Disenfranchisement: Objectives and Objections

Introduction

Since the entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982, much debate has focused on the legal, equality, and democratic rights of both individuals and groups. While acknowledging the progress in areas such as legal and equality rights, debates regarding democratic rights seem timeless and unsusceptible to the idea of the “living tree.”¹ This paper will analyze the highly controversial debate surrounding prisoner disenfranchisement and assert that voting is a fundamental right in democratic society. Through the analysis of the political objectives as well as the upholding and dissenting judgments in *Sauvé 2*, a decision where the Court held that prisoners have the right to vote under section 3 of the *Canadian Charter of Rights and Freedoms*, this paper will consider the philosophical justifications for disenfranchisement in conjunction with the weaknesses in the arguments given by the judiciary.² As revoking the voting rights of prisoners has a basis in social contract theory, a philosophical debate stemming from John Rawls’ work *A Theory of Justice* will also be considered.³ In addition to being a right, practical reasons for allowing prisoner enfranchisement will show that is a normatively desirable public policy choice.

In the first section, this paper will consider the pro-disenfranchisement stance held by the governmental objectives and justifications in *Sauvé 2*. Justice Gonthier’s reply to the argument of inequality will be analyzed second before finally considering the weaknesses in Chief Justice McLachlin’s argument based on political theory. The second section is a rebuttal to each of the arguments previously made. Opposing philosophies, logical reasoning as well as demographic statistics will be used to further the originally stated thesis. Finally, this paper will conclude with a brief analysis of the political and social consequences criminal disenfranchisement has on the process of prisoner rehabilitation. While this paper draws its main arguments from the

Canadian context of *Sauvé 2*, cases from the United States will also be considered. With fifteen states disenfranchising ex-felons for life, there has been much philosophical and practical debate over the right of incarcerated individuals to vote. As such, the arguments contained within these cases are important tools for each side of disenfranchisement and will be considered throughout this paper.

Disenfranchisement: a Tool

In *Judging Democracy*⁴, Christopher Manfredi and Mark Rush compare and contrast the American and Canadian judicial systems by examining similar decisions made in the neighbouring countries. In particular, they look at the decisions made regarding prisoner’s voting rights through the analysis of *Sauvé 2* and *Richardson*.⁵ While their analysis showed opposite judgements in the two cases, Manfredi and Rush noted that the debates the two courts engaged in were essentially the same as both argued the underlying philosophy of disenfranchisement. Moreover, the fact that both cases were highly divided within each court shows that the political theory behind decisions concerning voting rights are of particular importance.⁶ As such, when analyzing the pro-disenfranchisement position of the government and Justice Gonthier in *Sauvé 2*, examples from the US will also be considered.

Governmental Objectives with the Canadian Elections Act

Section 51(e) of the *Canadian Elections Act* was the provision contested as unconstitutional in *Sauvé 2*. It was this particular subsection of the federal legislation which denied the right to vote to “[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more.”⁷ Although *Sauvé*’s lawyer argued that it was unconstitutional under sections 3 and 15 of the *Canadian Charter*, this paper will pay particular focus to

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the infringement under section 3, which states “[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”⁸ As the crown agreed that the provisions of the *Canadian Elections Act* did infringe upon the right to vote, the governmental objectives are of particular importance in determining whether the infringement was justified. In the *Sauvé 2* judgement, Chief Justice McLachlin underlined the two governmental objectives for s.51(e) as “(1) to enhance civic responsibility and respect for the rule of law; and (2) to [...] enhance the general purpose of the criminal sanction.”⁹ Although one cannot deny that both objectives are highly symbolic of a democratic society¹⁰, whether or not they advance a justified limitation will be assessed.

