State of New Hampshire Supreme Court

NO. 98-695

2000 TERM

AUGUST SESSION

DAVID FISCHER

v.

GOVERNOR OF THE STATE OF NEW HAMPSHIRE,
SECRETARY OF STATE OF NEW HAMPSHIRE,
MURIEL GAGNON, SUPERVISOR OF CHECKLIST OF ROCHESTER, NH

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLEE, DAVID FISCHER

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QUESTIONS PRESENTED

1. Article 11 of the New Hampshire bill of rights guarantees all people the right to vote unless they have been convicted of bribery, treason, or wilful violation of the election laws. David Fischer is an inmate at the New Hampshire State Prison who has been convicted of none of these crimes. Did the trial court properly issue an injunction and declaratory judgment when it ordered state and local election officials to allow him to register for and vote by absentee ballot in the November 3, 1998 election?

2. The Governor and the Secretary of State are constitutional officers whose duties include the administration of state elections. David Fischer was threatened with a denial of his right to vote in violation of his constitutional rights. Were the Governor and Secretary of State among the proper defendants to enforce Mr. Fischer's right to vote?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

David Fischer is an inmate at the New Hampshire State Prison for men in Concord. *Order*, N.O.A. at 6. He was convicted of attempted first degree assault and witness tampering. *State v. Fischer*, __ N.H. __ (decided February 3, 1999), <http://www.state.nh.us/courts/supreme/opinions/9902/fischer.htm>. He has served approximately three years of his 11 to 22 year sentence. David Fischer was domiciled in Rochester, N.H. before his incarceration.

By letter sent from the prison dated September 4, 1998, David Fischer requested the Rochester City Clerk to register him to vote in time for the November 3, 1998 election, and to send him an absentee ballot. *Order*, N.O.A. at 6. Some time thereafter, Rochester officials responded by mailing Mr. Fischer's letter back to him with a copy of New Hampshire's disenfranchisement statute attached, and no Rochester official took any further action. *Order*, N.O.A. at 6-7. This was a denial of Mr. Fischer's request. *Order*, N.O.A. at 7.

Soon after the denial, Mr. Fischer requested assistance from the New Hampshire Civil Liberties Union. This action was filed on October 23, 1998.

The Merrimack County Superior Court (*Brennan*, J.,) allowed the Governor and the Secretary of State to be parties to the case. *Trn.* at 7. In addition to the named Chairperson, the court also added the remaining members of the Rochester Board of the Supervisors of the Checklist as defendants. *Trn.* at 7. The court found that Article 11 of the New Hampshire Constitution guarantees Mr. Fischer the right to vote, and that the state was able to enunciate no compelling interest to override that guarantee. *Order*, N.O.A. at 10. The court declared the felon disenfranchisement statutes unconstitutional and ordered local election officials to allow Mr. Fischer and others similarly situated to register and vote in the then-upcoming election. *Order*, N.O.A. at 10-11.

The state appealed.

SUMMARY OF ARGUMENT

Mr. Fischer first argues that based on the text of Article 11 of the New Hampshire Constitution, the felon disenfranchisement statutes are unconstitutional. He points out that Article 11 rights are enforceable by an individual, and that the language casting doubt on that was removed after the 1974 Constitutional Convention. He also notes that there is no legal or practical bar to an inmate voting by absentee ballot.

Mr. Fischer then argues that voting rights are fundamental, and that the state did not raise any compelling interest to overcome them, nor show that the felon disenfranchisement laws are narrowly tailored to fit any state purpose.

Mr. Fischer argues that even though Article 11 is unambiguous, its history shows that civil death, upon which the state appears to rely, has been abrogated by statutory and constitutional changes, and that the framers of Article 11 explicitly rejected including “felony” as one of the exceptions to the guarantee of voting rights.

Mr. Fischer also points out that inmates probably vote in the town in which they were domiciled before being incarcerated.

Finally, Mr. Fischer argues there was no procedural error in allowing the Governor and the Secretary of State to be parties to this action.

ARGUMENT

I. New Hampshire's Felon Disenfranchisement Statutes Violate the New Hampshire Constitution

A. Article 11 of New Hampshire's Bill of Rights Guarantees David Fischer's Right to Vote

Article 11 of the New Hampshire bill of rights provides, in relevant part:

> "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. . . . No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States. . . . Every inhabitant of the state, having the proper qualifications, has an equal right to be elected into office."

N.H. CONST. pt. I, art. 11. The text is clear, concise, and unambiguous. The only portion of the article that may be difficult to interpret is "proper qualifications" in the final (candidates) sentence. As the State points out, however, those words were removed from the first (voting rights) sentence, which says that "every" inhabitant "shall have" the "right to vote." The article creates an exception for three specific crimes, of which David Fischer has never been convicted.

After writing to City of Rochester officials with a request for voting registration materials, David Fischer was alerted to New Hampshire's disenfranchisement statutes, which provide:

> "A person sentenced for a felony, from the time of his sentence until his final discharge, may not . . . [v]ote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole."

RSA 607-A:2, I. In addition, RSA 654:5 provides that: "A person sentenced for a felony shall forfeit his rights as provided in RSA 607-A:2."

The statutes deny prisoners convicted of a felony the right to vote, regardless of the crimes of which they were convicted. It is undisputed that the statutes do not violate any federal rights. U.S. CONST. amd. 14, § 2.; *Richardson v. Ramirez*, 418 U.S. 24 (1974). The statutes, however, cannot be read in any way to comport with Article 11 of the New Hampshire Constitution. Accordingly, they are unconstitutional and the Superior Court's order must be affirmed.[1]

In the New Hampshire Constitution, when an "enumeration is clearly and explicitly made, it must be construed to control the general terms" of legislative power, "for otherwise it will be merely idle and nugatory." *In re Opinion of the Court*, 4 N.H. 565, 567 (1829). The three crimes for which disenfranchisement is authorized cannot therefore be expanded by legislation. Article 11 allows disenfranchisement for treason, bribery, and violation of election laws. Felonies are not included on the list. Disenfranchisement of all felons is therefore unconstitutional.

B. Other Sections of New Hampshire's Bill of Rights Guarantee David Fischer's Right to Vote

Even if Article 11 does not protect prisoners' right to vote, other sections of the New Hampshire Constitution do.

The Massachusetts Declaration of Rights, Article 1, provides that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights." Based on this, the Massachusetts Supreme Judicial Court found that prisoners there have a constitutionally protected right to vote. *Dane v. Registrars of Voters of Concord*, 371 N.E.2d 1358 (Mass. 1978).

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[1]Even the United States Supreme Court's research shows the New Hampshire Constitution guarantees felons the right to vote. In its listing of states having constitutional provisions barring felons from the franchise, New Hampshire is absent. *Richardson v. Ramirez*, 418 U.S. at 48 n.14.

The Massachusetts language is virtually identical to Part I, Articles 1 and 2 of the New Hampshire Constitution, which provide that "[a]ll men are born equally free and independent," N.H. CONST. pt. I, art. 1, and that [a]ll men have certain natural, essential, and inherent rights." N.H. CONST. pt. I, art. 2.

