Strategic Judicial Decision Making and Prisoners' Voting Rights: From *Sauvé I* to *Sauvé II*

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DRAFT

It is well established that Supreme Court judges "are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act."[1] The "others" whose preferences a judge strategically considers include public opinion, other institutions of government (whose cooperation is often needed if judgments are to be effectively implemented), and the judicial colleagues whose support is needed to achieve a majority coalition on the Court itself. In short, judges act strategically with respect to both external and internal audiences. This paper explores the internal coalition-building dimensions of two successive prisoners voting rights cases: *Sauvé I* (1993), which invalidated a blanket disqualification of all prisoner voting, and *Sauvé II* (2002), which invalidated any kind of prisoner disqualification whatsoever. The strategic interaction of internal coalition building is often reflected in carefully crafted compromises in the logic and rhetoric of the judicial opinion. We detect such strategic compromises particularly in *Sauvé I.*

At first glance *Sauvé I* seems a poor candidate for strategic or any other kind of analysis. In an unusually terse opinion, *Sauvé I* offers only the virtually unelaborated conclusion that a blanket disqualification of all prisoner voting violated the *Charter*'s section 3 right to vote and was unreasonable under section 1 of the *Charter*, leaving open the question whether a more finely tuned disqualification might pass constitutional muster. Nine years later in *Sauvé II* (2002), however, several of the same judges disagreed so vehemently about whether any kind of prisoner disqualification could be justified that their earlier unanimity must have been strategically constructed. Working back from the more fulsome evidence of *Sauvé II*, it is possible to infer the strategic calculations underlying the carefully crafted brevity of *Sauvé I.* Our analysis confirms James Gibson's view that judicial decision-making is a "function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." [2] We show that neither side on the substantive question could

[1] Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998), 10.
[2] James L. Gibson, "Decision Making in Appellate Courts" in John B. Gates & Charles A. Johnson, eds., *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991) at 256. Gibson refers

achieve a clear majority in 1993, perhaps because at least some judges were motivated not only by results-oriented policy considerations but also by scruples concerning proper judicial procedure – by what they thought "they ought to do." As a consequence, the most "feasible" outcome was a strategic waiting game, in which both sides of the substantive policy debate gambled that the inevitable turnover of their colleagues would turn the tide in their favour. The extreme brevity of *Sauvé I* is explained by this delaying strategy, but despite this brevity it is possible also to discern a key rhetorical compromise in the decision's only substantive sentence, which is carefully designed to reflect the preferences of each policy camp while keeping both options open.

Sauvé I Minimalism

The *Sauvé* decisions apply section 3 of the *Charter of Rights and Freedoms*. Section 3 ensures that "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons." At first blush, section 3 appears to require very little interpretation: if one is a citizen, one is entitled to a vote. Such an approach would, however, overturn even the most benign and generally accepted restrictions on the franchise such as age restrictions and residency requirements. Fortunately, section 1 of the *Charter* provides for the establishment of "reasonable limits" on rights, including section 3, so long as they are "demonstrably justified in a free and democratic society." While age and modest residency requirements have met this section 1 standard,[3] several other exclusions in the federal election law have failed to pass constitutional muster: mentally incompetent citizens (*Canadian Disability Rights Council v. The Queen* [1988] 3 F.C. 622 (T.D.)); federally appointed judges (*Muldoon v. Canada* [1988] 3 F.C. 628 (T.D.)); citizens absent from Canada (*Re Hoogbruin* (1985) 24 D.L.R. (4th) 718 (B.C.C.A.)).[4] The *Sauvé* cases test whether another class of citizens, prisoners, may be constitutionally denied the vote.

Sauvé I arose under a provision of the *Canada Elections Act*[5] (s.51e) that imposed a blanket voting disqualification on anyone incarcerated for any reason on voting day. The following is the sum total of the Supreme Court's substantive opinion in the case, with the emphasized sentence doing most of the work:

> The Attorney General of Canada has properly conceded that s. 51(*e*) of the *Canada Elections Act*, R.S.C., 1985, c. E-2, contravenes s. 3 of the *Canadian Charter of Rights and Freedoms* but submits that s. 51(*e*) is saved under s. 1 of the *Charter*. We do not agree. <u>In our view, s. 51(*e*) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court</u> (emphasis added).

