Both the state and federal courts' unwillingness to strike down felon disenfranchisement laws stems from the Supreme Court's interpretation of the Fourteenth Amendment in *Richardson v. Ramirez*.[105] In *Richardson*, three California residents filed a writ of mandamus in the Supreme Court of California to compel California county election officials to register them to vote.[106] They claimed that California's felon disenfranchisement law, which disenfranchised persons convicted of an "infamous crime," violated their equal protection rights under the Fourteenth Amendment of the United States Constitution.[107] The Supreme Court of California reviewed the statute with strict scrutiny and held that the statute was unconstitutional.[108] The Supreme Court of the United States then granted certiorari.[109]

The United States Supreme Court looked to Section 2 of the Fourteenth Amendment for guidance. Section 2 states:

> Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime,* the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.[110]

The Court concluded that Section 2 affirmatively sanctioned the exclusion of felons from voting.[111] Thus, felon disenfranchisement laws were not to be afforded strict scrutiny under the Fourteenth Amendment.[112] Rather, the Court held that the appropriate standard of review was rational

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argument).

[105] 418 U.S. 24 (1974).

[106] *Id.* at 26.

[107] *Id.* at 27.

[108] *Id.* at 33–34.

[109] *Id.* at 28.

[110] U.S. CONST. amend. XIV, § 2 (emphasis added).

[111] *Richardson*, 418 U.S. at 54.

[112] *Id.* at 54–55.

basis review.[113] Because the respondents could not prove discriminatory intent, the case was reversed.[114] Since *Richardson*, the Fourteenth Amendment has proven a nearly insurmountable barrier for convicted felons seeking to invalidate felon disenfranchisement laws.[115] Without evidence of the legislature's intent to purposefully discriminate, disenfranchisement laws will likely survive a rational basis review. Not surprisingly, few disenfranchisement cases have been able to prove discriminatory intent.

Case law illustrates just how difficult it is to prove discriminatory intent. In *Hunter v. Underwood*, the Court held that an Alabama Constitutional provision disenfranchising those convicted of crimes involving moral turpitude violated the Fourteenth Amendment.[116] The Court cited evidence from the Alabama Constitutional Convention of 1901, where the president stated that the purpose of the Convention was to "establish white supremacy in the State."[117] Those at the Convention specifically selected crimes "that were thought to be more commonly committed by [B]lacks."[118] *Hunter* created the standard for striking down a disenfranchisement law under the Fourteenth Amendment, a standard few cases thereafter have met.

In *Schroeder*, Judge Nelson's Order Granting Defendant's Motion for Summary Judgment mirrored the Court's reasoning in *Richardson*.[119] Similar to *Richardson*, the judge looked to the language of the Minnesota Constitution to determine if voting was a fundamental right.[120] Because the Minnesota Constitution affirmatively sanctions the disenfranchisement of felons,[121] the judge held that those convicted of a felony do not have a fundamental right to vote in Minnesota.[122] The judge concluded her order by quoting the majority opinion in *Richardson*, emphasizing that the power to change felon disenfranchisement laws lies with the legislature.[123] If the legislature fails to make changes, the order quoted, "their failure is some evidence, at least, of the fact that there are two sides to the argument."[124]

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[113] *Id.*

[114] *Id.* at 56.

[115] Matthew E. Feinberg, *Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61, 79 (2011).

[116] Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[117] *Id.* at 229.

[118] *Id.* at 232.

[119] *See generally* Order, *supra* note 2.

[120] *See generally id.*

[121] *See* MINN. CONST. art. VII, § 1 ("The following persons shall not be entitled or permitted to vote at any election in this state: . . . a person who has been convicted of treason or felony, unless restored to civil rights.").

[122] Order, *supra* note 2, at 7.

[123] *Id.* at 12.

[124] *Id.* (quoting Richardson v. Ramirez, 418 U.S. 24, 55 (1974)).

Ultimately, the district court in *Schroeder*, like the Court in *Richardson*, held that the legislature has virtually unconstrained power to regulate felon disenfranchisement and re-enfranchisement. Under *Richardson*, legislatures have the complete authority to define which crimes fall under the "other crimes" provision of the Fourteenth Amendment, so long as the legislature does not explicitly state its intention to discriminate—an absurdly low bar. Similarly, under *Schroeder*, the Minnesota legislature has unchecked power to define what crimes constitute a felony, a definition which has expanded over time. In an effort to create clear boundaries between the legislature and the judiciary, the courts have allowed for the gradual erosion of voting rights in Minnesota and in states across the country.[125] In the process, felon disenfranchisement provisions have been exploited and expanded.[126]

While state legislatures have the power to create felon disenfranchisement laws, the courts have the power to set constitutional limits on their expansion.[127] *Richardson* chose not to address the constitutional limits on the expansion of felon disenfranchisement.[128] Accordingly, state and federal courts, such as the court in *Schroeder*, have also chosen to avoid this question and instead align their reasoning with the majority opinion in *Richardson*.[129] But the basic question in *Richardson* remains unanswered. In looking to define the constitutional limits of felon disenfranchisement, *Richardson*'s dissenting opinion provides a sound roadmap.

B. The Power of Dissent

Justice Marshall, joined by Justice Brennan, wrote the dissenting opinion in *Richardson*.[130] In discussing the constitutionality of California's disenfranchisement law, Justice Marshall began with a historical analysis of the Fourteenth Amendment. While the majority concluded that Congress intended to affirmatively sanction felon disenfranchisement in Section 2 of the Fourteenth Amendment,[131] Justice Marshall interpreted the Section's

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[125] *See* Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html [https://perma.cc/4HLP-QHU3].

[126] *See supra* Section II.C; *see also* Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisment Reforms*, SENT'G PROJECT (Oct. 17, 2018), https://www.sentencingproject.org/publications/ expanding-vote-two-decades-felony-disenfranchisement-reforms/ [https://perma.cc/5AP8-6BEN].

[127] *See, e.g.*, *Richardson*, 418 U.S. at 24.

[128] *See generally id.*

[129] *See generally* Order, *supra* note 2.

[130] *Richardson*, 418 U.S. at 56.

[131] *See id.* at 43 ("[W]hat legislative history there is indicates that this language was intended by Congress to mean what it says.").

intent more narrowly. According to him, as acknowledged by the majority,[132] Section 2 was the result of a "compromise" between the North and the South.[133] The northern Republicans were concerned that the increased representation in the South would impact their political dominance. They also knew that southern Black men were more likely to support the Republican party.[134] Rather than force the South to enfranchise Black men, Section 2 was a compromise that gave the South a choice: "enfranchise Negro voters or lose congressional representation."[135] In that sense, Section 2 was intended to be a "remedy supplementary" to the other sections in the Fourteenth Amendment.[136] The Section was intended to expand, not limit, enfranchisement overall. The provisions of Section 2, Justice Marshall argued, were not intended to sanction election discrimination.[137] Moreover, they were "not forever immunized from evolving standards of equal protection scrutiny."[138] Thus, Justice Marshall concluded, all voting restrictions, even the two types of disenfranchisement listed in Section 2, were subject to strict scrutiny under Section 1 of the Amendment.