In addition, the New Hampshire bill of rights provides that: "Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent." N.H. CONST. pt. I, art. 12. This implies that a group of inhabitants, unless allowed to vote, has not given consent to the laws and would therefore not be bound by them.

Thus the New Hampshire's Constitution recognizes Mr. Fischer's right to vote even independent of the more specific language of Article 11.

C. There is No Constitutional Authority to Abridge Mr. Fischer's Right to Vote

There is no question that the Legislature has the authority to regulate the conduct and ministerial details of elections. "[T]he freedom of the elective franchise is subject to reasonable regulations established by the Legislature for the purpose, among others, of choosing the candidates and expediting the printing and distribution of the ballots." *Wilkes v. Jackson*, 101 N.H. 420, 422 (1958) (notification to Secretary of State to place name on ballot); *Levitt v. Attorney Gen.,* 104 N.H. 100 (1962), *reh'g den.*, 104 N.H. 100 (gerrymandering); *State v. Sullivan*, 101 N.H. 429 (1958) (requiring candidates disclose contributions and expenditures); *O'Brien v. Fuller*, 93 N.H. 221 (1944) (preparation of ballots); *Murchie v. Clifford*, 76 N.H. 99, 103-04 (1911) (regulation of residence, checklists, location of voting are legislative, but matters such as validity of particular ballot out of legislative control). Without such regulations,

democratic elections would be only an interesting theory. Jumping from the authority over ministerial regulations to the conclusion that the legislature can disenfranchise whole classes of citizens, however, is too constitutionally distant.

Because there is no constitutional authority for the legislature to disenfranchise him, David. Fischer has the right to vote.

II. Article 11 is Enforceable by an Individual Voter

A. "Proper Qualifications," Which Once Limited the Right-to-Vote Clause, Was Removed

The State points out that Article 11 was revamped following the 1974 constitutional convention. Since it was first drafted in 1783, Article 11 has governed both the right to run for office and the right to vote. Before 1974 the two were in a single sentence, both modified by the adjective phrase "proper qualifications." Before 1974 Article 11 allowed the legislature (and perhaps the common law) to enumerate proper qualifications for both voting and running for office.

The 1974 constitution convention made two changes. First, it divided the provision regulating running for office (candidates clause) from that regulating voting (right-to-vote clause), so that now they are in separate sentences. Second, while "proper qualifications" was left in the candidates clause, the 1974 constitutional convention eliminated "proper qualifications" from the right-to-vote clause.

In *Paey v. Rodrigue*, 119 N.H. 186 (1979), this court held that "proper qualifications" allowed the legislature to restrict a felon from holding office because it "promote[s] honesty and integrity in candidates for and holders of public office." *Paey*, 119 N.H. at 189. Even if "proper qualifications" were still in Article 11, *Paey* does not apply to this case. The state has great interest in the honesty and integrity of candidates and office-holders because they occupy a public trust. Ensuring the honesty and integrity of voters, however, is not the role of the government because voters have no special outward obligation to the public.

Nonetheless "proper qualifications" was deleted from the right-to-vote clause. When

constitutional provisions are repealed, the repeal must be enforced. *See, e.g., United States v. Chambers*, 291 U.S. 217, 222 (1933) ("Upon the ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality.")

The state has four responses. First, in its brief, the state calls it "awkward" that the 1974 constitutional convention split up the two clauses and eliminated "proper qualifications" from the right-to-vote clause. *Def. Br.* at 23. Second, the state claims that, based on its historical research, the purpose of the 1974 changes was only to "simplify the language" of Article 11, *Def. Br.* at 18, and to make "stylistic" changes, *Def. Br.* at 23. Given the dearth of commentary in the journal of the constitutional convention, such a limited purpose cannot be divined. More likely there was a substantive reason for the repeal, probably connected with the lowering of the voting age, the long-since repealed requirements that to be a voter a person must be male and own land, the gradual elimination of civil death, and the then-current civil rights movement.[2] Third, in saying that "the Article was intended to function as it always had" even after the 1974 changes, *Def. Br.* at 24, the state seems to allege that "proper qualifications" was taken out accidentally. Finally, the state may be simply pretending that the language is still there, *id.*, despite its obvious absence.

Even the structure of the New Hampshire constitution undermines the state's hope of retaining legislative control over voting rights. It is no accident that the bill of rights comes first.

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[2]The Voting Rights Act of 1965, along with its 1985 amendments, brought about the largest change in voting rights since the fourteenth and fifteenth amendments. For a review of the act in this context, see Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993).

> "The bill of rights is a bill of their equal, private rights, reserved by the grantors of public power. The reservation precedes the grant. Before they create the power of proportional taxation in the fifth article, and the supreme legislative power in the second article, and before they form themselves into a state in the first article, they lay the foundation, and therein reserve those personal liberties, which, upon the evidence of history and their own experience, they think cannot safely be surrendered to government."

State v. Express Co., 60 N.H. 219, 250 (1880); Charles Douglas, *The Unique Role of State Constitutions: Raising State Issues in New Hampshire*, 28 N.H. B.J. 309 (1987). This structure, putting reservation of rights before grants of authority, like many northeastern states' constitutions, was modeled on the Pennsylvania constitution of 1776. *See* J. Paul Selsam, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY (1971).

B. Article 11 Needs no Legislation to be Enforced by an Individual Voter

Given the disappearance of "proper qualifications" from the right-to-vote clause, Article 11 is enforceable by an individual voter.

The language of Article 11 is phrased in the affirmative, *i.e.*, inhabitants "shall have" the right to vote. This phrasing is similar to many other constitutional phrases that clearly create rights.

The Sixth Amendment to the United States Constitution provides that in criminal cases "the accused shall enjoy the right" to a speedy and public trial, an impartial jury, be informed of the charges, confront witnesses, and have assistance of counsel. U.S. CONST. amd. 6. The Sixth Amendment is phrased in the affirmative and its rights are clearly enforceable.

Many provisions of the New Hampshire Constitution are similarly affirmatively phrased, and each of them recognizes enforceable rights. For example, Part I, Article 2, declares that "[a]ll men have certain natural, essential, and inherent rights," some of which are then listed. In

Dugas v. Town of Conway, 125 N.H. 175, 182 (1984), this court held that the provision is a "limitation[] on the so-called police power of the State and subdivisions thereof." Other New Hampshire constitutional clauses with affirmative phrasing are, in Part I of the constitution, Articles 1, 4, 5, 7, 14, 15 (second sentence), 15 (fourth sentence), 18, 20, 22, 32, and 35. This court has recognized individually enforceable rights in each of them. The example cited by the state, *Def. Br.* at 20, indeed is not self-executing because it provides that the "legislature may by general law authorize . . ." N.H. CONST. pt. I, art. 39. *Harriman v. City of Lebanon*, 122 N.H. 477 (1982). *See also Opinion of the Justices (Prior Sexual Assault Evidence)*, 141 N.H. 562 (1997) (separation of powers is self-executing, but article 37 is not negatively phrased); *Canaan v. Enfield Village Fire Dist.,* 74 N.H. 517 (1908) (taxing power is not self-executing because constitution leaves taxing scheme legislative to choice).