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readers to an earlier work: James L. Gibson, "From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior" (1983) 5 Pol. Behav. 7.

[3] Age: *Fitzgerald v. Alberta*, 2004 ABCA 184; Residency: *Re Yukon Residency Requirement* (1986) 27 D.L.R. (4th) 146 (Y.T.C.A.); *Arnold v. Ontario* (1987) 61 O.R. (2d) 481 (H.C.); *Haig v. Canada* [1993] 2 S.C.R. 995 at 1029 (obiter). See Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 1997) (looseleaf), 42-3.

[4] See, generally, Hogg, 1997 at 42-3.

[5] R.S.C. 1985, c. E-2.

By the time the Supreme Court rendered this decision, the law had been revised to disqualify only those imprisoned for terms of two years or more – i.e., only "more serious" offenders.[6] Clearly, the brief *Sauvé I* opinion gave no indication of what the judges thought of this new law, and there was certainly no reason for them to address issues not directly raised by the blanket disqualification that had triggered the case. Nevertheless, there are many examples of the Court addressing issues not directly before them, or giving hints about pending related issues, and the Court's decision to say so little on a significant constitutional issue is curious.[7] Indeed, the extreme and unusual brevity of the opinion is obviously studied in its determination to steer clear of any hints whatsoever.

Table 1 sets the decision in the context of the broader options available to the Court.

Table 1: Supreme Court Options in Sauvé *I*

1. Uphold blanket disqualification	2. Invalidate blanket disqualification but uphold new 2 year limit	3. Invalidate both blanket disqualification and new 2 year limit, suggesting a longer limit (e.g., Lortie: 10 yrs.)	**4. Invalidate blanket disqualification on proportionality grounds without further comment** **(actual Sauvé *I* decision: 9-0)**	5. Invalidate all prisoner disqualifications

Option 1 – upholding the blanket disqualification – was clearly rejected by all of the judges and need not detain us. Under option 2, the Court would have invalidated the blanket disqualification but given a relatively clear indication that the new law's disqualification of those sentenced to 2 years or more was permissible. If the Court had thought that the 2-year criterion was too low, they might have suggested a longer alternative, such as the 10-year criterion proposed by the Lortie Commission;[8] this is

[6] S.C. 1993 c.19 amending s. 51 and adding s. 51.1.

[7] Compare the *Sauvé* decision's silence on the new law to the treatment of amendments to the Criminal Code in *R. v. Heywood* [1994] 3 S.C.R. 761 at 799 (Cory, J.). In *Heywood*, the majority (Cory, Lamer, Iacobucci, La Forest and Major) explicitly recognized changes to the vagrancy/loitering provisions enacted after the Court of Appeal's decision in *Heywood* and the Supreme Court hearing. The majority did not go so far as to affirm the constitutionality of the amendments, but they did suggest that the more narrowly tailored revisions addressed the overbreadth problems the Court had with the law before it (*Heywood* at 800). In fact, the majority uses the existence of the new law as confirmation that the earlier law is indeed overly broad (at 801).

[8] Royal Commission on Electoral Reform and Party Financing. *Final Report of the Royal Commission on Electoral Reform and Party Financing -- Reforming Electoral Democracy*, vol. 1. Ottawa: The Commission, 1991.

option 3 in the table. Under option 5, the Court would have struck down the law in a manner that precluded any other kind of disqualification. The Court did none of these things, unanimously agreeing to duck most of the issues with the minimalist opinion represented by option 4.

Strategic Delay

We know from *Sauvé II* that the option-4 minimalism of *Sauvé I* papered over an intense disagreement on the substantive issues. Table 2 shows that 3 of the *Sauvé I* judges (L'Heureux-Dubé, Gonthier, and Major) followed option 2 nine years later when they voted to uphold the 2-year criterion. Similarly, two of the *Sauvé I* judges (McLachlin and Iacobucci) voted for option 5 in 2002. Four of the *Sauvé I* judges (Lamer, La Forest, Sopinka, and Cory) left the Court before *Sauvé II*, so we lack knowledge of their where they stood in this dispute at the time of Sauvé *I*.

