COMMENTS

A DISPROPORTIONATE RESPONSE: *SCOPPOLA V. ITALY* (*NO. 3*) AND CRIMINAL DISENFRANCHISEMENT IN THE EUROPEAN COURT OF HUMAN RIGHTS

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I. INTRODUCTION

On May 22, 2012, the Grand Chamber of the European Court of Human Rights ruled, in the case of *Scoppola v. Italy* (*No. 3*), that an Italian law revoking the right to vote for life for those who are convicted of a crime and sentenced to at least five years imprisonment did not violate Article 3 of the First Protocol to the European Convention on Human Rights (the "Convention").[1] Article 3 of the First Protocol to the Convention binds its Contracting Parties to hold "free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[2] Denying citizens the right to vote as a result of a criminal conviction is an ancient practice known as criminal disenfranchisement.[3] It is a form of civic punishment employed around the world in a variety of manners including

1. *See* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 23 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-111044 (ruling that the Italian law on prisoner disenfranchisement did not violate Article 3 of the First Protocol).

2. Protocol One to the European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, E.T.S. 9 [hereinafter First Protocol].

3. *See* Morgan Macdonald, Note, *Disproportionate Punishment: The Legality of Criminal Disenfranchisement Under the International Covenant on Civil and Political Rights*, 40 GEO. WASH. INT'L L. REV. 1375, 1375 (2009) (tracing the history of criminal disenfranchisement back to Greek and Roman societies).

disenfranchisement for life, disenfranchisement only for certain crimes, and disenfranchisement for the duration of a prison sentence.[4]

Part II of this comment will look first at the European Court of Human Rights generally and the doctrines it has developed for interpreting the Convention over the years. Part II will then discuss the history of the Court's jurisprudence on Article 3 of the First Protocol. Part II will conclude by examining Article 31(3)(C) of the Vienna Convention on the Law of Treaties as an option for alternative interpretations of the Convention, as well as looking at more recent treaties and international documents regarding voting rights and the treatment of prisoners. Part III of this comment will begin by arguing that the proportionality analysis used in *Scoppola* (*No. 3*) is inconsistent with the Court's prior jurisprudence and that the proportionality analysis creates outcomes that are inconsistent with an evolutive interpretation of the Convention, falling outside a reasonable margin of appreciation. Furthermore, Part III will also argue that the *Scoppola* (*No. 3*) decision is not consistent with the Convention when analyzed in light of more recent international documents according to Article 31(3)(C) of the Vienna Convention. Part IV of this comment will make recommendations for how the Convention can be changed so that the voting rights of prisoners and convicts will be protected in the manner guaranteed by the Convention, including the addition of an explicit limitations clause on Article 3 of the First Protocol.

II. BACKGROUND

The background section of this comment will focus primarily on the jurisprudence of the European Court of Human Rights (the "Court"). First, it will look at the background of the Court and the doctrines it has developed in interpreting the Convention. The next section will look at the prior decisions of the Court involving Article 3 of the First Protocol, focusing on recent decisions involving criminal disenfranchisement. Finally, the last sections will look at an alternative method of interpretation under Article 31(3)(c) of the

4. *See generally id.* (analyzing differences in criminal disenfranchisement laws around the world, including Europe, in the context of Article 25 of the International Covenant on Civil and Political Rights [hereinafter ICCPR]).

Vienna Convention on the Law of Treaties that allows for the use of external international documents on prisoner's rights and voting rights.

A. THE CONVENTION AND THE COURT

In the wake of World War II and the subsequent Soviet domination of Eastern Europe, the Council of Europe conceived of the European Convention on Human Rights (the "Convention") both as a statement of the common values of Western Europe and as a bulwark against communist subversion.[5] To that end, the Council established strong enforcement mechanisms for the Convention.[6] These protections include allowing individuals to petition the Court for redress against a Contracting Party's violation of their rights and making the decisions of the Court binding on the Contracting Parties.[7]

1. Evolutive Interpretation Allows the ECHR to Incorporate Modern Norms of Human Rights into Articles of the Convention

The Court has long acknowledged the need to harmonize Convention standards with social developments.[8] This first became apparent in *Golder v. United Kingdom*, a case that decided whether the United Kingdom could restrain a prisoner from contacting legal counsel to discuss a lawsuit against a prison guard whom he believed

5. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR] (affirming the shared political traditions and ideals of the signatories, including freedom and the rule of law); *see also* DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1 (2d ed. 2008).