Justice Marshall additionally contended that the "other crimes" language in Section 2 was a congressional afterthought and that the language was not meant to have such broad implications on voting. There is little evidence as to why Congress added the "other crimes" language to Section 2 in the first place.[139] Section 2 went to the joint committee containing only the phrase "participation in rebellion," but left the committee with "other crimes" inexplicably tacked on.[140] Justice Marshall argued that the lack of legislative history emphasized that Congress did not intend for the words to have such great significance.[141] Many states had similar language in their state constitutions at the time.[142] As noted above, these provisions were not enforced before the Civil War.[143] Rather, they were largely remnants of "the fogs and fictions of feudal jurisprudence and doubtless [had] been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our

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[132] *See id.* ("[T]he framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence.").

[133] *Id.* at 73 (Marshall, J., dissenting).

[134] *Id.*

[135] *Id.* at 74.

[136] *See id.* at 75 (quoting Oregon v. Mitchell, 400 U.S. 112, 278 (1970)).

[137] *Id.* at 75–76.

[138] *Id.* at 76.

[139] *Id.* at 72–73.

[140] *Id.* at 73.

[141] *Id.* at 72–73.

[142] *Id.* at 77.

[143] *See supra* Section II.B.

system of government."[144] In other words, disenfranchisement clauses were largely symbolic limitations on voting. The symbolic nature of disenfranchisement laws during this time and the lack of legislative history further demonstrate that Congress likely did not intend for the words to be read as separate from the other sections of the Fourteenth Amendment.

The dissent's reasoning could similarly be applied to the Minnesota Constitution's sanction of felon disenfranchisement. While section 1 of article VII allows the legislature to disqualify those "convicted of treason or felony" from voting,[145] the legislative history of the provision shows that the drafters of the state constitution had little idea of what this provision meant or the impact it would have on our ability to vote in the state.

In discussing this provision during the Minnesota Constitutional Convention, one delegate moved to strike the entire section.[146] He noted that the provision was "certainly a very stringent one, and difficult of application, and in many cases would work great hardship."[147] The delegate further noted that the felony language of the section was "unusual" and that he had "never seen it in any other Constitution."[148] The delegate's motion to strike the provision did not succeed, but the discussion demonstrates the nature of disenfranchisement laws during the nineteenth century.[149] Such laws existed for hundreds of years in Europe and Colonial America,[150] yet people still did not fully understand their significance. This lack of understanding was due largely to the lack of enforcement of disenfranchisement laws before the Civil War.[151] These clauses were historic remnants. States included them in their constitutions but had little idea as to how the laws would be applied.

Likely, these states did not care how or if these provisions would be applied at all. So few people were convicted of felonies during this period that the delegates likely did not envision this provision having any real impact on the state. In the 1850s, 0.115% of the United States population was convicted of a crime each year, and only 0.029% of the population was incarcerated.[152] Moreover, notions of parole and supervised release had not

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[144] *Richardson*, 418 U.S. at 85–86 (quoting Byers v. Sun Sav. Bank, 139 P. 948, 949 (Okla. 1914)).

[145] MINN. CONST. art. VII, § 1.

[146] ANDREWS, *supra* note 24, at 540.

[147] *Id.*

[148] *Id.*

[149] No further discussion preceded the vote on the delegate's motion. *Id.* at 540–41. Following the vote, the remainder of the discussion centered on restoring voting rights. The delegates specifically included a provision granting the Governor or the Legislature the power to restore voting rights. *Id.* at 541. They did not want to "cut off the power of the Legislature [or Governor] to restore civil rights to any person." *Id.* at 540.

[150] *See supra* Section II.B.

[151] *See supra* Section II.B.

[152] The first statistic was found by dividing the number of convictions per 100,000 people

yet been introduced in America.[153] In contrast, today, 2.5% of the population is either incarcerated or under some form of supervised release.[154] The number of people incarcerated or under supervised release is more than eighty-five times the number in the 1850s. Black people are disproportionately represented in these numbers. In Minnesota, an estimated 15 to 20% of African Americans have a felony conviction.[155] Nationally, the numbers are higher. Around 33% of African Americans have a felony conviction.[156] Fifty-three thousand African Americans are on probation or supervised release in Minnesota and currently cannot vote.[157] To put that in perspective, only 44,593 votes separated Hilary Clinton from Donald Trump in Minnesota during the 2016 general election.[158] In other words, felon disenfranchisement laws now have the power to swing elections.

The drafters of the Minnesota Constitution neither intended nor foresaw the great impact this provision would have on the state. A look at the legislative history indicates the drafters likely felt obligated to include such a provision in the constitution and did not seem to care about its

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in 1850 (115.0) by 100,000 to determine the approximate percentage of persons convicted of a crime in the United States. *See* U.S. DEP'T OF JUST., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984 (1986). Similarly, the second number was found by dividing the number of people in prison per 100,000 people in 1850 (29.0) by 100,000 to find the approximate percentage of persons in prison in the United States at the time. *Id.*

[153] *See* ISAAC FULWOOD, U.S. PAROLE COMM'N, HISTORY OF THE FEDERAL PAROLE SYSTEM 1 (2003) ("Parole of federal prisoners began after enactment of legislation on June 25, 1910.").

[154] "About 0.7% of the United States is currently in a federal or state prison or local jail." Peter Wagner & Wanda Bertram, *What Percent of the U.S. is Incarcerated? (And Other Ways to Measure Mass Incarceration)*, PRISON POL'Y INITIATIVE (Jan. 16, 2020), https://www.prisonpolicy.org/blog/2020 /01/16/percent-incarcerated/#:~:text=Nearly%20one%20out%20of%20every,in%20a%20prison%20or%jaiil.&text=We're%20often%20asked%20what,state%20prison%20or%20local%20jail [https://perma.cc/439F-H3Ek]. One in fifty-five adults was on probation or parole in 2016, which is approximately 1.8%. *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW CHARITABLE TRS. (Sept. 25, 2018), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities [https://perma.cc/4G5G-GZJN].

[155] Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, U. OF GA. (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/ [https://perma.cc/VTB3-QSQH].

[156] *Id.*

[157] *Voting Rights Restoration*, *supra* note 62.