Upon the passage of the Nineteenth Amendment to the federal constitution allowing women to vote, there was a question raised whether legislation was necessary in New Hampshire to allow women the right to be elected into office. As noted, at the time the provisions of Article 11 regarding voting and being elected were in the same sentence and closely related, and (unlike now) *both* depended upon "proper qualifications." This court held that the common law rule barring women was within the limitations recognized by "proper qualifications," and that legislation was necessary to change the common law rule. *Opinion of the Justices*, 83 N.H. 589 (1927). Because the "proper qualifications" language is no longer a part of the right-to-vote clause, however, there is no basis on which to argue that enabling legislation is necessary to enforce it. On the contrary, this court has decided cases in which Article 11 rights were being enforced by an individual. *State v. Sullivan*, 101 N.H. 429 (1958); *Wilkes v. Jackson*, 101 N.H. 420 (1958).

III. Disenfranchising David Fischer Violates His Fundamental Rights

Any statute infringing the right to vote "strike[s] at the heart of representative government." *Reynolds v. Simms*, 377 U.S. 533, 555 (1964). There are both community and individual aspects of voting rights.

A. Restriction must Be Narrowly Tailored to Achieve a Compelling State Interest

The state concedes that voting is a fundamental right. *Def. Br.* at 25. *See State v. Cushing*, 119 N.H. 147, 148 (1979); *Tews v. Timberlane Regional Sch. Dist.*, 111 N.H. 14 (1971); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969); *Richardson v. Ramirez*, 418 U.S. at 78 (*Marshall*, J., dissenting). The state also concedes that any substantive state regulation of the franchise is subject to strict scrutiny. *Def. Br.* at 25.

"It is well settled that . . . classifications involving fundamental rights are subject to strict scrutiny and cannot survive unless they promote a compelling State interest." *Merrill v. City of Manchester*, 124 N.H. 8, 14-15 (1983) (property fundamental right); *Cheshire Medical Ctr. v. Holbrook*, 140 N.H. 187 (1995) (sex discrimination). N.H. CONST. pt. I, arts. 1 & 2. Any restriction on fundamental rights must be narrowly tailored to the compelling state interest. *Seabrook Police Assoc. v. Town of Seabrook*, 138 N.H. 177, 179 (1993); *McLaughlin v. City of Canton, Miss*, 947 F. Supp. 954, 975 (S.D. Miss. 1995) (restriction must be "precisely tailored to serve some compelling governmental interest"). This means that

> "The State has the heavy burden of showing, first, that the challenged disenfranchisement is necessary to a legitimate and substantial state interest; second, that the classification is drawn with precision – that it does not exclude too many people who should not and need not be excluded; and third, that there

> are no other reasonable ways to achieve the State's goal with a lesser burden on the constitutionally protected interest."

Richardson v. Ramirez, 418 U.S. at 78 (*Marshall*, J., dissenting); *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (restriction on voting must be "necessary to protect a compelling and substantial governmental interest," "must be drawn with 'precision'" "and must be 'tailored' to serve their legitimate objectives"; "if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference"); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

B. The State has not Claimed any Compelling Interest Upon Which to Base Felon Disenfranchisement

Although it advances four possibilities, the state has shown no compelling interest here.

1. Wrong Attitude

The state claims it is not appropriate to let prisoners vote because it would "create a voting population that would have reason to elect candidates least likely to perform the job well." *Def. Br.* at 26, *citing Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967). This is saying that prisoners might have the wrong attitudes. The argument has been thoroughly discredited. Allowing the state to

> "withdraw all political influence from those who are practically hostile to the existing order, strikes at the very heart of the democratic process. A temporal majority could use such a power to preserve inviolate its view of the social order simply by disenfranchising those with different views. Voters who opposed the repeal of prohibition could have disenfranchised those who advocated repeal to prevent persons from being enabled by their votes to defeat the criminal laws of the country. Today, presumably those who support the legalization of marihuana could be barred from the ballot box for much the same reason. The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debase that currency beyond recognition."

Richardson v. Ramirez, 418 U.S. at 82-83 (*Marshall*, J., dissenting) (quotations and citations omitted). In *Carrington v. Rash*, 380 U.S. 89 (1965), the United States Supreme Court wrote:

> "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."

Carrington v. Rash, 380 U.S. at 94 (quotations and citations omitted); *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (restrictions to "insure purity of the ballot box" and limiting vote to "knowledgeable voter" insufficient to meet constitutional test).

Society – the government – does not test for attitudes or views before recognizing the right to vote. Disallowing prisoners to vote because they might not share other peoples' opinions on criminal law or procedure is no different from preventing a person who pays high taxes from voting on tax policies, a receiver of child support from voting on custody laws, or an owner of a polluting industry from voting on air quality standards. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969) (state cannot limit vote in school district affairs to those it deems "primarily interested" or "directly affected"); *see* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (classical republicanism has long found ways to disenfranchise those with potentially different views by "reason of supposed defect of understanding, foreignness of outlook, subservience of position, or corruption of interest").

In fact, the state's argument is backward. It is reasonable to suppose that the people most knowledgeable about the workings of the criminal justice system, and therefor most likely to cast informed votes, are those subject to it.

2. Interest in Civil Society

The state's second argument is that felons do not have a role in civil society. *Def. Br.* at 26-27. This is a broad yet unsupported psychological and sociological claim that prisoners do not share in society's concerns or interests. Nothing could be further from the truth.

Prisoners retain many rights effected by legislative action. Many prisoners own land, securities, and other property, and many have children in school. Prisoners retain custody of their children, RSA 170-C:5, VI, may prosecute a civil action, *Bounds v. Smith*, 430 U.S. 817 (1977), and be subject to one. All, of course, have an interest in the budget of the Department of Corrections. While not part of the record, David Fischer has a bank account and owns a vehicle. These interests, as well as his membership in the human community, give Mr. Fischer an interest in the civil life of his town, state, and country.

With the demise of civil death, in short, prisoners can do most of the things non-prisoners do, except freely walk on the street. *See* Michael Mishlin, 2 RIGHTS OF PRISONERS ch. 15 (2nd ed. 1993). New Hampshire law recognizes this.

> "Except as otherwise provided by this chapter or by the constitution of this state, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue or be sued, and to hold offices of private trust in accordance with law."

RSA 607-A:3.

The allegation that prisoners are not interested in the civil life of their community is belied by expressions of their interest in it. David Fischer, the petitioner here, told a reporter exactly who he intended to vote for, betraying an enviable knowledge of state and local politics. Grace Murphy, *Inmate and Voter Leaning Toward the GOP*, MANCHESTER UNION LEADER at

A16 (Oct. 28, 1998). One New Hampshire inmate, serving a life sentence for murder, is a regular columnist for the *Concord Monitor*. *See, e.g.*, Ray Barham, *My Daughter Isn't to Blame for My Crime*, CONCORD MONITOR, Feb. 21., 1999; Ray Barham, *For Weeks, My View of Way of Life Was at Stake: Random Drug-Testing Issue Was No Small Matter*, CONCORD MONITOR, Oct. 11, 1998. The level of scholarship contained in some publications written by prisoners is astonishing. *See, e.g.*, J.M. Taylor, *Pell Grants for Prisoners Part Deux: It's Deja Vu All Over Again,* 8 J. OF PRISONERS ON PRISONS 47 (1997) (advocating educational opportunities for prisoners); Charles Huckelbury, *On Being a Nigger*, 8 J. OF PRISONERS ON PRISONS 9 (1997) (essay on life as a convict by a New Hampshire prisoner).