After removing the rhetoric surrounding the first reason behind the denial of inmates to vote, one is left with one of classical liberalism’s central concepts: the social contract.¹¹ In classical social contract theory if one breaks the contract by breaking the law, it follows that one is no longer in society. In more modern terms, if someone breaks the law, they no longer have a right to participate in society; in particular, they no longer have the right to vote. This thought is widespread throughout political theory and is not confined to the Canadian judicial sphere. Social contract theory was also at the heart of Judge Friendly’s decision to disenfranchise ex-felons in the American *Green v. Board of Elections* trial.¹² As it is central to the philosophical debates of almost every case concerning prisoner disenfranchisement, the theory of the social contract will be considered later in this section with reference to one of the weaknesses in Chief Justice McLachlin’s decision.

As the second governmental objective in the *Elections Act*, to “enhance the general purpose of the criminal sanction,”¹³ is not based in political theory but rather aims at providing additional punishment, it requires less philosophical analysis than the previously stated objective. This justification is “intended to be morally educative for incarcerated [...] offenders,”¹⁴ as well as an additional deterrent to possible law-breakers. This political goal of increased punishment is intended to increase the psychological effects of incarceration on an offender as opposed to simply the physical consequences of being jailed. The logic behind this justification is the assumption that by the threat or, in the case of a convicted criminal, the actual revocation of an important part of one’s Canadian citizenship will lead to more remorse in the inmate.

Choosing Inequality

Chief Justice McLachlin refers to the expansion of suffrage as an important aspect of Canadian history and describes the idea of felon disenfranchisement as “ancient and obsolete.”¹⁵ As this argument finds root in the equality right section of the *Charter*¹⁶ it is important to consider whether or not prisoners are being treated unfairly. Justice Gonthier’s counterargument insists that this is not discriminatory, as the disenfranchisement is not “based on some irrelevant personal characteristic such as gender, race, or religion.”¹⁷ Similarly, in the United States Judge Krupansky used a similar counterargument against inequality. Felons are not “disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal

act for which they assume the risks of detention and punishment.”¹⁸ Because the reason behind a prisoner’s disenfranchisement is a choice rather than a personal characteristic, it follows logically that it is non-discriminatory if he or she is punished by revocation of the right to vote.

Christopher Manfredi asserts a similar point in an article published in the *Review of Politics*. He asserts that restrictions on voting can be imposed, but only if done so in a universal fashion.¹⁹ That is to say, a restriction that applies to the entire population equally (such as the age restriction) is legitimate. Therefore, threatening disenfranchisement as a consequence of criminal activity is similarly legitimate.²⁰

Weaknesses in the McLachlin Judgement

To fully assess the arguments for disenfranchisement, the weaknesses in Chief Justice McLachlin’s decision should be noted. Although this paper agrees with McLachlin’s judgement, it acknowledges that the depth and breadth of her philosophical arguments are lacking. As Justice Gonthier notes in his dissenting judgement, McLachlin’s position is based on “one philosopher [which leads her to] replace one reasonable position with another, dismissing the government’s position as ‘unhelpful’.”²¹

As for matters of depth, one must consider McLachlin’s philosophical argument that although “the social compact requires the citizens to obey the laws created by the democratic process [...] it does not follow that failure to do so nullifies the citizen’s continued membership in the self-governing polity.”²² However, there is nothing in classical social contract theory that prohibits the disenfranchisement of a citizen’s mem-

bership into society²³; in fact, the consequence of societal banishment is arguably the most important effect of breaking the social contract.²⁴ Thus, when considering McLaughlin's analysis of social contract theory, one is left lacking an argument founded on philosophical voting theory.

Disenfranchisement: A Paradox

While there are many legitimate arguments favouring disenfranchisement, this section will analyze and address the previously made arguments – the legislative objective of enhancing civic responsibility and providing additional punishment, the counterargument to inequality, and the weaknesses in Chief Justice McLachlin's decision – to assert that criminal disenfranchisement is unconstitutional as well as impractical.