[158] *Minnesota Presidential Race Results: Hillary Clinton Wins*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/minnesota-president-clinton-trump [https://perma.cc/RJ7G-AS5U].

practical application.[159] The legislative history does not suggest the drafters intended to give the legislature limitless authority to expand felon disenfranchisement. Rather, the notes from the debates make clear that they, in fact, intended for the legislature to increase enfranchisement by "restor[ing] civil rights to any person who may be convicted for violating the provisions of this section."[160] Furthermore, as Justice Marshall argued regarding the U.S. Constitution, the disenfranchisement sanctioned in this provision is not frozen and "forever immunized from evolving standards of equal protection scrutiny."[161] We are "not confined to historic notions of equality."[162] While the Minnesota Constitution facially sanctions disenfranchisement of those convicted of felonies, there is no reason why the statutes created under this provision should not be viewed with strict scrutiny as an infringement on the fundamental right to vote, especially given our evolving notions of equality. To exclude these statutes from the Equal Protection Clause is to immunize them from any meaningful review.

C. The Expansion of the Word "Felony" and the Court's Selective Historical Analysis

There is no question that the Minnesota Constitution disqualifies those convicted of a "felony" from voting. The question then becomes, what qualifies as a felony under the Minnesota Constitution? First, it is helpful to track the historical evolution of the word felony. In feudal times, serious crimes were not necessarily felonies.[163] To qualify as a felony, a crime had to involve some breach of faith or truth, which was deemed an essential element of the lord to vassal relationship.[164] Without that violation of truth, even the most wicked crimes were not considered felonies.[165] After the Norman Conquest of England, the feudal concept of felony was reshaped by the common law.[166] Under common law, felonies were defined by the punishment. Crimes that were punishable by death or loss of property were considered felonies.[167] There were nine traditional common law felonies: murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem, and larceny.[168] These common law felonies were brought from Europe to America. Colonial America continued to define felonies based on their

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[159] *See generally* ANDREWS, *supra* note 24.

[160] *Id.* at 540–41.

[161] Richardson v. Ramirez, 418 U.S. 24, 76 (1974) (Marshall, J., dissenting).

[162] *Id.*

[163] Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 CLEV. ST. L. REV. 461, 463 (2009).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.* at 464.

punishments. In the early 1800s, America continued to use the common law definition of felony. The 1832 Webster's Dictionary defined felony as "[i]n common law, any crime which incurs the forfeiture of lands or goods. All offenses punishable by death are felonies."[169]

Minnesota was no different. In 1858, a felony in Minnesota was defined as a "public offense punishable with death, or which is, in the discretion of the court may be, punishable by imprisonment in the penitentiary or territorial prison."[170] Even after Minnesota began enacting criminal statutes, the statutes largely followed the common law definitions of various crimes.[171] Thus, when the delegates of the Minnesota Constitution drafted section 1 of article VII, their idea of felony was a rather narrow one. Those who committed felonies in Minnesota were subject to the death penalty.[172] Since then, our definition of felony has continued to broaden. As our definition of felony has expanded, so has article VII, section 1 of the Minnesota Constitution. Today in Minnesota, no crime is punishable by death.[173] Nevertheless, felonies remain a category of crimes in Minnesota. A felony is currently defined in Minnesota as "a crime for which a sentence of imprisonment for more than one year may be imposed."[174] In the past twenty-five years, Minnesota's incarceration rate has increased by 150%.[175] The state has also created an entire system of parole and supervised release that did not exist in 1858. Minnesota's criminal justice system and, with that, the categorization of crime has drastically changed.

As such, the word "felony" in article VII, section 1, should be read narrowly, and the historical definition of felony should apply. The Minnesota Constitution should be read to disqualify from voting only those convicted of crimes punishable by death. All other crimes the legislature has subsequently included in its definition of felony fall outside of the scope of the Minnesota Constitution. The legislature, of course, has full authority to change the definition of felony and thus expand felon disenfranchisement. However, any expansion of disenfranchisement that exceeds the common law definition of felony should be subject to strict scrutiny. States, including Minnesota, have pushed back on this idea largely because they are aware

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[169] *Felony*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1832).

[170] MINN. STAT. ch. 87 § 3 (1858).

[171] *See* O'Connell v. State, 6 Minn. 279, 285 (Minn. 1861) ("The crime of rape is a crime at common law . . . [t]he statute does not define the crime, but prescribes the punishment.").

[172] MINN. STAT. ch. 87 § 3 (1858).

[173] *History of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/minnesota [https://perma.cc/3R47-T6A3] ("The death penalty in Minnesota has been abolished since 1911.").

[174] MINN. STAT. § 609.02, subdiv. 2 (2020).

[175] Andy Mannix, *Decades of New Laws Caused Minnesota's Prison Population Spike*, STAR TRIB. (Feb. 7, 2016), https://www.startribune.com/decades-of-new-laws-caused-minnesota-s-prison-population-spike/367934361/ [https://perma.cc/DVU9-FPYZ].

that their current disenfranchisement laws could not survive review under strict scrutiny.[176] While the government would likely argue that convicted felons, even under an expansive definition, should not be able to vote while incarcerated, any governmental interests of felon disenfranchisement after a person has been released from prison are tenuous at best.[177]

D. The Court's Narrow Definition of Fundamental Right

The United States Supreme Court has declared the right to vote "the essence of a democratic society."[178] Any restrictions on the right to vote "strike at the heart of representative government."[179] Moreover, Minnesota has recognized the right to vote as a fundamental right.[180] The Supreme Court of Minnesota has affirmed that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[181] Not only has the court acknowledged that the right to vote is fundamental, but it recognized that "[o]ther rights, even the most basic, are illusory if the right to vote is undermined."[182] While the right to vote may be restricted under the Minnesota Constitution, these restrictions cannot go unchecked, as voting is a fundamental right.

Under the narrow definition of felony provided in the Minnesota Constitution, only those convicted of treason or a crime punishable by death fall outside of the scope of the fundamental right to vote. This interpretation of the provision best protects an individual's right to vote and aligns with the state's view of voting as a fundamental right.[183]

In Minnesota, the exercise of political franchise is a fundamental right.[184] In *Erlandson v. Kiffmeyer*, the Minnesota Supreme Court held that a "restriction that . . . denies the franchise to citizens who are otherwise

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[176] *See infra* Section V.F.

[177] *See infra* Section V.F.

[178] Reynolds v. Sims, 377 U.S. 533, 556 (1964).

[179] *Id.*

[180] Erlandson v. Kiffmeyer, 659 N.W.2d 724, 730 (Minn. 2003) (quoting Burson v. Freeman, 504 U.S. 191, 199 (1992)).

[181] *Id.*

[182] *Id.*

[183] *See* Kahn v. Griffin, 701 N.W.2d 815, 832 (Minn. 2005) ("It is undisputed that the right to vote is a fundamental right under both the federal and state constitutions, and under both constitutions any potential infringement is examined under a strict scrutiny standard of review."); *see also* Ulland v. Growe, 262 N.W.2d 412, 415 (Minn. 1978) ("It is well established that the exercise of the political franchise is a 'fundamental right.'"); State *ex rel.* St. Paul v. Hetherington, 240 Minn. 298, 303, 61 N.W.2d 737, 741 (1953) ("To whatever extent a citizen is disenfranchised by denying him reasonable equality of representation, to that extent he endures taxation without representation and the democratic process itself fails to register the full weight of his judgment as a citizen.").