6. *See* HARRIS ET AL., *supra* note 5, at 2–4 (describing the Convention's evolution as analogous to a European Bill of Rights, with the Court in the role of a national constitutional court); *see also* Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology?*, 31 MICH. J. INT'L L. 621, 626–27 (2010) (referring to the Convention as a "regional quasi-constitution" that reflects the increased integration of Europe).

7. *See* HARRIS ET AL., *supra* note 5, at 4–5 (emphasizing that the protections offered by the Convention employ "strong enforcement mechanisms").

8. *See* YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 197 (2002) (tracing the origins of evolutive interpretation back to the mid-1970s).

libeled him, resulting in the denial of his parole.[9] In deciding the case in Golder's favor, the Court incorporated a right of access to a court into the Convention's Article 6 right to a fair trial.[10] The Court accomplished this by ascribing great importance to portions of the Convention that emphasize respect for the rule of law.[11] The Court considered access to the courts as a key component of the rule of law.[12] This landmark decision affirmed the nature of the Convention as a guarantee of human rights in Europe, not merely as a contract by which sovereign states agree to limit their sovereignty.[13] The ruling also established the principle that the lack of an explicit provision in the text of an article of the Convention is not a complete barrier to granting an unenumerated right.[14]

The Court elaborated on the process of expanding Convention protections in *Tyrer v. United Kingdom*, which concerned whether the judicial corporal punishment of a minor as a punishment for a criminal assault violated Article 3 of the Convention.[15] In ruling for

9. *See* Golder v. United Kingdom, App. No. 4451/70, 18 Eur. H.R. Rep. (ser. A) at 9 (1975) (deciding in favor of the right of a prisoner to access counsel and a court to lodge a libel claim against one of his jailers).

10. *See Golder*, App. No. 4451/70, at 18 (concluding that article 6 provides the "right to a court," which includes the right of access to the court); HARRIS ET AL., *supra* note 5, at 6 ("[O]ne could not suppose compliance with the rule of law without the possibility of taking disputes to court."); *see also* George Letsas, *Strasbourg's Interpretive Ethic: Lessons for the International Lawyer*, 21 EUR. J. INT'L L. 509, 516 (2010) (referring to the decision in *Golder* as bold and revolutionary for incorporating a right not explicitly included in the Convention text).

11. *See Golder*, App. No. 4451/70, at 17 (citing explicitly to Article 3 and the Preamble of the Convention as examples of sections stressing the importance of the rule of law).

12. *See id.* (stating that the rule of law only functions properly where individuals have access to courts).

13. *See* HARRIS ET AL., *supra* note 5, at 6; *see also Golder*, App. No. 4451/70, at 564 (elaborating that to interpret the Convention any other way would create the possibility for Contracting Parties to arbitrarily restrict access to the court system without violating the Convention).

14. *See Golder*, App. No. 4451/70, at 18 (finding that article 6 provides a right of access to courts even though no specific provision grants it); *see, e.g.*, Matthews v. United Kingdom, 1999-I Eur. Ct. H.R. 252, 267 ("The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention.").

15. *See generally* Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) (1978) (deciding that judicial corporal punishment of a minor violated the Convention's Article 3 prohibition on degrading punishment).

the minor, the Court declared that "the Convention is a living instrument which . . . must be interpreted in the light of present-day conditions."[16] This is commonly known as the evolutive interpretation[17] and allows the Court to interpret the Convention to adapt to changing social attitudes.[18] In *Tyrer*, the Court justified its ruling by explaining that a great majority of Contracting Parties did not allow judicial corporal punishment.[19] However, a great majority of the Contracting Parties need not change their law before the Court will incorporate a new standard into the Convention.[20] In the absence of a European consensus, the Court previously incorporated a right on the basis of a prevailing international trend.[21] In these ways, the Court has used evolutive interpretation to expand the protections of the Convention in response to a variety of social developments.[22]

2. The Margin of Appreciation Doctrine Allows the Court to Take Account of Unique National Conditions When Deciding a Case

The margin of appreciation doctrine refers to the degree of

16. *See id.* at 15.