Table 2: Preferences of *Sauvé I* Judges Based on *Sauvé II* Opinions (2002)

1. Uphold blanket disqualification	2. Invalidate blanket disqualification but uphold new 2 year limit **L'H-D, Gonthier, Major (3)**	3. Invalidate both blanket disqualification and new 2 year limit, suggesting a longer limit (e.g., Lortie: 10 yrs.)	4. Invalidate blanket disqualification on proportionality grounds without further comment (actual *Sauvé I* decision: 9-0)	5. Invalidate all prisoner disqualifications **McLachlin, Iacobucci (2)**

4 Unknowns (left Court between Sauvé I & II): Lamer, La Forest, Sopinka, Cory

It is possible, of course, that the two groups of *Sauvé I* alumni had simply not made up their minds in 1993, but given how fervently and intransigently they supported their preferences in 2002, it seems unlikely that all of them were previously uncommitted. It is much more plausible that disagreement was equally intense in 1993 but that the committed judges chose not to make their quarrel fully public at that time because neither side could achieve a majority coalition (for reasons we shall explore below) – in effect, that they were biding their time hoping to find their preferred majority in a future case.

Table 3 shows why option-4 minimalism was the only rationally available choice for both substantive camps, assuming neither could achieve a majority.

Table 3: Strategy in *Sauvé I*: biding time *with no majority possible*

1. Uphold blanket disqualification	2. Invalidate blanket disqualification but uphold new 2 year limit **L'H-D, Gonthier, Major (3)**	3. Invalidate both blanket disqualification and new 2 year limit, suggesting a longer limit (e.g., Lortie: 10 yrs.)	4. Invalidate blanket disqualification on proportionality grounds without further comment (actual *Sauvé I* decision: 9-0)	5. Invalidate all prisoner disqualifications **McLachlin, Iacobucci (2)**
	Conservative Winset:			
			Liberal Winset:	

The "conservatives" on this issue preferred option 2 but might have been induced to compromise on a threshold higher than 2 years if a majority could have been found for option 3. That would at least have preserved the principle of a constitutionally legitimate form of disqualification. With no majority possible for either option 2 or 3, they would have been prepared to accept the compromise of option-4 minimalism. Their "winset" in the spatial array of alternatives, in other words, extends from option 2 through option 4. For the option-5 "liberals," on the other hand, only option 4 would have been an acceptable alternative in the absence of a majority able to implement their preference. Their principled opposition to any kind of disqualification would have to be sacrificed were they to compromise on the higher threshold of option 3. The liberals' "winset," in short, includes only options 4 and 5. Assuming no substantive majority on either side, the two winsets overlap only on the evasive minimalism of option 4, making this the only rational result in *Sauvé I*. The result reflected the fact that "a court opinion that is inconsistent with a justice's policy preferences may be more detrimental to the justice's policy goals than no opinion"[9] or a minimalist one.[10]

[9] Forrest Maltzman, James F. Spriggs II, Paul J. Wahlbeck, "Strategy and Judicial Choice: New Institutionalist Approaches to Supreme Court Decision-Making," in *Supreme Court Decision-Making: New Institutionalist Approaches*, H. Gillman and C.W. Clayton, eds. (Chicago: University of Chicago Press, 1999), 53.

[10] Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge Mass.: Harvard University Press, 1999).

Strategic Rhetoric

While *Sauvé I* clearly represents a disagreement-disguising minimalism, it does not hide the disagreement altogether. Although they did not make their disagreement fully public in 1993, one can with the benefit of hindsight see its outline in the central substantive sentence in the Sauvé *I* judgment:

> In our view, s. 51(*e*) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court.