[184] *Ulland*, 262 N.W.2d at 416.

qualified" to vote must be subject to strict scrutiny.[185] On the other hand, if the restriction is "more in the nature of a simple electoral regulation," then rational basis scrutiny applies.[186] Felon disenfranchisement is not a "simple electoral regulation," so strict scrutiny should apply. The court in *Schroeder*, however, disagreed.[187] While the court agreed that voting is a fundamental right, the court explained that the right is limited by the Minnesota Constitution.[188] The "language of the Minnesota Constitution determines what is and is not a fundamental right."[189] Thus, the court concluded that a person who has been convicted of a felony does not have a fundamental right to vote in Minnesota.[190] The court arrived at this conclusion by reading article VII expansively. According to the court, the Minnesota Constitution disqualifies every person whom the legislature deems to be a felon from voting. The power to disenfranchise and re-enfranchise, therefore, lies exclusively with the legislature, and this power is unlimited.

Conversely, the plaintiffs argued that the "enumerated exceptions to voting rights" should be "implemented in a manner that narrowly tailors deprivation of the right to vote to accomplish a well-defined and compelling government interest."[191] The plaintiffs' reasoning is sound; article VII should be read narrowly to ensure the protection of the right to vote. Any expansion of disenfranchisement should be analyzed under strict scrutiny. As Justice Marshall stated in the *Richardson* dissent, "the right to vote 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.'"[192] It follows then that article VII should be interpreted narrowly to support this fundamental right of our democratic society.

The court also reasoned that the Minnesota Constitution sanctions several other different types of voting restrictions.[193] Age, residence, and competency are other restrictions that the Minnesota Constitution places on voting.[194] Therefore, the right to vote is a limited one. However, the felony

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[185] *Erlandson*, 659 N.W.2d at 733; *Kahn*, 701 N.W.2d at 832; *Hetherington*, 240 Minn. at 303, 61 N.W.2d at 741 ("The right to vote . . . is a fundamental and personal right essential to the preservation of self-government.").

[186] *Ulland*, 262 N.W.2d at 415.

[187] Order, *supra* note 2, at 13.

[188] *Id.* at 6.

[189] *Id.* at 7.

[190] *Id.*

[191] Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment at 21, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Apr. 3, 2020).

[192] Richardson v. Ramirez, 418 U.S. 24, 77 (1974) (Marshall, J., dissenting) (citing Reynolds v. Simons, 377 U.S. 533, 555 (1964)).

[193] Order, *supra* note 2, at 6.

[194] *Id.*

restriction is distinct from the other restrictions in the state's constitution. Age, residence, and competency are all either defined in the constitution or have proven to be relatively stagnant terms. Age and residence requirements are explicitly outlined in the Minnesota Constitution.[195] Those restrictions are clearly defined and cannot be changed absent a constitutional amendment. Moreover, to be disqualified from voting due to incompetency, the constitution requires that an individual be declared legally incompetent through a court order.[196] While the definition of legal incompetence is not clearly expressed in the constitution, this term has not been expanded in the way the felony restriction has.[197] In fact, in Minnesota, the legislature has worked to reform laws regarding voting incapacity to remove "over- and underinclusive terminology."[198]

In contrast, the felony restriction is unique in its ability to expand and evolve over time. The felony definition of today is remarkably different from the felony definition of the nineteenth century.[199] The term continues to expand, and, as a result, so does the number of people barred from voting. Courts have refused to notice this distinction and continue to treat felony disenfranchisement the same as any other restriction on voting. However, no other voting restriction has been exploited in the same way. The courts that uphold such exploitation, like the court in *Schroeder*, are unable to find any legislative history that supports such expansion. The delegates of the Minnesota Constitutional Convention drafted article VII at a time when the definition of felony was limited, and felon disenfranchisement clauses were not heavily enforced.[200] Their short discussion of the provision is further evidence that the delegates did not anticipate that the clause would have a great impact on the voting population.[201] In fact, as noted above, the delegates themselves seemed

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[195] *See* MINN. CONST. art. VII, § 1 (establishing a voting age requirement of eighteen years of age and a residence requirement of thirty days).

[196] *Id.*

[197] It is estimated that the number of individuals barred from voting in the United States due to legal incompetence is in the thousands. *See* Michelle Bishop, *Disability is No Reason to Strip a Person's Voting Rights*, HUFFINGTON POST (May 12, 2018), https://www.huffpost.com/entry/ opinion-bishop-disability-voters_n_5af5b085e4b0e57cd9f9042f [https://perma.cc/XMC2-W3W4].

[198] Note, *Developments in the Law–The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1183–84 (2008) ("In 2003, Minnesota changed its law from one automatically disenfranchising those under guardianship to one disenfranchising them only after judicial proceedings that specifically revoke their right to vote.").

[199] *See supra* Section V.C.

[200] RICHARD FRANKLIN BENSEL, THE AMERICAN BALLOT BOX IN THE MID-NINETEENTH CENTURY 29 (2004) ("If a man was not personally known by those attending the polls, there was no way to determine whether he had been disqualified by criminal conviction. As a result, very few voters were challenged on the ground that they were convicted felons.").

[201] *See* ANDREWS, *supra* note 24, at 540–41.

unsure as to how the provision would impact the state.[202] While courts cite widespread historical use of felon disenfranchisement laws as justification for their use today, in reality, these laws are markedly different.[203] Courts in Minnesota would be justified in treating the expansion of felon disenfranchisement with strict scrutiny. Doing so would both respect the language of the Minnesota Constitution and protect the fundamental right to vote.

E. International Law as a Comparison

Although felon disenfranchisement laws are common in the United States, the same cannot be said for the rest of the democratic world. Felon disenfranchisement is "far outside the international norm."[204] The international community has rejected permanent disenfranchisement, and a majority of European countries impose no ban on felon voting whatsoever.[205] In most European countries, governments even facilitate voting by those convicted of felonies.[206] Other European countries ban only some prisoners from voting, usually those serving long sentences for certain serious crimes.[207] That said, a minority of European countries do

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[202] *Id.* A delegate at the Minnesota Constitutional Convention noted that the disenfranchisement provision was "certainly a very stringent one, and difficult of application, and in many cases would work great hardship." *Id.*

[203] *See* Order, *supra* note 2, at 1. The court began its historical analysis of felon disenfranchisement by stating that "[f]elony disenfranchisement has its roots in ancient Greek and Roman society." *Id.* It went on to state that "[t]his practice similarly has a long history in the United States," noting that "two dozen states practice[ed] felony disenfranchisement at the eve of the Civil War." *Id.* Finally the court noted "[t]oday felony disenfranchisement is widespread in the United States." *Id.* The court wrote about felon disenfranchisement as if the practice had remained unchanged throughout history.