17. *See* HARRIS ET AL., *supra* note 5, at 7 (showing where the Court used modern-day norms to effect incremental change); *see also* Letsas, *supra* note 10, at 527 (describing evolutive interpretation as the doctrine that most embodies the Court's interpretive ethic).

18. *See* HARRIS ET AL., *supra* note 5, at 7 (referring to the Court as interpreting the general intentions of the parties, not the particular intentions of the parties in 1950).

19. *See* Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV 57, 61 (2010) (quoting from the *Tyrer* judgment and noting that the majority of Contracting Parties did not use juvenile corporal punishment); *see also* Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 19 (1979) (citing that a great majority of Contracting Parties had adopted a standard regarding children born out of wedlock as a reason for incorporating that standard into the Convention).

20. *See* HARRIS ET AL., *supra* note 5, at 8 (describing the standard used by the Court in Goodwin v. United Kingdom as less demanding than a great majority standard).

21. *See, e.g.*, Goodwin Christine v. United Kingdom, 2002-VI Eur. Ct. H.R. (incorporating a right to legal recognition of gender identity for post-operative transsexuals based on a prevailing international trend, rather than a European consensus).

22. *See* HARRIS ET AL., *supra* note 5, at 7 (emphasizing that evolutive interpretation should not be used to introduce a right into the Convention that has no basis in its text, drawing a fine line between judicial interpretation and judicial legislation).

independence afforded to a State when applying the provisions of the Convention to its national laws.[23] The Court first fully articulated this doctrine in *Handyside v. United Kingdom*, which dealt with whether the British government could restrain a publisher from publishing a book the government deemed obscene.[24] In the absence of a standardized set of European morals, the Court determined that it is for the national authorities to decide what is necessary for the protection of morals in a democratic society.[25]

The breadth of the margin of appreciation is dependent on the context in which it is applied.[26] The margin is construed broadly where a Convention article does not have an explicit limitations clause, as is the case for criminal disenfranchisement.[27] Articles 8 through 11, which contain highly specific limitations clauses, stand in sharp contrast to those articles under which the Court grants States a broader margin of appreciation.[28] Due to the specificity of the text of the articles, a narrower margin is applied by the Court.[29] The margin is not only construed in the context of the Convention article in question. It is also responsive to national conditions, thus

23. *See* FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 37 (2d ed. 1996) (defining margins of appreciation as the outer limits of schemes of protection which are still acceptable under the Convention).

24. *See generally* Handyside v. United Kingdom, 24 Eur. Ct. H.R. Rep. (ser. A) (1976) (holding that seizure of a textbook intended for teenagers was justified by the protection of public morals).

25. *See id.* at 753–54 (stating that local authorities are in a better position than international judges to determine what violates the morals of that locality).

26. *See* JACOBS & WHITE, *supra* note 23, at 37 (referring to the subject matter and circumstances of a case as factors affecting the breadth of the margin); *see also* HARRIS ET AL., *supra* note 5, at 13 (contrasting the wide margin applied in cases involving national emergencies and public morals with the narrow margin applied in cases involving integral parts of a person's identity, such as sexual orientation).

27. *See* ARAI-TAKAHASHI, *supra* note 8, at 14 (citing the Court's jurisprudence on Article 3 of the First Protocol as an example of where the lack of an express limitations clause has broadened the margin of appreciation).

28. *See, e.g.*, ECHR, *supra* note 5, art. 8(2) (limiting violations of the right to respect for private and family life to certain situations provided for by law which are necessary in a democratic society as in the Goodwin case, which found that denying legal recognition of the gender identity of post-operative transsexuals could not be justified as necessary in a democratic society).