This seemingly straightforward sentence is actually a finely balanced rhetorical compromise. To see this, we need to remind ourselves of the components of section 1 analysis as set out in the *Oakes* case.[11] In order for a prima facie infringement of a *Charter* right to be "demonstrably justified as a reasonable limit" under section 1, it must have a "pressing and substantial" purpose and the legislative means must be "proportional" to that purpose. If there is no compelling purpose, no further analysis is necessary and the law is struck down as an "unreasonable limit." If there is a compelling purpose, the legislative means can be proportional to that purpose only if they are rationally connected to it. That is, they must actually achieve the compelling purpose. If they do not, again the analysis ends and the law is struck down. Even if the law actually achieves the compelling purpose, however, it may still be disproportional because it infringes the right more than necessary to achieve the purpose. Why kill flies with a sledgehammer when a flyswatter will do? This is the "minimal impairment" component of the proportionality test. Finally, even legislative means that are rationally connected to the purpose and meet the minimal impairment criterion must show that the gains in achieving the compelling purposes outweigh the cost in lost rights.

In sum, the *Oakes* test proceeds through an ordered progression – from "compelling purpose" to "rational connection" to "minimal impairment" to cost-benefit balancing – with the analysis reaching each subsequent stage only if the legislation passes the previous one. In most cases, laws pass the compelling purpose and rational connection tests, and the analysis focuses on the "minimal impairment" issue, which is why it has become popular to speak of an inter-institutional policy "dialogue" between courts and legislatures.[12] Striking a law down on minimal impairment grounds, in other words, implies that it would be possible to achieve the goal with more finely tuned legislation, thus inviting the legislature, as the Court's dialogic interlocutor, to respond with a new law.[13] Needless to say, such dialogue is not possible if a law lacks a sufficiently "compelling" purpose or if the imaginable legislative means are not "rationally connected" to such a purpose.

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[11] *R. v. Oakes* [1986] 1 S.C.R. 103 at 138-9.

[12] Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures (or perhaps the *Charter of Rights* Isn't Such a Bad Thing After All," 35 (1997) *Osgoode Hall Law Journal* 529.

[13] Hogg and Bushell 1997 at 80; c.f. F.L. Morton, "Dialogue or Monologue?" in Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal & Kingston: McGill-Queen's University Press, 2001 at 112.

With this in mind, consider the option-2 group in the *Sauvé* decisions – i.e., the group that upheld the 2-year criterion in 2002 and likely had the same preference in 1993. This group clearly sees the blanket disqualification as failing the minimal impairment component of the section 1 analysis but thinks that the more carefully crafted the 2-year criterion for disqualification meets that test. In their view,

> This case is another episode in the continuing dialogue between courts and legislatures on the issue of prisoner voting… Parliament responded to [the 1993] judicial advice by enacting legislation aimed at accomplishing part of its objects while complying with the Charter.[14]

In other words, the option-2 group saw the earlier blanket disqualification as failing only the minimal impairment component of the *Oakes* proportionality analysis, meaning that it passed both the compelling purpose and rational connection tests.

The option-5 group, by contrast, believes that no prisoner disqualification can pass constitutional muster, meaning that no amount of fine tuning to achieve "minimal impairment" will suffice. Accordingly, they see no room for interinstitutional "dialogue":

> The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again.[15]

This can only mean that a prisoner disqualification of any kind fails to pass either the "compelling purpose" or "rational connection tests." In *Sauvé I*, almost half of Richard Sauvé's factum (15 of the 32 pages) argues that there is no compelling purpose,[16] and in *Sauvé II*, the option-5 group shows that it is strongly tempted by this view, noting the "thin basis" of the law's objective and maintaining that "[q]uite simply, the government has failed to identify particular problems that require denying the right to vote."[17] This group could not have made this clear in *Sauvé I*, however, without clearly exposing the policy disagreement that all of the judges were eager to disguise. They would instead content themselves with an indication that the law infringed the proportionality test. In doing so, of course, they created a path dependency that prevented a *Sauvé II* invalidation explicitly on compelling purpose grounds, however much they may have been tempted to do so. Thus, while their *Sauvé II* opinion casts doubt on the law's compelling purpose, it ultimately rests its case on rational connection grounds.