[204] Ghaelian, *supra* note 56, at 789.

[205] AM. C.L. UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 6 (2006). Countries that allow all prisoners to vote include Austria, Albania, Croatia, the Czech Republic, Denmark, Finland, Germany, Finland, Germany, Iceland, Ireland, Lithuania, Macedonia, the Netherlands, Serbia, Slovenia, Sweden and Switzerland. *Id.*

[206] *Id.* at 4.

[207] *Id.* at 4–7. Countries that ban select prisoners from voting include Belgium, Bosnia and Herzegovina, France, Greece, Italy, Luxembourg, Malta, Norway, Poland, Portugal, and Romania. *Id.* at 7. Often the courts impose this added penalty on a case-by-case basis. *Id.* Poland permits courts to disenfranchise those convicted of intentional crimes and sentenced to more than three years in prison. *Id.* France bars voting only by those convicted of offenses involving crimes of moral turpitude or crimes against the public, such as forgery or embezzlement. *Id.* In Portugal, courts normally add disenfranchisement to the sentence of a "horrendous crime or serious crime—someone that held a sentence for eight to ten years, or fifteen years." *Id.* (quoting a Portuguese official). In Greece, those in prison with life sentences lose their right to vote forever. *Prisoner Votes by European Country*, BBC NEWS (Nov. 22, 2012), https://www.bbc.com/news/uk-20447504 [https://perma.cc/K3WK-D4YG].

disenfranchise all prisoners.[208]

American disenfranchisement laws differ from European laws in two respects. First, American disenfranchisement laws are unique in their ability to reach outside of prisons. In all but sixteen states, American disenfranchisement laws affect not only people in prison but also those living in the community, either on probation, parole, or after completing every aspect of their sentence.[209] Second, European countries with disenfranchisement laws have made clear that disenfranchisement is designed and delivered as a form of punishment.[210] In contrast, most defenders of disenfranchisement laws in the United States tend to avoid justifying the laws as a form of punishment.[211] Rather, proponents insist that they are regulatory measures.[212]

The United Nations "has specifically criticized the United States' disenfranchisement policy."[213] The United States signed and ratified two treaties—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)—which are both critical of blanket voting bans.[214] A General Comment to the ICCPR provides that "[i]f conviction for an offense is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offense and the sentence."[215] The United Nations Human Rights Committee oversees the implementation of

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[208] AM. C.L. UNION, *supra* note 205, at 6. Countries that disenfranchise all prisoners include Belarus, Bulgaria, Estonia, Hungary, Kosovo, Latvia, Moldova, Russia, Slovakia, Spain, Ukraine, and the United Kingdom. *Id.*

[209] *Id.* at 5.

[210] *Id.*

[211] *Id.*; *see also* Defendant's Memorandum Supporting Summary Judgment at 16, Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440 (Minn. Dist. Ct. Feb. 25, 2020) [hereinafter Defendant's Memorandum] ("Restoring voting rights at the completion of the sentence is a rational choice that many other states have also made."); Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1728 (2014) ("[O]ffenders who commit serious felonies are subject to regulatory disenfranchisement because they have violated the civic trust that makes liberal democracy possible."); Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010).

> Just as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights.

Id.

[212] Ghaelian, *supra* note 56, at 790.

[213] AM. C.L. UNION, *supra* note 205, at 26.

[214] *Id.* at 27.

[215] U.N. Hum. Rts. Comm., General Comment Adopted under Article 40, Paragraph 4, of the Int'l Covenant on Civil and Political Rights, ¶ 14, CCPR/C/21.Rev.1/Add.7 (1996) (adopting comments related to G.A. Res. 2200A (XXI), art. 25 (Dec. 16, 1966)).

the ICCPR, and the Committee has charged the United States with violating the treaty. The Committee recommended that the United States "adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole."[216] Additionally, the ICERD monitoring body, the Committee on the Elimination of Racial Discrimination, noted that it was "concerned about the political disenfranchisement of a large segment of the ethnic minority population who are denied the right to vote by disenfranchising laws and practices," which is potentially a violation of articles 1 and 5 of the ICERD.[217]

In recognizing the right to vote as fundamental, most foreign courts examine disenfranchisement legislation by applying a proportionality review, which is often seen as a higher threshold of review than the American strict scrutiny test.[218] Under proportionality review, many foreign disenfranchisement laws have been struck down.[219] For example, South Africa's Constitutional Court addressed the issue of whether the government had the authority to deny prisoners the right to vote in *Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders* ("NICRO").[220] The court failed to find a legitimate government interest justifying disenfranchisement and held that the government could not deprive prisoners of the right to vote simply "to correct a public misconception as to its true attitude to crime and criminals."[221] Additionally, the European Court of Human Rights applied proportionality review to a United Kingdom law that operated as a blanket ban on inmate voting.[222] The court struck down the blanket ban but reasoned that some disenfranchisement was acceptable to allow a democracy to take "steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention."[223] Still, the court held that there must be a "discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned."[224]

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[216] *U.N. Committee Says U.S. Bans on Former Prisoner Voting Violate International Law*, AM. C.L. UNION (2006), https://www.aclu.org/other/un-committee-says-us-bans-former-prisoner-voting-violate-international-law [https://perma.cc/NL3K-84YR].

[217] AM. C.L. UNION, *supra* note 205, at 28 (citing U.N. Hum. Rts. Comm., Rep. of the Comm. on the Elimination of Racial Discrimination on Its Fifty-Eighth Session, ¶ 397, U.N. Doc. A/56/18 (2001)). Articles 1 and 5 of ICERD prohibit racial distinctions that *effectively* impair the equal exercise of political rights. *Id.* at 27.

[218] Ghaelian, *supra* note 56, at 798–99.

[219] *Id.* at 792.

[220] *Minister of Home Affs. v. Nat'l Inst. of Crime Prevention & the Re-Integration of Offenders* 2005 (3) SA 280 (CC) at 2 para. 2 (S. Afr.).

[221] *Id.* at 27 para. 56.

[222] Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. 187.

[223] *Id.* at para. 71.

[224] *Id.*

While this transnational judicial discourse is not binding on the United States, it can and has been discussed in judicial opinions rendered by the United States Supreme Court. In *New York v. United States*, Justice Frankfurter referred to Argentinean, Australian, Brazilian, and Canadian constitutions in his majority opinion.[225] Additionally, in *Lawrence v. Texas*, the Court cited European Court of Human Rights jurisprudence in holding that same-sex couples have a constitutional right to privacy.[226] In *Roper v. Simmons*, when examining the application of capital punishment in cases involving an offender under the age of eighteen, the Court cited several non-binding treaty provisions and examined Canadian, British, and Indian jurisprudence.[227] Similarly, courts in Minnesota could use transnational judicial discourse to bolster a decision to restrict the expansion of felon disenfranchisement. Rather than looking solely at comparative state laws, which are also not binding in Minnesota, courts could broaden their analysis to include a discussion on the constitutionality of disenfranchisement laws worldwide. This is an especially critical discussion given that the United States continues to face harsh criticism for its widespread use of blanket felon disenfranchisement laws.