29. *See* ARAI-TAKAHASHI, *supra* note 8, at 9 (stating that the limitations clauses were placed in these articles, with an accordingly narrow margin of appreciation, to protect the most vital Convention rights).

reinforcing the Convention as the bare minimum human rights standard in Europe.[30] That is to say, what is a legitimate aim in Latvia is not the same as in Turkey.[31]

3. Under Proportionality Doctrine, the Court Weighs the Extent of the Violation of a Convention-Protected Right Against the State's Margin of Appreciation

The final interpretive doctrine at issue here is the doctrine of proportionality. Proportionality is the mechanism by which the Court determines whether a State exceeds its margin of appreciation.[32] Specifically, this principle asks if the deviation from the Convention "is not excessive in relation to the legitimate needs or interests that have caused it."[33] The goal of the doctrine is to find a fair balance "between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[34] More narrowly, the Court requires that the means employed by a State be proportionate to the aim pursued.[35]

In application, the doctrine has come under attack for not living up to its mandate,[36] leading to decisions that can appear to be unjust and

30. *See id.* at 3 (describing the guarantees of the Convention as the minimum standard).

31. *See, e.g.*, Ždanoka v. Latvia, App. No. 58278/00, 45 Eur. Ct. Rep. 17, 79-80 (2006) (holding that Latvia was within the margin of appreciation in banning an unrepentant member of the Communist party from public office for life because of her actions during the 1991 revolution); Şahin v. Turkey, App. No. 44774/98, 41 Eur. Ct. H.R. 8, 30 (2005) (holding that Turkey did not violate the Convention by banning students from wearing the Islamic headscarf in public university lecture halls because of the Turkish government's interest in maintaining a secular society).

32. *See* ARAI-TAKAHASHI, *supra* note 8, at 193 (referring to proportionality as a yardstick measuring whether a national authority overstepped its margin of appreciation).

33. *See* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 80 (3d ed. 1998) (characterizing the principle as a balance between the needs of the community and the rights of the individual).

34. *See* Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) at 44-45 (1989) (holding that the UK would violate the Convention if it extradited a West German national to America where he could be sentenced to the death penalty).

35. *See* ARAI-TAKAHASHI, *supra* note 8, at 14 (referring to proportionality as a way to prevent the overburdening of individual rights in pursuit of societal goods).

36. *See generally* Stavros Tsakyrakis, *Proportionality: An Assault on Human*

to value the interests of the community over the individual's fundamental rights.[37] Specifically, the Court in *Otto-Preminger-Institut v. Austria*, which looked at whether local Austrian authorities could prevent the public exhibition of a film believed to be offensive to the majority Catholic population, held that the protection of religious peace and prevention of religious offense outweighed an individual's right to freedom of expression.[38] In circumstances such as these, where the Court decides whether a State exceeded its margin of appreciation, the Court assesses whether the national legislature considered issues of proportionality in drafting the law; the Court will find a law disproportionate if the State did not make any such considerations.[39]

B. PRINCIPLES OF ECHR JURISPRUDENCE ON ARTICLE 3 OF PROTOCOL 1

1. The Case of Mathieu-Mohin and Clerfayt v. Belgium*, 1987*

The jurisprudence of the ECHR with regard to Article 3 of the First Protocol begins with the landmark case of *Mathieu-Mohin and Clerfayt v. Belgium*.[40] Two French-speaking Belgian legislators brought the case, alleging illegal discrimination when they were

Rights? (NYU Law Sch. Jean Monnet Working Paper No. 09/08, 2008), http://centers.law.nyu.edu/jeanmonnet/papers/08/080901.pdf (identifying situations where proportionality analysis failed to protect the rights of the individual by overemphasizing the social worth of the violation to society).

37. *See, e.g.*, IA v. Turkey, App. No. 42578/98, 45 Eur. H.R. Rep. 249, 258 (2005) (holding that seizure of a 'blasphemous' book did not violate the Convention because the interests of the public in respect for their religion outweighed the freedom of religious expression of the author); Otto-Preminger-Institut v. Austria, App. No. 13470/87, 19 Eur. H.R. Rep. 21 (1994) (holding that Austria did not violate Article 10 by seizing a film perceived to be offensive to Tyrolean Catholics).

38. *See Otto-Preminger-Institut*, App. No. 13470/87, at 59–60 (justifying the seizure of the film by saying that if it had been displayed, some people would feel their religious beliefs were under attack).

39. *See* HARRIS ET AL., *supra* note 5, at 11–12 (stating that a law should not be found proportionate where there is no evidence that national authorities had considered its proportionality).