Legislative Limitations

The first governmental objective, to enhance civic responsibility, is based on social contract theory wherein a violation of said contract leads to a revocation of societal rights. It is this political theory that is behind the saying "he got what he deserved;" it is the thought of retribution. However ingrained that this may be in the average person's everyday psyche, one must ask if it has a place in removing fundamental rights. Although this idea is highly controversial, this paper asserts that classic social contract theory is out-dated in an era of universal suffrage in the democracies of the developed world. As such, the justification of enhancing civic responsibility given by government to limit the voting rights of prisoners is also outdated. This thought is promoted in *A Theory of Justice* wherein John Rawls sets social contract theory in a contemporary framework. This revamped notion of the social contract will be explored later in this section when

discussing the weaknesses in McLachlin's judgement.

The second governmental objective of "providing additional punishment"²⁵ was to be carried out through both its deterring and educative elements. However, this paper argues that neither the means (education and deterrence) nor the ends (additional punishment) are practical. First, additional punishment as an educative tool is extremely limited. Denying the right to vote is paradoxical to the message trying to be sent as it "misrepresents the nature of our rights and obligations under the law and consequently undermines them."²⁶ In a democracy, individuals vote for those who represent them. However, if those representatives can then bar those citizens as this objective attempts to do, it shows a self-contradiction between the means and ends of the policy the government is attempting to achieve. Although the second objective of deterrence is not contradictory, it is impractical due to the low visibility of disenfranchisement.²⁷ This objection to deterrence flows into the overall impracticality of the objective; United States Justice Brennan argued that "the offender, if not deterred by the thought of the specific penalties of long imprisonment [...] is not very likely to be swayed from his course by the prospect of expatriation."²⁸

Indirect Discrimination through Disproportionate Representation

Both arguments given by Canadian Justice Gonthier and American Justice Krupansky assert that the disenfranchisement of felons cannot fall under a heading of discrimination as they are not due to "immutable characteristic[s]"²⁹ but rather to decisions made by each felon to commit a crime. Although this paper does not support that argument

that prisoner disenfranchisement is discriminatory to prisoners, it does assert that the disproportionate amount of Aboriginal people in Canadian prisons and African-Americans in US penitentiaries should not be ignored. While Aboriginals comprise only 2.7% of the adult Canadian population, approximately 18.5% of offenders now serving federal sentences are of First Nations, Métis and Inuit ancestry and, should the current trend continue, it is expected to reach the 25% mark in less than 10 years.³⁰ There is a similar situation in the United States; 14% of the population of young men are African American, but they represent over 40% of the prison population.³¹ With such disproportions in the prison population, already marginalized groups would suffer from indirect discrimination through disenfranchisement.

In "The Purity of the Ballot Box," Tribe contests the argument regarding decisions mentioned by Gonthier, Krupansky, and Manfredi arguing that they assume that "the criminality is the product of free choice."³² This argument is highly controversial in modern debate. In light of the overwhelming number of "what if" scenarios, this paper will allow the reader to consider theoretical situations that would lead to an invalidation of the discrimination due to "free choice" argument both in terms of the means (the opportunity for choice) and ends (indirect discrimination of marginalized groups).

Strengths within Weaknesses

There were two major weaknesses in Chief Justice McLachlin's decision. First, she only used one political theorist to support her view and secondly, she misinterpreted the classical theory of the social contract. As previously mentioned, Justice Gonthier paid

particular attention to Chief Justice McLachlin's lack of breadth when noting that she only made reference to one political theorist, John Mill. In Mill's *Thoughts on Parliamentary Reform*³³, he describes the "possession and the exercise of political, and among others electoral, rights is not of the chief instruments both of moral and of intellectual training for the popular mind."³⁴ Gonthier's criticism of Mill is perfectly valid as political theory is based on competing philosophies. However, his criticism of McLachlin based on her using Mill is lacking. Political philosophy is constantly being debated; analysis and conclusion by one author simply provides ground for further discussion and contestation. This paper agrees that simply quoting one philosopher weakened the Chief Justice's position, however it is not a limiting factor in her judgement as Justice Gonthier asserts.