3. Social Contract

The state alleges that "incarcerated felons have violated the social contract that forms the foundation of representative democracy," *Def. Br.* at 26-27, by having "chosen" to live outside of society. *Id.*

First, the state ignores those prisoners who have landed in prison by crimes based not on choice, but on lesser mental states, *e.g.*, conspiracy, RSA 629:3 (liability for act of another); manslaughter, RSA 630:2, I(a) (liability for death caused by extreme mental or emotional disturbance); negligent homicide, RSA 630:3 (death caused negligently); simple assault, RSA 631:2-a (bodily injury caused negligently); statutory rape, RSA 632-A:2, III (strict liability for sex among consenting teenagers); cruelty to animals, RSA 644:8, III (negligent cruelty).

Second, the state mis-characterizes the "social contract" idea to mean that members of society obey its laws in exchange for participation in their making. In fact, as envisaged by John Locke, the contract involves protection of property and safety and rights in exchange for

authorizing the community to levy taxes and regulate behavior.

Locke's ideas are unmistakably expressed in Articles 3 and 12 of the New Hampshire bill of rights.

> "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void."

N.H. CONST. pt. I, art. 3.

> "Every member of the community has a right to be protected by it . . . ; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary."

N.H. CONST. pt. I, art. 12.

This court has commented on the Lockian bargain:

> "Government is formed by men for the common good, for the preservation of their lives, liberties, and estates, and the enjoyment of them in peace and safety; and 'it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it.' Locke on Government, b.2. c. 9, ss 123, 124, 131; c. 11, ss. 134, 140. Government, says the bill of rights, is 'instituted for the general good,' 'for the common benefit, protection, and security of the whole community.' Arts. 1, 10. 'Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property. He is therefore bound to contribute his share in the expense of such protection.'Art.12."

State v. Express Co., 60 N.H. 219, 250 (1880) (citations as in original intact).

Likewise, the basis for the holding in *Richardson v. Ramirez*, 418 U.S. at 24, is section 2 of the Fourteenth Amendment. Note that its language is a trade of representation for taxation – the amendment excepts from counting by the census for purposes of congressional representation "Indians not taxed" in addition to providing an incentive to allow blacks to vote.

Felons have not given up their side of Locke's contract. That requires a renunciation of citizenship.

4. Maintain Responsible Citizenship

Finally, the state claims that preventing prisoners from voting is "the only way the state can maintain responsible citizenship and the basic conception of a political community." *Def. Br.* at 26. The proposition is unsupported, and its meaning is not clear. It is probably news to most that the state sees its job as maintaining responsible citizenship or defining the political community. While it may be the duty of the state to allow people the *opportunity,* in a republican democracy these things are shaped by the people, not the government. N.H. CONST. pt. I, art. 1 ("all government of right originates from the people"). Moreover, disenfranchising prisoners is hardly necessary to serve the claimed interest. Maine, Massachusetts, and Vermont allow prisoners to vote, and it appears that responsible citizenship exists no less there than here.

C. Disenfranchising All Incarcerated Felons Does Not Narrowly Tailor the Restriction to any Compelling State Interest

Even supposing that the state had a compelling interest in disenfranchising Mr. Fischer, the statute is not narrowly tailored to the interest.

The statutes the state is defending disenfranchise all incarcerated felons. The statutes are at once both two broad and too narrow.

> "First, the disenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws. Rather it encompasses all . . . felons and there has been no showing that [they] generally are any more likely to abuse the ballot than the remainder of the population. In contrast, many of those convicted of violating election laws are treated as misdemeanants and are not barred form voting at all. It seems clear that the classification here is not tailored to achieve its articulated goal, since it crudely excludes large numbers of otherwise qualified voters."

Richardson v. Ramirez, 418 U.S. at 79 (*Marshall*, J., dissenting). Moreover, in the last decade

there has been a vast expansion in federal drug laws, many of which even when involving small quantities are labeled felonies. Thus, the felony/misdemeanor distinction may no longer be useful.

Because of these over- and under-inclusion problems, many state criminal disenfranchisement schemes have not worked. *Allen v. Ellisor*, 477 F. Supp. 321, 324 (D. S.C. 1979) ("kaleidoscopic quilt" of disenfranchising crimes), *reversed and remanded en banc*, 664 F.2d 391 (4th Cir. 1981), *vacated on other grounds*, 454 U.S. 807 (1981); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (list of disenfranchising crimes unconstitutional as based on racial stereotyping). In *Stephens v. Yeomans*, 327 F. Supp. 1182 (D.N.J. 1970), the court struck down the list of crimes because it was arbitrary. It wrote that under New Jersey's law, "[t]hieves are disenfranchised [but] [r]eceivers of stolen property are not. It is hard," the court concluded, "to understand why Bill Sikes should be ineligible for the franchise and Fagan eligible." *Id.* at 1188.

The list of crimes contained in Article 11 is already narrowly tailored. It disenfranchises people who have committed crimes against democracy itself.

> "Article 11th bespeaks a clear intention on the part of the Founders to deny the vote . . . only to those who on the basis of their past conduct might . . . give aid or assistance to an enemy of the people, accept money in exchange for the corrupt performance of a public duty or subvert the election process. In short Article 11th prohibits from [voting] a very specific class: those who in the past have been convicted of crimes the very essence of which is destructive of free representative government. And it does so without reference to whether the crime is a felony or a misdemeanor, without reference to whether a sentence was imposed or not, without reference to where the sentence was served, or its length. And rightly so; because what is condemned in Article 11th is the nature of the crime. To all others Article 11th extends the right to vote."

Brief for Appellant at 8, Paey v. Rodrigue, 119 N.H. 186 (1979) (No. 78-276).

D. The New Hampshire Constitution and Statutes Already Contain a Better

Way

The third prong of the fundamental rights analysis is that if there is a compelling interest, and if the restriction is narrowly tailored, the statute is nonetheless unconstitutional if there is another reasonable way to accomplish the state's compelling goal. Here the state fails on the first two prongs. Nonetheless, there is a better way than denying the vote to all felony prisoners. That is to disenfranchise those people convicted of treason, bribery, and wilful violations of the elections laws – the list contained in Article 11. New Hampshire law already provides that "[a]ny person convicted of bribery or intimidation relating to elections" shall be disqualified from exercising the right to vote. RSA 654:6.

E. Disenfranchising Prisoners Violates Their Right to Rehabilitation

In *Richardson v. Ramirez*, 418 U.S. at 55, the majority wisely left to "the legislative forum" the choice of whether rehabilitation is a sufficient reason to abandon felon disenfranchisement. In New Hampshire, that decision is prescribed by the constitution, which declares "The true design of all punishments being to reform, not to exterminate mankind." N.H. CONST. pt. I, art. 18. Voting is a significant part of the rehabilitation process.