40. *See* Mathieu-Mohin and Clerfayt, 113 Eur. Ct. H.R. (ser. A) at 22 (1987) (stating that prior to 1987 the Court had not ruled on this issue); *see also* JACOBS & WHITE, *supra* note 23, at 270 (quoting the Mathieu-Mohin case for a statement of the scope of the right protected under Article 3 of Protocol 1).

denied admission, by law, to the local Flemish council because they took their legislative oaths in French.[41] The pair alleged that by preventing them from being elected to the council because they chose to take their legislative oath in their native tongue, the law violated their rights under the Convention.[42] In deciding the case, the Court set forth several principles that form the bedrock of jurisprudence for this comment.[43]

The first of these principles is that these rights guaranteed under Article 3 are individual rights, despite the article's ambiguous wording.[44] The second principle is that the rights are not absolute and, in the absence of an express limitations clause, are subject to implied limitations with a wide margin of appreciation afforded to State parties.[45] The last principle is that, in limiting the right, a State must not curtail it to the extent that it "impairs the essence of the right and deprives it of its effectiveness."[46] The Court evaluates this standard by determining if the narrowing of the right is in "pursuit of a legitimate aim and that the means employed are not disproportionate."[47]

41. *See Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 19, 21 (explaining that Belgian law requires members of the Flemish council to take their legislative oath in Flemish).

42. *See id.* at 21 (implying that the language requirement thwarts the free expression of the people in the choice of legislature).

43. *See* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 12 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-111044 (citing to *Mathieu-Mohin* for a statement of the Court's general principles on Article 3). *See generally* HARRIS ET AL., *supra* note 5, at 713–14 (summarizing the main principles of the *Mathieu-Mohin* judgment and noting that the Court acknowledges the sensitive issues a State faces in managing its electoral process).

44. *See Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 22-23 (clarifying that Article 3 of the First Protocol is worded not to merely create obligations between the States, but to create a positive obligation on the States to hold free elections for the people).

45. *See id.* (affirming that the States are free to institute any particular electoral system so long as it is democratic).

46. *See id.* at 23.

47. *See id.*

2. Criminal Disenfranchisement Decisions of the ECHR

a. The Case of Labita v. Italy*, 2000*

The Court first decided a criminal disenfranchisement case using the *Mathieu-Mohin* principles in 2000, in *Labita v. Italy*.[48] Benedetto Labita was arrested in 1992 on suspicion of being a mafioso.[49] He was disenfranchised as part of a set of temporary preventive measures imposed upon him by virtue of his being an accused mafioso.[50] Labita was disenfranchised after his acquittal in 1995 until the term of disenfranchisement expired in late 1997.[51]

In analyzing Labita's disenfranchisement under the *Mathieu-Mohin* principles, the Court found that the Government's articulated aim of discouraging mafia influence on the Italian political system was legitimate.[52] However, the Court found his disenfranchisement disproportionate because it was imposed after his acquittal, which removed the basis for imposing disenfranchisement in the first place.[53] This appears to impose a requirement that, to be proportionate, the punishment must bear a relevant and sufficient link to the legitimate aim.[54] The Court implicitly afforded the Italian government a wide margin of appreciation in this case because of the historical threat the mafia has posed to Italian political structures.[55]

48. *See* Labita v. Italy, 2000-IV Eur. Ct. H.R. 99, 148.

49. *See id.* at 102 (explaining that Labita was suspected of running a financial company for his brother-in-law, who authorities believed to be the head of the local mafia, based on the cooperating testimony of a former mafioso).

50. *See id.* at 1246 (citing Article 32 of Presidential Decree 223 of March 20, 1967 as authority for the removal of civil rights).

51. *See id.* at 1244–45 (detailing the timeline of the preventive measures imposed upon Labita).

52. *See id.* at 1266 (framing the aim of the government in terms of the mafia's risk to Italian politics because mafia members would vote for other mafia members).

53. *See id.* (stating that the acquittal nullified any suspicion of mafia involvement that would have justified the imposition of disenfranchisement).

54. *See* William Ashby Powers, Comment, Hirst v. United Kingdom (No. 2)*: A First Look at Prisoner Disenfranchisement by the European Court of Human Rights*, 21 CONN. J. INT'L L. 243, 266–67 (2006) ("This 'lack of concrete evidence' severed the sufficient relationship that had existed between disenfranchisement and the government's aim of preventing the mafia from influencing elections.").