The second problem with Chief Justice McLachlin's judgement is based on her quoting of social contract theory. Her assertion that the failure of an individual to obey the law does not result in the nullification of said individual's citizenship is incorrect from the viewpoints of almost every major classical social contract theorist including Hobbes, Rousseau, Locke, and Kant. However, although this paper accepts McLachlin's misunderstanding of the classic social contract theory, it asserts that her position is nonetheless valid *in a modern context*.³⁵ John Rawls, a contemporary political philosopher has revamped the original social contract theory to a modern context in his 1971 book *A Theory of Justice*. Rawls refers to the "principle of participation" which is the principle of equal liberty defined in the political context.³⁶ He defines the underlying worth of the principle of participation is in the

"fair opportunity to take part in and influence the political process"³⁷ wherein the "constitution must take steps to enhance the value of equal rights of participation for all members of society."³⁸ Rawls' work on social contract theory is based upon the same principles of equal representation as classical philosophers, but diverges in respect to voting rights. He sees the right to vote as fundamental; a government that disenfranchises some of its citizens is illegitimate as it is disrespecting the principle of "one elector, one vote."³⁹ As was previously noted, political theories often find base on the limitations of other theories. As such, this paper does not attempt to argue the superiority of one theory over another, but rather the appropriateness that one may hold in this particular case. The contemporary historical context in which Rawls writes is of considerable importance as the extension of suffrage beyond a small representation of the population.⁴⁰ As such, it is argued that the other authors cited regarding social contract theory are less applicable concerning voting rights and they are, in this context, outdated.

The Goal of Rehabilitation

It must ultimately be understood that intelligent people disagree. Although contrasting political theories is necessary when considering the opposing decisions many countries have taken concerning voting rights, it is important to consider aspects further than philosophy. As such, this paper will finish by considering an important aspect of criminal disenfranchisement: the rehabilitation process of ex-felons.

In contemporary society, rehabilitation is a particularly popular objec-

tive of the penal system.⁴¹ Canada in particular attempts to strike a balance between punishment and treatment through programs intended to teach and counsel.⁴² As the sentence of most inmates is less than life, they must at some point attempt to reintegrate into society. However, the case of fifteen American states disenfranchising ex-felons for life starkly contradicts the idea of rehabilitation and "indicates that society has less faith in the rehabilitative possibilities of prison than its rhetoric might suggest."⁴³ However, one must recognize that the *Canadian Elections Act* only denies the right to vote while an inmate is incarcerated. As such, this paper considers the long-term effects on an individual's psyche who has at one point been disenfranchised.

The judgement given by Justice Sachs in the South African decision in *August* is an example that clearly depicts the importance of enfranchisement as "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."⁴⁴ Although this decision is particularly relevant to South Africa due to the economic disparities in the country, it emphasizes an important aspect of voting; the feeling of inclusion. Chief Justice McLachlin refers to the connection between prisoners and society as an aspect that needs to be "bolster[ed] rather than undermine [d],"⁴⁵ as:

"depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community, while the right to participate in voting helps teach democratic values and social responsibility."⁴⁶

The dissenting decision in *Sauvé 2* made reference to the testimony given by the appellant Aaron Spence to show how disenfranchisement is “meaningful to offenders.”⁴⁷ However, the testimony did not take into account the possible long-term feelings Spence may have towards a government that deprives individuals of something considered inherently “valuable.”⁴⁸

Ultimately, if the goal of rehabilitation is the reintegration of an ex-criminal into society, then limiting a fundamental democratic right is going directly against that objective. Therefore, if a society is both democratic and has rehabilitation as an objective of incarceration, it should not allow disenfranchisement. By denying felons the right to vote from felons, whether in the short or long-term, states are undermining the possibility of full reintegration into society by removing a sense of identity linked to the governing body.