> "Loss of citizenship rights – including the right to vote – inhibits reformative efforts. If correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest."

National Advisory Commission on Criminal Justice Standards and Goals, Corrections, Standard 16.17, p. 592 (1973), cited in *Richardson v. Ramirez*, 418 U.S. at 85, n. 32 (*Marshall*, J., dissenting).

F. Disenfranchising Prisoners Violates Their Right to an Absentee Ballot

Flowing from the right to vote is the concomitant right to register and exercise the right. *O'Brien v. Skinner*, 414 U.S. 524 (1974). "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause." *Harper v. Virginia Board. of Elections*, 383 U.S. 663, 665 (1966). Any statutory scheme that prevents prisoners from exercising the right is a violation of equal protection, *O'Brien*, 414 U.S. at 524, and of the right to vote itself. *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973); *Cepulonis v. Secretary of Commonwealth*, 452 N.E.2d 1137 (Mass. 1983).

Courts have worked out the practicalities and logistics of prisoner voting: by temporary release on election day, by escorting inmates to polling places, by setting up polling places at the prison, or by absentee ballot. *See, e.g., Tate v. Collins*, 496 F. Supp. 205 (W.D. Tenn. 1980). Absentee voting is just one, albeit the most practical, of the options. Although the right to vote is not dependent upon its existence, absentee balloting clearly does exist, RSA 657:1, has existed since before the deletion of the "proper qualifications" language from the right-to-vote clause of Article 11, and must exist by constitutional mandate contained in Article 11. As the state has advanced no compelling reason to the contrary, it would be a violation of equal protection and of the right to vote to not allow prisoners to vote absentee. *O'Brien v. Skinner*, 414 U.S. 524 (1974) (statute which barred pre-trail detainees from absentee balloting held unconstitutional).

The state suggests that a now-repealed statute creates an exception to the Article 11 right to vote. The 1830 statute apparently forbid detention pursuant to a civil warrant on voting day. The state finds an implication in this that arrest on a criminal warrant was therefore allowed, resulting in a potential loss of the arrestee's voting rights. *Def. Br.* at 13. The state elsewhere,

however, concedes that pre-trial detainees have a right to vote, even under the disenfranchisement statutes. *Def. Br.* at 28. The argument does not detract from Mr. Fischer's right to vote.

Accordingly, there is no constitutional, statutory, or practical bar to absentee voting by inmates. Denial of absentee voting would thus violate David Fischer's right to vote and his right of equal protection.

G. Disenfranchising Prisoners Violates Their Rights Under International Law

In 1992, the United States became a party to the United Nations International Covenant on Civil and Political Rights, G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23 1976, Art. 25. It binds signatories to guarantee that "Every citizen shall have the right and the opportunity, . . . without unreasonable restrictions, . . . [t]o vote. *Id.*

Recently South Africa's highest court ruled that prisoners should be allowed to vote in the upcoming national elections. In its decision the Constitutional Court wrote "The vote of each and every citizen is a badge of dignity and personhood. Quite literally everybody counts." Associated Press, *S. African Prisoners Can Vote*, N.Y. TIMES ON THE WEB, April 1, 1999, <http://www.nytimes.com/aponline/i/AP-SAfrica-Prisoners-Vote.html>.

Because people are sometimes imprisoned for political crimes, the court below noted that "in other countries today where people are struggling for the right to vote for representatives and against governments that imprison people for any number of reasons . . . how interesting it would be if under their constitutions it were provided that people could vote even though they were in prison." *Trn.* at 23.

H. Disenfranchising Prisoners May Violate Equal Protection Rights of Minorities

While no racial effect has been alleged here, it is useful to note the context in which this case arises. In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court held that Alabama's disenfranchisement scheme was unconstitutional because it had been adopted with a racially discriminatory purpose, and because it continues to have disparate racial effects.

Based on *Hunter*, a Mississippi prisoner, Jarvious Cotton, challenged that state's law on similar grounds. *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). The Mississippi Supreme Court had acknowledged that the disenfranchisement provisions of its 1890 constitution had been expressly drafted "to obstruct the exercise of the franchise by the negro race." *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896). The Fifth Circuit held, however, that the constitutional provision's re-enactment in 1950 had "removed the discriminatory taint associated with the original version," *Cotton*, 157 F.3d at 390, and upheld the law under the federal constitution.

Based on unpublished research, four generations of Cottons have been prevented from voting. Jarvious's great-grandfather, Moses Cotton, was beaten to death by the KKK for attempting to vote; his grandfather, Thomas Cotton, could not vote because of KKK intimidation; his father, Herious Cotton, could not vote because of the poll tax and the reading comprehension test; and now Jarvious Cotton cannot vote because of his felony conviction. *See Brief of Amicus Curiae Emily Bolton*.

I. Disenfranchising Prisoners May Create a Generation of Uninvolved Men

> "The disenfranchisement of ex-felons had 'its origin in the fogs and fictions of feudal jurisprudence and doubtless has 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 system of government.'"

Richardson v. Ramirez, 418 U.S. at 85-86 (quoting *Byers v. Sun Savings Bank*, 139 P. 948, 949 (Ok. 1914)).

Nonetheless, it has significant consequences today, effectively barring from civic life an entire generation of men. Because of felon disenfranchisement, it is estimated that 3.9 million Americans have currently or permanently lost their right to vote. In some states, nearly one-third of black men are disenfranchised. As a holdover from explicitly racist state laws, large portions of an entire generation of men are not able to participate in the political life of their community. Marc Mauer, *Sentencing Project*, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES at 8-9, (Oct. 1998) (report is part of the record, *Trn.* at 36, and has been submitted by its authors as an *amicus curiae* brief).

IV. History Shows the Gradual Disappearance of Civil Death and Explicit Renunciation of Restrictions on Felon Voting

The state presents an historical argument. It neglects, however, to show that Article 11 contains an ambiguity justifying the exploration of history. Nonetheless, the history shows only that civil death is dead, and that the framers of Article 11 explicitly rejected including "felony" as one of the exceptions to the voting rights guarantee.

A. Ambiguity is Necessary to Explore History, and Article 11 is Not Ambiguous

The rule of construction requiring a showing of ambiguity to explore the history of a statutory or constitutional provision is more than a convenient way to avoid historical research. It serves an important purpose.

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. So, also, where the law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.
>
> "There is even a stronger reason for adhering to this rule in the case of the constitution than in that of a statute, since the latter is passed by a deliberate body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in the State, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is most likely to be that meant by the people in its adoption."

Lake County v. Rollins, 130 U.S. 662, 670-71 (1888) (citations omitted) (passage quoted with

approval in *N.H. Munic. Tr. Workers' Comp. Fund v. Flynn, Comm'r*, 133 N.H. 17, 21-22 (1990)).