55. *See generally* Benjamin Scotti, Comment, *RICO Vs. 416-bis: A Comparison of U.S. and Italian Anti-Organized Crime Legislation*, 25 LOY. L.A. INT'L & COMP L. REV. 143 (detailing the mafia's past and current influence on

b. The Case of Hirst v. United Kingdom (No. 2)*, 2004-2006*

On March 30, 2004, a seven-judge Chamber of the Court handed down a judgment in the case of *Hirst v. United Kingdom* (*No. 2*).[56] Using an axe, John Hirst killed his elderly landlady.[57] For this crime, he was convicted and sentenced to a discretionary sentence of life imprisonment, with a fourteen-year tariff.[58] Pursuant to the Representation of the People Act 1983, Hirst lost the right to vote for the term of his imprisonment due to his conviction and custodial sentence.[59]

The British government argued before the Chamber that the Act pursued the legitimate aims of "preventing crime and punishing offenders" as well as "enhancing civic responsibility and respect for the rule of law."[60] In evaluating these aims, the Chamber relied heavily on the analysis of the Canadian Supreme Court in the case of *Sauvé v. Canada* (*No. 2*).[61] The Canadian Court found that neither aim bore a rational link to criminal disenfranchisement and that disenfranchisement may instead undermine those aims.[62] However, the Chamber declined to rule on the aim, citing the margin of appreciation, and chose instead to find the law disproportionate.[63] This construction reflects the nature of the Chamber's analysis, with

Italian politics).

56. Hirst v. United Kingdom (No. 2), App. No. 74025/01, 2005-IX Eur. Ct. H.R. 189, 220 (2005) (holding that the 1983 Representation of the People Act violated Article 3 of the First Protocol to the European Convention on Human Rights).

57. *See* Powers, *supra* note 54, at 269.

58. *See Hirst* (*No. 2*), 2005-IX Eur. Ct. H.R., at 214 (explaining that a tariff is the part of the sentence relating to retribution and deterrence, allowing for further imprisonment based on the parole authority's belief that the offender is a danger).

59. *See id.* at 197 (citing Section 3 of the Representation of the People Act 1983, stating that a person who is convicted of a crime and receives a custodial sentence shall be banned from voting in parliamentary or any other elections for the term of his imprisonment).

60. *See id.* at 207.

61. *See id.* at 201 (acknowledging the differences in the Canadian Charter and the European Convention while still finding the analysis of the Canadian court relevant to the circumstances).

62. *See id.*; Sauvé v. Canada (No. 2), [2002] 3 S.C.R. 519 (Can.) (rejecting the arguments of the Canadian government that there is a "rational link" between the legitimate aims argued and the disenfranchisement penalty).

63. *See* Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. at 214 (refraining from ruling on the aims of the governments because of the vast disparity in penal practices among member states).

legitimate aim and proportionality forming independent bases for finding a law in violation of Article 3 of the First Protocol.[64]

In finding the law disproportionate, the Chamber focused on the large number of people (more than 70,000) affected by the disenfranchisement as well as its automatic, arbitrary and indiscriminate nature.[65] The Chamber also assessed whether the Parliament considered issues of proportionality in passing the law and found that it did not.[66] The Chamber concluded by determining that a narrower tailoring of the law could be proportionate but that the law as it stood fell outside any "acceptable margin of appreciation."[67]

Upon appeal from the British Government, a full Grand Chamber of the Court ruled on the case on October 6, 2005.[68] This Court, too, found the law in violation of the article but altered some of the reasoning of the lower Chamber.[69] The Court took particular care at the beginning to emphasize the vital nature of the right to vote as a right that upholds the legitimacy of government and not a privilege that may be revoked.[70] However, contrary to the reticence of the Chamber, the Court emphatically endorsed the aims of the government.[71]

64. *Compare* Powers, *supra* note 54, at 283–84 (describing the bifurcated nature of the Court's inquiry), *with* Powers, *supra* note 54, at 284 (elaborating on the Canadian style of analysis which balances the aim, however illegitimate, against the deprivation of the right and looks for a "rational link" between the two).