F. Under Strict Scrutiny, Minn. Stat. § 609.165 Violates Minnesota's Equal Protection Clause

Section 609.165 easily fails strict scrutiny review, which is likely why courts have made a concerted effort to avoid applying this standard. However, after concluding that all voting, outside of the narrow restrictions authorized by article VII, is a fundamental right, section 609.165 should be reviewed under strict scrutiny. Section 609.165 applies to crimes other than those punishable by death and is thus an expansion of disenfranchisement and a direct infringement on the fundamental right to vote. As such, this direct infringement is subject to strict scrutiny.[228] Under strict scrutiny review, the state must show that the current disenfranchisement scheme is "narrowly tailored and reasonably necessary to further a compelling governmental interest."[229] The compelling governmental interest must be specifically stated, and the statute must have an "actual, and not just . . .

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[225] Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining* Richardson v. Ramirez, 13 TULSA J. COMP. & INT'L L. 279, 293 (2006).

[226] *Id.* at 294.

[227] *Id.*

[228] *See* Ulland v. Growe, 262 N.W.2d 412, 415 (Minn. 1978) ("Legislative enactments which directly infringe such [fundamental] rights are subject to 'strict scrutiny' review.").

[229] Greene v. Comm'r of Minn. Dep't of Hum. Servs., 755 N.W.2d 713, 725 (Minn. 2008); *see also* In re Welfare of Child of R.D.L., 853 N.W.2d 127, 133 (Minn. 2014) ("[T]he County must carry a 'heavy burden of justification' to show that the classification is narrowly tailored to serve a compelling government interest." (internal citations omitted)).

theoretical" connection to the governmental interest.[230]

In *Schroeder*, the government stated that the purpose of adopting section 609.165 was "to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen."[231] While that may have been the presumed purpose, there is no evidence that the statute did, in fact, promote rehabilitation. Studies show that non-voters are more likely to be rearrested than voters.[232] Although these studies acknowledge that the data does not provide proof of direct causation, it is clear that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[233] Furthermore, the state cites no evidence supporting the proposition that disenfranchising those on probation, parole, or some form of supervision *promotes* rehabilitation. Evidence shows the opposite. Preventing those on probation or parole from voting actually stifles rehabilitation, as those who can vote are less likely to recidivate and more likely to successfully complete probation.[234] Thus, under strict scrutiny, the state would have a difficult time articulating a governmental interest that is served by the statute.

The state could further argue that the felon disenfranchisement statute is necessary to prevent voting fraud. This is a common argument among proponents of felon disenfranchisement laws.[235] Again, there is little evidence to support this argument, especially given the state's blanket restriction of all felonies regardless of the type of crime committed.[236] Another common argument made by disenfranchisement proponents is that felons have forfeited their right to participate in government.[237] Others

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[230] State v. Russel, 447 N.W.2d 886, 889 (Minn. 1991).

[231] Defendant's Memorandum, *supra* note 211, at 16 (citing MINN. STAT. ANN. § 609.09 (West 1962) (Advisory Committee's Comment)).

[232] CHUNG, *supra* note 20, at 4 ("The revocation of voting rights compounds the isolation of formerly incarcerated individuals from their communities, and civic participation has been liked with lower recidivism rates. In one study, among individuals how had been arrested previously, 27 percent of non-voters were rearrested, compared with 12 percent of voters.").

[233] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 214 (2004).

[234] *See* Plaintiffs' Memorandum in Support of Summary Judgment, *supra* note 81, at 30 ("Not only are voters less likely to recidivate than non-voters, they are 'more likely to successfully complete probation and parole supervision,' as demonstrated by data from those states where probationers and parolees are allowed to vote." (citations omitted)).

[235] Proponents of felon disenfranchisement have argued that past criminality may predict future participation in electoral fraud. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 120 (2004).

[236] Jamie Fellner, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, SENT'G PROJECT (1998), https://www.hrw.org/legacy/reports98/vote/index.html#Top OfPage [https://perma.cc/W5AW-H4VQ].

[237] MANZA & UGGEN, *supra* note 27, at 12. Senator Mitch McConnell, when arguing in favor of felon disenfranchisement stated, "[T]hose who break our laws should not dilute the

believe that ex-felons are more likely to favor corrupt candidates or more lenient criminal codes.[238] Still, these arguments lack solid evidentiary support. Moreover, the United States Supreme Court has ruled that states may not fence out a class of voters because of concerns about how they might vote.[239]

Even assuming there was a legitimate government interest served by the statute, the state would have to prove that the statute is narrowly tailored to achieve that interest. Statutes that are not "precisely tailored to serve that compelling state interest" must be invalidated.[240] In terms of voter fraud, this argument is outlined in the dissenting opinion of *Richardson v. Ramirez*. Disenfranchisement provisions, such as section 609.165, are "patently both overinclusive and underinclusive."[241] The statutes are overinclusive in that they encompass all former felons, and "there has been no showing that ex-felons generally are any more likely to abuse the ballot than the remainder of the population."[242] Moreover, the provisions are also underinclusive in that "many of those convicted of violating election laws are treated as misdemeanants and are not barred from voting at all."[243] Thus, a portion of those at risk of committing voter fraud are not included within the provisions.

Furthermore, if the statute's compelling government interest is rehabilitation, the statute most certainly could have been drafted in a less restrictive way. The statute could disenfranchise persons incarcerated following a felony conviction and re-enfranchise those released from prison, including those on probation, parole, or supervised release. This would constitute a less restrictive alternative and would still achieve the government's interest in rehabilitation. To survive strict scrutiny review, the state would need to explain why expanding the statute to include people on parole, probation, and supervised release is necessary to achieve the governmental interest of rehabilitation. Given the contradictory evidence,

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votes of law-abiding citizens." *Id.* Former Attorney General Jeff Sessions has argued that "a person who violates serious laws of a State or of the Federal Government forfeits their right to participate in those activities of that government [because] their judgment and character is such that they ought not to be making decisions on the most important issues facing our country." Michael Gentithes, *Felony Disenfranchisement & the Nineteenth Amendment*, 53 AKRON L. REV. 431, 437–38 (2019). Senator George Allen has also argued against re-enfranchising convicted felons, stating that allowing a former felon to vote would make them "feel like a full-fledged citizen again." *Id.*

[238] Miles, *supra* note 235, at 120.

[239] Carrington v. Rash, 380 U.S. 89, 96 (1965).