However, the option-5 group could not afford to make its views on rational connection public in *Sauvé I* either, for that, too, would bring into the open their intention to foreclose the kind of "dialogue" that their option-2 opponents wanted to keep open.

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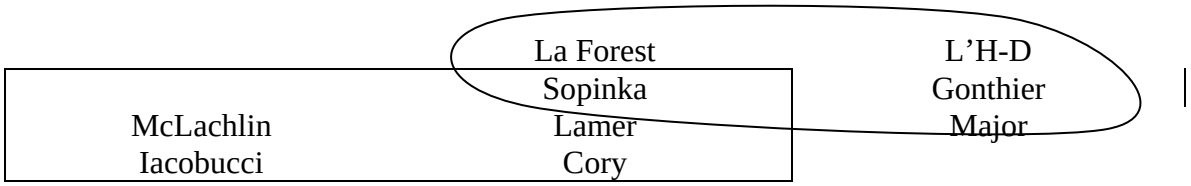
[14] *Sauvé II* at para 104 (Gonthier J. quoting with approval Justice Linden in the Court of Appeal).
[15] *Sauvé II* at para 17 (McLachlin C.J.)
[16] Factum of the Respondent Richard Sauvé. By contrast, the minimal impairment portion of the factum is one paragraph. Sauvé, facing life imprisonment, had obvious reasons for preferring the insufficient objective argument to any discussion of minimal impairment.
[17] *Sauvé II* at para 26 (McLachlin, C.J.).

The option-5 group in *Sauvé I* would thus have favoured a simple indication that the proportionality test had been infringed, without specifying which prong of that test was at stake. They would no doubt have preferred the key sentence in *Sauvé I* to stop after its first clause: "s. 51(*e*) is drawn too broadly and fails to meet the proportionality test." For similar reasons, the option-2 group would likely have preferred a sentence to read, "s51(e) fails to meet the minimal impairment component of the proportionality test." The fact that the sentence includes both clauses – "s. 51(*e*) … fails to meet the proportionality test, particularly the minimal impairment component of the test" – clearly represents a strategic compromise given the lack of a majority for either side. Had a majority agreed that only "minimal impairment" was at issue, a more extensive opinion would likely have emerged making the option of further dialogue quite clear; had a majority agreed that "rational connection" was violated, that again would likely have been made clear in a more extensive opinion, saving nine years of additional litigation.

Explaining the Lack of a Substantive Majority

Clearly, *Sauvé I* is best understood as a strategic response to the lack of majority on either side of the substantive policy issue. But this begs the question of why a majority did not exist. Consider the puzzle posed in Figure 1.

Figure 1: The Coalition Puzzle



The column on the left contains the two known *Sauvé I* liberals while the column on the right displays the three known conservatives. The central column contains the four *Sauvé I* judges no longer on the Court when Sauvé *II* was decided in 2002. The known liberals would have needed to attract three of these four potential votes to form a majority (represented by the hypothetical boxed group). If they had fallen short by just one, would that not have left two judges to join a conservative majority of five (represented by the circled group)?

There are two possible reasons why neither side was able to gain a majority on the substantive policy issue. First, there may have been some judges who had genuinely not made up their mind and wanted to buy time. Second, a cross cutting issue might have outweighed the central issue in the minds of some judges.

In fact, there was a cross cutting issue related to the middle clause in Gibson's statement that judicial decision-making is a "function of what [judges] prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." It may well be that some judges on the court had scruples about the propriety of reaching the substantive policy issue. The judicial process is suffused with rules enjoining judges from deciding more than they have to in any particular case. The rules of standing limit the right to raise issues for judicial decision to those who have been directly affected by a law.[18] One cannot launch the legal challenge of a censorship law, for example, just because it offends one's libertarian sensibilities; one must wait until one has been hauled into court for violating the law. Similarly, courts need not decide issues that have become "moot" because of the death of the litigant or settlement of the issue. The same logic means that courts should limit their decision-making to only those issues actually posed by the parties, the facts of the case, or the law under which the case arose. These rules have all become increasingly honoured in the breach, with courts treating them as more and more discretionary (which is to say less and less rule-like). Standing is more likely to be granted to litigants not directly affected by a law and moot issues more likely to be decided.[19] Similarly, issues and laws not directly raised by the factual context or the parties are often addressed.[20] Nevertheless, these traditional rules of "judicial propriety" still persist and can affect decisional outcomes.