While not always stating the rule, this court has found ambiguity in constitutional language before consulting the history of a provision's adoption. *See, e.g.*, *Claremont Sch. Dist. v. Governor*, 138 N.H. 183 (1993) (uncertainty of words' definitions expressed before citing contemporaneous dictionary); *Warburton v. Thomas*, 136 N.H. 383 (1992) (whether overriding governor's veto, which by constitution requires vote by "two-thirds of that house" means two-thirds of entire body or of members present; court allowed that, before turning to history, language did not answer the question); *N.H. Munic. Tr. Workers' Comp. Fund v. Flynn, Comm'r*, 133 N.H. 17, 22 (1990) (before canvassing history, court found in the constitutional amendment, "the term 'responsibility' is susceptible to a more expansive reading" than other words in the amendment); *Attorney-General v. Morin*, 93 N.H. 40, 43 (1943) ("to ascertain the meaning of particular expressions it may be necessary to give attention to the circumstances under which they became parts of the instrument"); *Thompson v. Kidder*, 74 N.H. 89 (1906) (court found language of two constitutional provisions regarding taxation of legacies contradictory before turning to history to resolve them); *Attorney-General v. Taggart*, 66 N.H. 362 (1890) (whether constitutional provision allowing president of the senate to assume powers of governor when the office "shall become vacant, by reason of his death, absence from the state, or otherwise" includes absence by reason of illness; court found words "otherwise" and "vacant" not susceptible of clear interpretation without use of history).

Even when this court has used constitutional history to illuminate the text, it has been wary of delegates' statements. In *N.H. Munic. Tr. Workers' Comp. Fund v. Flynn, Comm'r*, 133

N.H. 17 (1990), this court said:

> "The statements made by the delegates to the constitutional convention are not always significant in determining the meaning of a particular amendment. To be entitled to consideration, the delegates' statements must interpret the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object. After all, we will not redraft the constitution in an attempt to make it conform to an intention not fairly expressed in it.

Id. at 21 (quotations and citations omitted).

The state did not attempt to show any ambiguity on the face of Article 11. This is, one suspects, because Article 11 is stunningly *un*ambiguous:

> "All elections are to be free, and every inhabitant of the state of 18 years of age and upwards shall have an equal right to vote in any election. . . . No person shall have the right to vote under the constitution of this state who has been convicted of treason, bribery or any willful violation of the election laws of this state or of the United States."

N.H. CONST. art. 11. Plainer language is hard to imagine. The state instead argues that either Article 11 or the civil death statutes have an "historical ambiguity," *Def. Br.* at 11, a term of unclear meaning ascribed to but not appearing in a 1987 Oregon case cited by the state, *Lipscomb v. State*, 753 P.2d 939 (Or. 1987), in which the court found ambiguity before delving into the history.

If the history presented by the state shows anything cogent, however, it is only the gradual disappearance of civil death, and an explicit renunciation of "felony" as an exception to Article 11.

B. History of New Hampshire's Civil Death Statute

In 1836 the first civil death statute provided:

"That if any person shall be convicted of any crime the punishment of which is by

> law solitary imprisonment and confinement to hard labor for life, and shall be imprisoned in pursuance of sentence, on such conviction all contracts of whatever nature to which such person shall be a party, shall be affected, changed or annulled in the same manner as they severally would have been by such person's death. The bonds of matrimony to which such person shall be a party shall be dissolved, and such person shall cease to have any title to or interest in any estate, real or personal, and the same shall be treated, dispossessed of, and descend in all respects as if the death of such person had taken palace at the time of such imprisonment, and all power and authority of whatever nature which such person might lawfully exercise over any other person or persons, shall thenceforth cease as if such person were dead."

LAWS, ch. CCLXXIII, sec. 4 (1836), *Appx. to Def. Br.* at 127. Eight years later it appears that some stylistic changes were made. The effect of the law was the same, however, and the words "civil death" were first used. LAWS, ch. 25 sec. 14 (1843), *Appx. to Def. Br.* at 132.

The original civil death statute, quoted above, applied to all those sentenced to "hard labor for life." In 1867 the legislature narrowed the statute, to effect only those "convicted of any offence punishable by death, and sentenced accordingly." LAWS, ch. CCXLIV, sec. 7 (1867), *Appx. to Def. Br.* at 143. After that the statute remained essentially unchanged for a hundred years. RSA 607:8 (1966).

In 1967 the statute was replaced with an explicit renunciation of the civil death concept:

> "Except as otherwise provided by this chapter or by the constitution of this state, a person convicted of a crime does not suffer civil death or corruption of blood or sustain loss of civil rights or forfeiture of estate or property, but retains all of his rights, political, personal, civil, and otherwise, including the right to hold public office or employment, to vote, to hold, receive, and transfer property, to enter into contracts, to sue or be sued, and to hold offices of private trust in accordance with law."

RSA 607-A:3. The statute is the same today.

When this statute was being debated, the legislature assumed those in prison could vote. Senator Chandler asserted that a then-proposed felon disenfranchisement bill would bring New

Hampshire law into conformity with other states: "It concerns a person who is convicted of a felony – convicted and confined in State Prison and who would not be able to become a candidate for public office or vote. As it is now, such a person can do these things." JOURNAL OF THE SENATE (1967) at 452.

Presumably as a result of this knowledge, that same year New Hampshire got its first explicit felon disenfranchisement statute, that which is challenged here.

C. History of Civil Death in Article 11

The 1783 constitution included the original Article 11, which provided simply:

> "All elections ought to be free, and every inhabitant of the State having the proper qualifications has equal right to elect, and be elected into office."

N.H. CONST. art. 11 (1783), *Appx. to Def. Br.* at 6.

The Article was supplemented in 1903 to include a provision requiring a reading test for voting. N.H. CONST. art. 11 (1902). *Appx. to Def. Br.* at 43-44. It was further appended after the 1912 Constitutional Convention to exclude from voting those who had been "convicted of treason, bribery, or any wilful violation of the election laws." N.H. CONST. art. 11 (1912), *Appx. to Def. Br.* at 47-49. It was appended again in 1942 to authorize absentee voting, JOURNAL OF THE CONSTITUTIONAL CONVENTION 94 (1941), something which the legislature had already enacted and the authority for which does not appear to have been in doubt. In 1956 and 1968 changes were made to account for primary voting and for anachronistic exemptions to the illiteracy disqualification. It kept that form until after the 1974 Constitutional Convention. At that time the reading test was dropped and, as noted above, the clause regulating qualifications of candidates was split from the clause ensuring voting rights, with only the candidates clause

retaining the "proper qualifications" language. In 1984 a sentence ensuring disabled access to voting places was added.

The delegates to the 1889 Constitutional Convention were aware that Article 11 allowed felons to vote. Delegate Cross of Manchester declared, "The men confined in the prisons of this State have a legal right to-day to vote." JOURNAL OF THE CONSTITUTIONAL CONVENTION 35 (1889), *Appx. to Def. Br.* at 38. Delegate Cross then went on to advocate a change in this situation, which apparently did not occur. The state wrongly characterizes Delegate Cross's speech as though he were talking only about men who "came out" of the state prison. *Def. Br.* at 15.