[240] *See* Plaintiffs' Memorandum in Support of Summary Judgment, *supra* note 81, at 31 (citing State v. Trahan, 870 N.W.2d 396, 404 (Minn. Ct. App. 2015), *aff'd*, 886 N.W.2d 216 (Minn. 2016)).

[241] Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

[242] *Id.*

[243] *Id.*

this would be a difficult argument for the state to make. Therefore, under strict scrutiny review, section 609.165, as it is currently written, would likely fail.

G. Minnesota Statutes Section 609.165 Fails a Rational Basis Review

Even under rational basis review, Minnesota's current disenfranchisement scheme should not survive. The Minnesota Constitution applies "an independent Minnesota constitutional standard of rational basis review," which is more stringent than the federal standard.[244] This heightened standard of review requires,

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.[245]

The court noted that this heightened standard of review "is particularly appropriate . . . in a case such as this where the challenged classification appears to impose a substantially disproportionate burden on the very class of persons whose history inspired the principles of equal protection."[246] Given the immensely disproportionate impact section 609.165 has on people of color, this heightened standard of review would be an appropriate standard of review to apply to this case.

The district court in *Schroeder*, however, disagreed.[247] The court ultimately chose not the apply *Russell*'s heightened standard of review.[248] In its order, the court first noted that the *Russell* heightened rational basis standard has not been used by the Minnesota Supreme Court to strike down a law since 1991.[249] This statement is misleading. While this heightened rational basis standard has not been used to strike down a law since 1991, the Minnesota Supreme Court does, in fact, continue to use *Russell* when

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[244] State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991).
[245] *Id.* at 888.
[246] *Id.* at 889.
[247] Order, *supra* note 2, at 8–9.
[248] *Id.*
[249] *Id.*

analyzing statutes.[250] In a July 2020 decision, the Minnesota Supreme Court emphasized the *Russell* standard, stating that:

> [W]e hold lawmakers to a higher standard of evidence when a statutory classification demonstrably and adversely affects one race differently than other races, even if the lawmakers' purpose in enacting the law was not to affect any race differently.[251]

The court concluded by stating that Minnesota's equal protection standard is not less deferential to the legislature than the federal standard, "[b]ut where a law demonstrably and adversely affects one race different than other races . . . our precedent under the Minnesota Constitution requires more of lawmakers . . . than does the Fourteenth Amendment."[252]

Despite the noted adverse impact that felon disenfranchisement has in Minnesota, the court decided not to apply the heightened standard of review. To justify this decision, the court argued that the statute is "not the source of the disenfranchisement."[253] Rather, the court stated that the Minnesota Constitution was the source of the disenfranchisement, while section 609.165 is the "method of restoring the right to vote."[254] Again, this statement is misleading. The Minnesota Constitution grants the legislature *both* the power to disenfranchise and to re-enfranchise. Section 609.165 does both. The statute expands the disenfranchisement authorized by the Minnesota Constitution, as the statute uses an expansive definition of "felony" and applies to those on probation and parole, neither of which existed at the time the Minnesota Constitution was drafted. Thus, by expanding disenfranchisement, the statute serves to disenfranchise as well as re-enfranchise.

Finally, the court's order states that the enactment of section 609.165 in 1983 "converted the process of restoring the right to vote from a discretionary model to an automatic one."[255] In so doing, the court reasoned that the statute "expanded re-enfranchisement."[256] That the statute is less restrictive than its predecessors is irrelevant. The *Russell* standard for heightened review applies when a law "adversely affects one race different than other races."[257] In Minnesota, African Americans comprise 4% of Minnesota's voting-age population but account for more than 20% of

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[250] *See* Fletcher Props., Inc. v. City of Minneapolis, 947 N.W.2d 1, 25 (Minn. 2020).
[251] *Id.* at 19.
[252] *Id.* at 27.
[253] Order, *supra* note 2, at 9.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] Fletcher Props., Inc. v. City of Minneapolis, 947 N.W.2d 1, 25 (Minn. 2020).

disenfranchised voters.[258] Furthermore, American Indians comprise less than 1% of Minnesota's voting-age population but comprise 7% of those disenfranchised.[259] The statute clearly has an adverse effect on people of color. As such, the heightened standard of review should apply. The judge's phrasing of the statute as one that "expanded re-enfranchisement" does not change the analysis under *Russell*.

Under this heightened standard of review, the government needs "actual as opposed to theoretical factual justification for a statutory classification."[260] The government needs to do more than simply state that the statute was enacted "to promote the rehabilitation of the defendant and his return to his community as an effective participating citizen."[261] The government needs actual factual justification, proving that the statute does, in fact, promote rehabilitation. In neither the State's memoranda nor the court's order is such evidence provided.

The court ultimately applied a traditional rational basis review, similar to the analysis in federal courts. As the court notes, "[t]o survive rational basis review the challenged statute must be 'a rational means of achieving a legislative body's legitimate policy goal.'"[262] The court reasoned that because the legislature's policy goal in enacting section 609.165 was to promote rehabilitation by automatically restoring civil rights to persons convicted of felonies after their sentence ended, the statute was a rational means of achieving the legislature's goal.[263] The court stated that "[a]lthough the Plaintiffs advocate that the line should have been drawn elsewhere, this Court does not have the ability to substitute its judgment for that of the legislature."[264] The statute, the court concluded, expanded re-enfranchisement.[265]

While it is true that the statute converted the individualized restoration of rights to an automatic one, the statute did not expand restoration. The 1907 statute required that a person convicted of a felony wait "one year from the date of the judgment" to apply to the district court for reinstatement of civil rights.[266] The one year started from the "date of judgment," not the date of release, contrary to what is stated in the court's order.[267] That meant that

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[258] *See* Plaintiffs' Memorandum in Support of Summary Judgment, *supra* note 81, at 36.

[259] *See id.*

[260] *Fletcher Props.*, 947 N.W.2d at 27.

[261] Order, *supra* note 2, at 9 (citation omitted).

[262] *Id.* (citing *Fletcher Props.*, 947 N.W.2d at 19).

[263] *Id.* at 10.

[264] *Id.*

[265] *Id.*

[266] Act approved March 12, 1907, ch. 34, §§ 1–2, 1907 Minn. Laws 40–41.

[267] *See* Order, *supra* note 2, at 2 ("A 1907 statute allowed a person convicted of a felony to apply to the courts for reinstatement of civil rights at least a year *after their release from incarceration* if they had three witnesses to testify to their good moral character." (emphasis added)). *But see* Act approved March 12, 1907, ch. 34, §§ 1–2, 1907 Minn. Laws 40–41

individuals serving sentences of one year or longer could apply to the courts for reinstatement of their civil rights immediately after being released from prison. Therefore, under the 1907 statute, the *maximum* amount of time an individual was required to spend outside of prison without the ability to vote was one year.