Conclusion

Newton’s Third Law of Motion states for every action there is an equal and opposite reaction. Political philosophy has taken on the same framework wherein every argument has an equally valid counterargument. In this balancing of conclusions, each argument is picking at flaws in the previous reasoning, which is exactly why philosophy is such a highly debated topic. The practical implications of political theory on modern affairs bring the controversy to the forum of governmental legislation and judicial decision. The effect of the two Canadian cases regarding prisoners’ voting rights, *Sauvé 1* and *Sauvé 2*, respectively, has spurred great debate among academics. Manfredi removes the rhetoric used in both the justifications and philosophies to pinpoint the two questions American and Canadian Justices were arguing: “the meaning of citizenship and the ra-

tionale for punishment.”⁴⁹ This paper contrasted those underlying philosophical debates surrounding the references to social contract theory, as well the debates concerning equality and effectiveness. The modern social contract put forward by scholars such as Rawls and Mill concur that although punishment is required when one breaks a law, the right to political representation through voting is fundamental in democratic society and should not be stripped of any citizen. To address arguments regarding equality, the overrepresentation of minority groups in the federal inmate population (Aboriginals in Canada and African-Americans in the United States) is a very important factor. The effectiveness of disenfranchisement to achieve the government’s objective of further punishment through deterrence and education are weak at best, impractical and self-contradictory at worst. When these three overarching themes are concluded, this paper is left with a strong position against the disenfranchisement of prisoners, whether only during their sentenced incarceration or for life.

To further illustrate the detriment criminal disenfranchisement has on society, the practical implications denying the democratic right to vote on inmate rehabilitation was considered. The long-term effects disenfranchisement holds on an individual attempting to reintegrate into society decidedly outweigh the short-term goal of an educative message.

Section 3 of the *Canadian Charter of Rights and Freedoms* asserts that “[e]very citizen of Canada has the right to vote,”⁵⁰ without referring to any internal limitations. Moreover, this democratic right is not subject to the government’s notwithstanding clause, which shows the value the right to vote holds in society. In

the *Sauvé 2* judgment, the Supreme Court of Canada moved beyond the “stereotypes cloaked as common sense”⁵¹ to assert the fundamental value voting holds in democratic society. This paper commends the Supreme Court of Canada on the progressive position taken that has removed the symbolic justification of disenfranchisement through the idea that “deviants are the source and embodiment of corruption, pollution, and moral turpitude.”⁵² The right of every citizen to vote lies at the heart of Canadian democracy, regardless if they live in a cell or bedroom.

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¹The “living tree” metaphor is used to justify the evolution of jurisprudence analogous to changing societal norms. *Edwards v. Attorney General of Canada*, [1930] A.C. 124 [Edwards].

²*Sauvé v. Canada*, [2002] 3 S.C.R. 519 [Sauvé 2]. Note that the lower court decision of *Sauvé 1* will not be analyzed independently, but only as it is referred to in *Sauvé 2*.

³John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

⁴Christopher Manfredi and Mark Rush, “Of Real and “Self-Proclaimed” Democracies: Differing Approaches to Criminal Disenfranchisement,” in *Judging Democracy* (Peterborough: Broadview Press, 2008), 49-64.

⁵*Richardson v. Ramirez*, [1974] 418 U.S. 24 [Richardson].

⁶Highly controversial decisions usually result in a split court. The Supreme Court of Canada decision was 5-4 in favour of prisoner enfranchisement while the Supreme Court of the United States upheld the disenfranchisement of prisoners 6-3. *Sauvé 2*, *supra* note 2 at 1.; *Richardson*, *supra* note 5 at 1.

⁷*Canada Elections Act*, [1985] R.S.C. [Elections Act].

⁸*Canadian Charter of Rights and Freedoms*, s. 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁹*Sauvé 2*, *supra* note 2 at 1.

¹⁰As per McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 21.

¹¹Social contract theory explains the formation of society as an association of individuals who agree to come together in a political sphere wherein they abide by laws they themselves created. As per Jean-Jacques Rousseau, *The Social Contract*, trans. Maurice Cranston (New York: Penguin Books, 2004).

¹²This case is unavailable for public view (“cert. denied”), but was referred to by Laurence H. Tribe, “The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘The Purity of the Ballot Box,’” *Harvard Law Review* 102, no. 6 (1989): 1304.

¹³*Sauvé 2*, *supra* note 2 at 1.

Caption describing picture or graphic.

¹⁴As per Gonthier J. *Ibid.*, at para. 72.