The change perhaps most significant to this case was made in the 1912 Constitutional Convention. There was a proposal to add a provision barring any person "convicted of treason, *felony*, bribery, larceny or any wilful violation of the election laws" from voting. JOURNAL OF THE CONSTITUTIONAL CONVENTION 110 (1912), *Appx. to Def. Br.* at 49 (emphasis added). The proposal, as worded, failed. Instead, the convention barred only those convicted of bribery, treason, and violations of the election law, but not larceny, nor all felons. *Id.*, *Appx. to Def. Br.* at 51. The state concedes this history. *Def. Br.* at 14.

An undisclosed intent of a proposed constitutional amendment does not prevail over the intent clearly expressed in the language of the amendment. *Concrete, Inc. v. Rheaume Builders, Inc.*, 101 N.H. 59 (1957). The state has not shown that the changes made to Article 11 mean anything different than what its language states.

D. The History is Not Helpful for the State's Position

The constitutional and statutory history is not kind to the State. It shows that, except for a

blip between 1966 and 1974, civil death has been steadily diminished by statute and constitution. Moreover, it shows that the 1912 constitutional convention explicitly rejected a felon exception to the guarantee of voting rights. The history cannot be made to demonstrate, as the state might wish, that Article 11 is somehow not operative, or does not mean what it says.

New Hampshire has a long tradition of full suffrage. Throughout much of United States history, one had to be a landowner to vote. New Hampshire, in 1775, was the first place to allow voting without being a freeholder. The move has been called "revolutionary." Francis Newton Thorpe, 1 A CONSTITUTIONAL HISTORY OF THE AMERICAN PEOPLE: 1776-1850 at 191-92 (1898).

> "Strongly democratic in opinion, the people of New Hampshire, when the colony became a State, abolished the old franchise qualifications, and, with almost unparalleled liberality, required of the voter only that he be a taxpayer, duly enrolled in a town. In this respect New Hampshire widely departed from Massachusetts, though freely adopting many provisions of its constitution."

Id. at 194. This strong right-to-vote tradition is reflected in Article 11.

V. In What Town Does a Prisoner Vote?

While the issue is not currently before the court, the law concerning in what town prisoners vote may be informative.

The New Hampshire Constitution provides that "every *inhabitant* . . . shall have an equal right to vote" and that "every person shall be considered an *inhabitant* for the purposes of voting in the town . . . where he has his *domicile*." N.H. CONST. pt. I, art. 11 (emphasis added).

There are four statutes that define domicile, inhabitant, or residence. In the context of where prisoners vote, the statutes are contradictory, and appear to simultaneously allow and disallow local registration and voting. RSA 21:6; RSA 21:6-a; RSA 654:1, I; RSA 654:2. In addition, the absentee registration statute requires that the person file an affidavit requiring the applicant to swear "I do not intend to be present within said town at such time prior to said election as shall enable me personally to appear before the supervisors of the checklist of said town" in order to personally register to vote. This requirement may pose some problems for prisoners whose home town is the same as the location of the prison.

In short, some of the statutes reiterate that domicile is determined by an intention to make the place one's home for the indefinite future, and that domicile cannot be lost by temporary absence. It is clear that the state cannot take away a person's domicile because of incarceration. RSA 654:2. Generally the statutes appear to declare that the town from which the prisoner haled is his domicile. RSA 654:1, I, however, says that domicile is where one intends to return, and the last sentence says that domicile is where one lives for a significant portion of the year, which in the case of a prisoner make it appear that the prison town may be his voting place.

In *State v. Daniels*, 44 N.H. 383 (1862), the court held that an intention to reside in a

place permanently or for some indefinite time is essential to make it one's place of voting. *See also Leach v. Pillsbury*, 15 N.H. 137 (1844); *Atherton v. Thornton*, 8 N.H. 178 (1835).

More recently, the New Hampshire Supreme Court decided *In re Bryan L.,* 123 N.H. 420 (1983), which resolved a dispute between Manchester (where YDC is located), and Littleton (where the parents of a committed child lived) over which municipality would pay the costs of special education. While *Bryan L.* is clearly relevant to the matter, it is not clear what result is implied by it.

There are currently bills before the General Court which will probably rectify this confusion.

As a constitutional matter, "inhabitant" is defined:

> "And every person, qualified as the constitution provides, shall be considered an inhabitant for the purpose of being elected into any office or place within this state, in the town, or ward, where he is domiciled."

N.H. CONST. pt. II, art. 30. While the article applies only to being elected, and not to voting, this court has construed the word "inhabitant" in this clause with reference to all the other places in the constitution where the word appears. The court said "inhabitant" means "citizen" for the purposes of all the election and candidate articles, including Article 11. *Barker v. Young*, 80 N.H. 447 (1922).

"Domicile" has also been defined in the context of Article 30. Before the modern word "domicile" was substituted, Article 30 used the phrase "where he dwelleth and hath his home." In *Felker v. Henderson*, 78 N.H. 509 (1917), the court said these words mean a place where a person has a settled residence with an intention to stay there indefinitely, notwithstanding the fact that he entertained a floating intention to move to another place at some indefinite time in the

future. Thus, one may read article 11 as though it says:

> *every person shall be considered a [citizen] for the purposes of voting in the town . . . where he has his [intention to stay indefinitely].*

In *Dane v. Board of Registrars of Voters of Concord*, 371 N.E.2d 1358 (Mass. 1978), prisoners registered to vote in the town where the prison was located, and other residents objected. The court reviewed the law of other jurisdictions where courts have found that because domicile is a matter of intention, and prisoners live in their location under compulsion, prisoners' domicile cannot be in the town where the prison is. *Dane*, 371 N.E.2d at 1365.

The court did not find this logic persuasive, however. Instead, it drew analogies to other Massachusetts cases involving a drafted soldier, students required to live on campus, a patient at the state hospital, and a prisoner seeking federal diversity jurisdiction. It found that all four lived in a place under compulsion but that each had a domicile in the place where they were forced to live. The court thus found, based on equal protection principles, that incarcerated felons could vote in the town where the prison was located.

VI. There Are Sufficient Parties and Circumstances for this Court to Reach the Issue of Mr. Fischer's Right to Vote

A. The Governor and Secretary of State are Proper Party Defendants

The Governor of the State of New Hampshire, as well as the Secretary of State, are properly party defendants in this case.

> "The governor shall be responsible for the faithful execution of the laws. [Sh]e may, by appropriate court action or proceeding brought in the name of the state, enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state."

NH CONST. pt. II, art. 41.

"The intent of this article is to impose a duty upon the Governor to carry out the legislative mandates and to enforce constitutional requirements." *Opinion of the Justices*, 116 N.H. 406, 412 (1976).

If local officials deny citizens' constitutional rights, as happened here, the governor is constitutionally required to enforce them, making her a proper defendant in this case.

Similarly, the Secretary of State is a constitutional officer of the executive branch, N.H. CONST. pt. II, art. 67; *Opinion of the Justices*, 106 N.H. 402 (1965), whose duties are the general oversight of state elections. RSA chs. 652-668. In this case, the secretary of state may have a role in the creation of ballots, their delivery to the prison for inmate voting, their delivery back to the appropriate local officials for counting, and for assisting local officials in inmate voting. Moreover, under the governor's duty to enforce the election laws, the Secretary of State is the likely executive branch official to institute the appropriate action.