The 1963 statute changed that. By 1963, Minnesota, as well as the rest of the country, had adopted an expansive system of parole and probation.[268] In 1965, the average parole period in the United States was twenty-nine months.[269] Of the 89,900 people released from prison in 1965, 54,300 were placed on parole.[270] The enactment of section 609.165, therefore, *extended* the period of disenfranchisement for the majority of convicted felons in Minnesota by an average of seventeen months. While the statute automatically restored civil rights, the law still required an extension of disenfranchisement for the majority of those on probation, parole, or another form of supervised release.[271] In fact, given the new probation and parole system, the l963 statute was the most restrictive statute that the state had ever enacted regarding felon disenfranchisement. Before 1907, the 1867 statute immediately reinstated civil rights to all convicted felons who finished a prison sentence without having any disciplinary violations.[272] Thus, convicted felons with no disciplinary violations automatically had their civil rights restored after release from prison from 1867 to 1907. In 1907, the statute changed, requiring a maximum waiting period of one year.[273] In contrast, the 1963 statute, section 609.165, more than doubled the average waiting period.[274] Although the legislature claimed that the purpose of the statute contemplated the "rehabilitation of those convicted," it provided no

("Before such restoration to civil rights shall take effect such person or persons shall at the end of one year *from the date of the judgment thereof* or at any time thereafter first apply to the district court" (emphasis added)).

[268] *Probation and Pretrial Services: History*, U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-history#:~:text=President%20Calvin%20Coolidge%20signs%20the,sentence%20in%20the%20federal%20courts [https://perma.cc/QYV3-3SXP]. Many states passed probation laws at the end of the nineteenth century and beginning of the twentieth century. *Id.* Massachusetts was the first state to establish a probation system in 1878. *Id.* The federal government did not permit probation until the Probation Act of 1925, which was signed by President Calvin Coolidge. *Id.*

[269] BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850–1984, at 177 (1986).

[270] *Id.* at 182. While the numbers are not available for 1965, in 1976, more people were on probation or parole than in confinement. *Id.* at 180. While 457,528 people were confined in either state or local prisons, 1,461,459 people were on probation or parole.

[271] Criminal Code of 1963, ch. 753, § 609.165, 1963 Minn. Laws 1198.

[272] Act approved Feb. 10, 1867, ch. 14, § 82, 1867 Minn. Laws 18–19.

[273] Act approved March 12, 1907, ch. 34, §§ 1–2, 1907 Minn. Laws 40–41.

[274] *See supra* text accompanying note 270–71.

explanation for extending disenfranchisement until after the completion of probation and parole rather than upon release from prison.[275]

The rational basis standard in Minnesota requires "a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals."[276] The actual effect of section 609.165 was to extend the minimum disenfranchisement period for the majority of those convicted of felonies in Minnesota. While, theoretically, the legislature may have believed that an automatic system of re-enfranchisement would lead to increased enfranchisement, the statute actually decreased enfranchisement. The legislature chose to make convicted felons wait until after the completion of their probation or parole, rather than after completion of incarceration, to vote.

Moreover, the legislature stated that the goal of the statute contemplated the "rehabilitation of those convicted."[277] Again, Minnesota law looks at the actual, not theoretical, effect of a law.[278] While, theoretically, the legislature could have believed that section 609.165 would promote rehabilitation, in reality, research shows that democratic participation is positively associated with a reduction in recidivism.[279] One study found that voting behavior is "significantly correlated with subsequent measures of incarceration, re-arrest, and self-reported criminality."[280] Additionally, disenfranchisement is more stigmatizing than reintegrative because it serves to further isolate an individual from society.[281] The State, in its memorandum, did not detail any evidence that section 609.165 has had a real positive effect on rehabilitation.[282] The theoretical belief that the statute would promote rehabilitation is not enough to survive Minnesota's rational basis review. Without such evidence, the plaintiffs' equal protection claim should prevail.

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[275] Criminal Code of 1963, ch. 753, § 609.1, 1963 Minn. Laws 1185.

[276] State v. Garcia, 683 N.W.2d 294, 299 (Minn. 2004).

[277] Criminal Code of 1963, ch. 753, § 609.1, 1963 Minn. Laws 1185.

[278] *See Garcia*, 683 N.W.2d at 299.

[279] Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L. J. 407, 414 (2020).

[280] *Id.*

[281] *Id.* at 415.

[282] *See* Defendant's Memorandum, *supra* note 211, at 6. "It is believed that where a sentence has either been served a completion or where the defendant has been discharged after parole or probation his rehabilitation will be promoted by removing the stigma and disqualification to active community participating resulting from the denial of his civil rights." *Id.* (citation omitted). This quote describes the theoretical effect of the statute, but the memorandum does not detail the statute's actual effect.

VI. CONCLUSION

Felon disenfranchisement is a topic that has gained traction in recent years. Courts around the country have been tasked with assessing the constitutionality of these laws, and Minnesota is amongst the states that have faced this question. Under federal precedent, these laws are difficult to strike down, and only a handful of cases have been successful, all requiring a showing of discriminatory intent. Recognizing the federal barrier, a recent Minnesota state court case, *Schroeder v. Minnesota Secretary of State*, argued that Minnesota's felon disenfranchisement statute violates Minnesota's Constitution.[283] The district court ultimately held that the power to regulate felon disenfranchisement and re-enfranchisement lies exclusively with the legislative branch, a holding that was affirmed by the Minnesota Court of Appeals.[284] While this may be true to an extent, the legislature's ability to regulate enfranchisement should not go unconstrained.

Article VII's sanction of felon disenfranchisement should be read narrowly, taking into account the historical use of such laws and any relevant historical definitions. Under this reading, any expansion of felon disenfranchisement, including the expansion contained in section 609.165, should be reviewed under strict scrutiny. At a minimum, the court should apply Minnesota's heightened rational standard of review. Under either heightened standard, section 609.165 would likely be deemed unconstitutional. Nevertheless, the Ramsey County court was hesitant to apply either standard of review.

Across the country, felon disenfranchisement laws are enforced and upheld. Rather than looking domestically, however, courts should look for guidance abroad. On a global scale, the United States is a clear outlier, and our disenfranchisement laws have been repeatedly condemned by international observers. On an international level, a decision to strike down a felon disenfranchisement law as violative of Minnesota's state constitution would not be revolutionary. In fact, even disenfranchising incarcerated felons would be more extreme than the approach in most European countries. Although the law would support such a decision, it seems unlikely that the Minnesota Supreme Court will reverse the decision of the Ramsey County and Minnesota Court of Appeals. While the courts clearly have the authority to strike down the felon disenfranchisement law, they have proven unwilling to do so. The power remains in the hands of the legislature, and it will be up to them to amend or repeal the law.

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[283] Order, *supra* note 2, at 1.

[284] *See id.* at 13; Schroeder v. Simon, 962 N.W.2d 471, 487 (Minn. Ct. App. 2021).