¹⁵McLachlin is referring to a time when the vote was only allowed to men of a certain age, income, and social class. *Sauvé 2*, *supra* note 2 at para. 43.

¹⁶S.15(1): Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¹⁷Gonthier J. in *Sauvé 2*, *supra* note 2 at para. 69.

¹⁸*Wesley v. Collins*. [1985] M.D. Tenn. [*Wesley*] at para. 27.

¹⁹Christopher P. Manfredi, “Judicial Review and Criminal Disenfranchisement in the United States and Canada,” *The Review of Politics* 60, no. 2 (1998): 297.

²⁰This particular argument assumes that along with the outcome of prison time, a person who is considering committing a crime also acknowledges the outcome of the loss of vote.

²¹Gonthier J. in *Sauvé 2*, *supra* note 2 at para. 157.

²²McLachlin C.J. *Ibid.*, at para. 47.

²³Classical liberalists such as Hobbes, Locke, Rousseau and Kant all promoted or accepted the idea of felon disenfranchisement.

²⁴It is also important to note that one’s citizenship is revoked when one breaks a law under the social contract. One is not only no longer allowed to participate in the democratic process, but in extreme cases one is no longer protected by the society’s laws (i.e. if one is killed, the person who committed the act is not punished).

²⁵*Sauvé 2*, *supra* note 2 at 1.

²⁶As per McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 31.

²⁷Tribe, “The Disenfranchisement of Ex-Felons,” 1307.

²⁸Expatriation is used as this case referred to the consequences of military desertion. It is applicable to this paper as loss of citizenship is a worse fate than loss of the right to vote. As such, if a person were not to consider the worse consequence, it would logically follow that they would not consider the lesser. Moreover, as this case is in an American context, the possibility of the death penalty would be on the minds of potential criminals in particular states. *Trop v. Dulles*, [1958] 356 U.S. 86 [*Trop*].

²⁹*Wesley*, *supra* note 17 at para. 27.

³⁰All statistics were taken by Correctional Services Canada in 2006. Office of the Correctional Investigator, “Backgrounder: Aboriginal Inmates,” The Correctional Investigator Canada, <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20052006info-eng.aspx>.

³¹Race, Ethnicity & Health Care, “Young African American Men in the United States,” The Henry J. Kaiser Family Foundation, <http://usjamerica.files.wordpress.com/2010/01/7541.pdf>.

³²Tribe, “The Purity of the Ballot Box,” 1311.

³³John Stuart Mill, *Thoughts on Parliamentary Reform* (London: John W. Parker and Son, 1859). Although the previous line was not an exhaustive list of social contract theorists, they are the leading authority of classical contract theory.

³⁴Mill, *Parliamentary Reform*, 22-23.

³⁵The most recently deceased author previously mentioned was Immanuel Kant in 1804.

³⁶Rawls, *A Theory of Justice*, 221.

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³⁷Ibid., at 224.

³⁸Ibid.

³⁹Ibid., at 222.

⁴⁰Gender, class, race, wealth, and religion have all been reasons for disenfranchisement in the past.

⁴¹Tribe, “The Purity of the Ballot Box,” 1301.

⁴²Justice Canada Monitor, “Correctional Issues,” The Justice Canada Monitor, <http://www.justicemonitor.ca/correctionalissues.htm>.

⁴³Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven: Yale University Press, 1981), 112.

⁴⁴*August v. Electoral Commission*, [1999] 3 S.A.L.R. 1 [August] at para. 17.

⁴⁵McLachlin C.J. in *Sauvé 2*, *supra* note 2 at para. 38.

⁴⁶Quoted testimony of Professor Jackson in the appellants’ record. Ibid., at para. 38.

⁴⁷Ibid., at para. 183.

⁴⁸Ibid.

⁴⁹Manfredi, “Criminal Disenfranchisement in the United States and Canada, 279.

⁵⁰S.3: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

⁵¹*Sauvé 2*, *supra* note 2 at para. 18.

⁵²Tribe, “The Purity of the Ballot Box,” 1315.

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