In *Richardson v. Ramirez*, 418 U.S. at 27 n.1, at 34-35 n.12, at 36-38, the California

Secretary of State was included as party. There, some local officials conceded the inmate-voter's right to vote, which threatened to produce differing results depending upon where the person voted, and also threatened the case with mootness. *See*, *Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8 (1st Cir. 1996).

The City of Rochester defendants have not contested this case on appeal. If the state defendants are found improper parties, this case is forfeited and the decision of the Superior Court stands unappealed.

B. City of Rochester Defendants

It should be noted that Muriel Gagnon, Supervisor of Checklist of Rochester, was a party named in Mr. Fischer's petition. *Appx. to Def. Br.* at 1. During the hearing, the other five members of the Rochester Board of the Supervisors of the Checklist were joined as additional defendants.

Attorney Danford Wensley, counsel for Rochester, noted that Rochester has a board of supervisors of the checklist which maintains the voter roles, the board has six members with one from each ward, Ms. Gagnon is one of them, Ms. Gagnon is the chairperson of the board, and that she can take no independent action without a majority vote of the board. Attorney Wensley noted these facts for the purpose of requesting that Ms. Gagnon be dismissed as a defendant. *Trn.* at 3-4. Attorney Joshua Gordon responded by requesting instead that the other five members of the board be added as defendants. *Trn.* at 4. The court ruled:

> "As far as I can see everybody is in. I think these are all proper defendants. As far as the supervisors of the checklist in Rochester are concerned, we can consider that amended to the group as an entity. That is my decision on that issue."

Trn. at 7. It is thus clear that the other five members of the board are defendants in this case.

Attorney Wensley expressed his objection to the ruling on the grounds that the supervisors are popularly elected officials whereas Ms. Gagnon is elected by the council, and that he doubted his authority as city solicitor to represent them. *Trn.* at 7-8. Attorney Wensley stated however: "I do not object to representing them." *Trn.* at 8. It should be noted that, despite Attorney Wensley's doubts, Ms. Gagnon is popularly elected no different from the other five members, RSA 41:46-a; RSA 669:15; *Trn.* at 8, and while any party has a right to be independently represented, there is no distinction between Ms. Gagnon and the other members of the board of supervisors on the grounds raised. Based on this, the court understood that Attorney Wensley represented the other five members, and exercised its authority to join them. RSA 654:42.

In any case, the court's addition of the other five members of the Rochester board of supervisors of the checklist was not appealed nor briefed by any party. The other five members are therefore properly defendants before this court.[3]

C. Declaratory Judgment Actions Affecting the State Must Involve the State

The proper defendant in a declaratory judgment is one that presently asserts a claim adverse to the petitioner's right. *See Jaskolka v. City of Manchester*, 132 N.H. 528, 531 (1989). *See also Claremont Sch. Dist. v. Governor*, 138 N.H. 183 (1993).

This case has obvious state-wide implications, bearing on every state and local election official. It is the state, in the person of the Governor and the Secretary of State, that presently may have claims adverse to Mr. Fischer's right to vote. In Article 11 voting rights cases, where a statute may be found unconstitutional and where the actions of non-party local officials are

[3]For the convenience of the Court, and upon information and belief of counsel, the other five members of the board are: Susan E. Lampron (Ward 1), T.J. Jean (Ward 2), Richard Timmons (Ward 3), Patty Dunlap (Ward 4), Sharon Stewart (Ward 5).

involved, the state is the proper defendant. *See Beaudoin v. State*, 113 N.H. 559 (1973).

D. Injunction is an Appropriate Remedy

While a declaratory judgment generally is clearly a correct remedy in this case, *Beaudoin v. State*, 113 N.H. 559 (1973), Mr. Fischer was denied his vote in a particular election – that held on November 3, 1998. Elections are not interchangeable. The issues and candidates arising in one are not repeated in another. Had Mr. Fischer not been allowed to vote in that election, he would have been irreparably injured.

Because of this, injunctions are the standard way voting rights are enforced. In *O'Connors v. Helfgott*, 481 A.2d 388, 394 (R.I. 1984), the Rhode Island court noted that "no amount of monetary damages can rectify this vote dilution." Voting rights cases often end in an order of an injunction, usually on an assumption, but without a discussion, of the irreparable injury. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585-87 (1964) (equal representation; court commended use of equitable remedies); *Quinn v. Missouri*, 839 F.2d 425 (8th Cir. 1988) (property ownership requirement); *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) (racial segregation at polling place); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966) (racial discrimination in registration); *Schrenker v. Clifford*, 387 N.E.2d 59 (Ind. 1979) (mailing absentee ballots). In one case, Supreme Court Justice Kennedy enjoined an *election* to enforce the federal Voting Rights Act. *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy in chambers).

New Hampshire law requires that, except for same-day registration, municipal supervisors of the checklist close their voter checklists on the Saturday ten days before an election. RSA 654:8; RSA 654:28. The purpose of this early deadline is to give a court an opportunity to revise the checklist when necessary. RSA 654:27; RSA 654:42. The legislature

recognized that election disputes by their nature tend to occur near the time of election, and the statute thus contemplates last-minute election disputes. RSA 654:42 (court shall "set a time and place for an immediate hearing"). These by necessity involve injunctions.

E. Standing of the NHCLU is Not an Issue

The state urges that this court reach the issue of whether the New Hampshire Civil Liberties Union (NHCLU) was a proper plaintiff. The NHCLU withdrew from this case after it was appealed because litigation of its standing, raised by the state in its Notice of Appeal, would have been a distraction from the central issue of this case – the constitutionality of the felon disenfranchisement statutes. The state concedes that NHCLU's standing is moot, but suggests that the issue should be reached because it is capable of repetition. *Def. Br.* at 30, n.11. Capability of repetition is an exception to the mootness doctrine, but only when the repeating event is of too short a duration so that it will always evade review and when there is a good reason to reach the moot issue. Joshua L. Gordon, *What's Moot and What's Not: The Law of Mootness in New Hampshire*, 36 N.H. B.J. 69 (March 1995). The state has alleged neither. This court should not reach out to rule on an issue not before it, especially when its resolution will have no impact on the case.

F. Any Procedural Error in this Case Is Harmless Error

The state has raised five procedural issues – that the Governor is not a proper defendant, the Secretary of State is not a proper defendant, the Rochester Board of Supervisors of the Checklist are not defendants, an injunction is not an appropriate remedy, and the NHCLU should not have been granted standing. Each of these, at most, is harmless error. There are sufficient parties and circumstances for this case to be justiciable, and this court should reach the central issue at hand – David Fischer's right to vote.

CONCLUSION

In view of the foregoing, David Fischer was properly allowed to vote, and the decision of the court below should be affirmed.

Respectfully submitted,

David Fischer
By his Attorney,

Law Office of Joshua L. Gordon

Dated: August 7, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for David Fischer requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 7, 2000, copies of the foregoing will be forwarded to Martin Honigberg, Senior Assistant Attorney General; and to Danford Wensley, Esq.

Dated: August 7, 2000

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