In *Sauvé I*, the law actually brought before the courts by the original litigation was the previous blanket voting disqualification for anyone incarcerated on voting day. Here traditional principles of judicial propriety would counsel precisely the option-4 minimalism that the Court adopted, namely, a narrow invalidation of the blanket disqualification as an unreasonable limit on the right to vote, leaving the question of other kinds of limits to another day and another case. It seems likely that this option was chosen strategically rather than sincerely by the most policy-committed judges involved in this case. Given the disdain, almost revulsion, that McLachlin and Iacobucci expressed for the very idea of a prisoner disqualification, it is hard to imagine them depriving prisoners of the centrally important democratic right to vote for almost another decade if they didn't have to. Similarly, the *Sauvé I* conservatives displayed such staunch support for the principle of disqualification in 2002 that at least some of them would have been strongly inclined to dispel uncertainty about its constitutional bona fides in 1993, had they been able to do so.

Had all of the judges been policy-committed to this extent, a majority would have formed and strategic minimalism would have been unnecessary. It may have been made strategically necessary for the policy-committed judges because some of their colleagues had simply not made up their minds on the central issue and preferred a minimalist decision in the meantime. Of course, the inclination of such "policy-uncommitted" judges

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[18] *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)* [1992] 1 S.C.R. 236.
[19] *R. v. Smith* [2004] 1 S.C.R. 385 (narrow exceptions where death of accused does not make a case moot); *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (public interest may warrant a grant of standing and the deciding of a moot case); *Doucet-Boudreau v. Nova Scotia (Minister of Education)* [2003] 3 S.C.R. 3 (need for judicial guidance as reason for hearing moot case).
[20] *R. v. Smith* [1987] 1 S.C.R. 1045.

to opt for minimalism would also reflect strategic calculation – the need to buy time – rather than sincere attachment to the propriety principle. It is possible, however, that one or more judges were sincerely devoted to the rules of judicial propriety, perhaps to the extent that they outweighed strong policy commitments on the issue. This possibility is well represented in the literature. Pritchett, for example, contending "that judicial 'preferences' were influenced by conceptions of what it was appropriate for judges to do…developed an intervening variable between a justice's policy preferences and a justice's votes in cases which he called 'judicial role conception'."[21] The plausibility of this intervening variable having a sincere effect on the *Sauvé I* decision varies directly with the extent to which any of the judges involved had a consistent record of supporting judicial propriety principles in a principled manner. This clearly points to a line of follow-up research.

Whether or not any of the judges were sincere in their support of the minimalist outcome in *Sauvé I*, it seems clear that at least some of them were playing a strategic waiting game, delaying a substantive decision in the hope of a more certain majority on their side in the future. As Table 4 shows, the "liberals" won this strategic gamble, attracting 3 of the 4 newcomers to the Court to form a narrow 5-judge majority in favour of an outright ban on prisoner voting disqualifications.

Table 4: Who Won the Waiting Game? or where did the newcomers go in *Sauvé II*?

1. Uphold blanket disqualification	2. Invalidate blanket disqualification but uphold new 2 year limit **L'H-D Gonthier Major + *Bastarache* (4)**	3. Invalidate both blanket disqualification and new 2 year limit, suggesting a longer limit (e.g., Lortie: 10 yrs.)	4. Invalidate blanket disqualification on proportionality grounds without further comment	**5. Invalidate all prisoner disqualifications** **McLachlin Iacobucci + *Binnie Arbour LeBel* (5)**

[21] Cornell w. Clayton and Howard Gillman, eds., *Supreme Court Decision-Making: New Institutionalist Approaches* (Chicago: University of Chicago Press, 1999), 23. See also the other authors cited on the same point on this page.