65. *See Hirst*, 2005-IX Eur. Ct. H.R., at 216 (describing the effect on the people as arbitrary and indiscriminate because there is no consideration of the particular crime or of individual circumstances).

66. *See id.* at 204 (stating that Parliament never weighed the competing interests of the effects on the prisoner and the social value of disenfranchisement).

67. *See id.*

68. *See Hirst*, 2005-IX Eur. Ct. H.R., at 220 (upholding the judgment of the Chamber that the British law violated Article 3 of the First Protocol).

69. *See* Powers, *supra* note 54, at 289–93 (explaining that the Court discounted the analysis initially used in the Chamber's decision).

70. *See Hirst*, 2005-IX Eur. Ct. H.R. , at 201 (elaborating on the evolution of voting rights from a time when only elite groups could vote to today where universal suffrage is the standard, further stating that any departure from the principle undermines the rule of law).

71. *See id.* at 214 (disregarding both the analysis of the Canadian court from *Sauvé* (*No. 2*) and doubts about the efficacy of the measures in achieving the articulated aims, which the Court did not find incompatible per se with the

In its analysis of the law's proportionality, the Court endorsed the reasoning of the Chamber.[72] The Court further criticized the indiscriminate nature of the disenfranchisement by noting that the punishment was an ancillary penalty not announced during sentencing.[73]

c. The Case of Scoppola v. Italy (No. 3)*, 2012*

On May 22, 2012, the European Court of Human Rights ruled that Italy did not violate Franco Scoppola's rights under the Convention when it disenfranchised him pursuant to his conviction and life sentence for murdering his wife.[74] The law that allowed for Scoppola's disenfranchisement, Presidential Decree no. 223/1967, provides that all those sentenced to five years' imprisonment or more shall be banned from running for public office for life.[75]

The Court began its analysis by adopting the reasoning of the *Hirst* (*No. 2*) Court with regard to legitimate aim.[76] Turning next to the proportionality inquiry, the Court utilized the analysis of the *Hirst* (*No. 2*) Court, examining the automatic, arbitrary, and indiscriminate nature of the law.[77] As to the arbitrary nature of the law, the Court differentiated the Italian law by emphasizing that the length of disenfranchisement varies according to the length of sentence and only applies to those with a sentence of three years or

Convention).

72. *See id.* at 217.

73. *See id.* at 215 ("[T]he criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent . . . that there is any direct link between the facts of any individual case and the removal of the right.").

74. *See* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 3 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-111044 (detailing the particulars of Scoppola's crime and the proceedings against him).

75. *See id.* at 5–6 (correlating voting bans to the duration an individual is imprisoned, ranging from a five-year ban for those sentenced three to five years to a possible lifting of the ban three years after release).

76. *See id.* at 13 (accepting that disenfranchisement serves the aims of preventing crime and enhancing civic responsibility and respect for the rule of law).

77. *See id.* at 14 ("[W]hen disenfranchisement affects a group of people generally, automatically, and indiscriminately, based solely on the fact that they are serving a prison sentence, irrespective of the nature or gravity of the offense and their individual circumstances, it is not compatible with Article 3 of Protocol Number 1.").

longer.[78] The Court differentiated the indiscriminate nature of the British law from the Italian law by pointing to the Italian sentencing criteria, which allows for the court to take account individual circumstances when determining the length of sentence.[79] Furthermore, the Court also felt that mechanisms of the Italian penitentiary system that allowed for reductions in sentence length based on good behavior in connection with the possibility of regaining the right to vote three years after release mitigated the indiscriminate nature of the law.[80]

C. ARTICLE 31(3)(C) OF THE VIENNA CONVENTION ON THE LAW OF TREATIES PROVIDES AN ALTERNATIVE METHOD OF ANALYSIS THAT INCORPORATES EXTERNAL RULES OF INTERNATIONAL LAW

Article 31(3)(c) of the Vienna Convention states that, along with all other internal context, external rules of international law applicable in the relations of the parties may be considered when interpreting the terms of a treaty.[81] The policy underlying this practice reflects a need to harmonize regimes of international law through interpretation in light of evolving international norms.[82] In that respect, the policy is similar to the Court's own internal doctrine of evolutive interpretation.

Article 31(3)(c) analysis is a practice that is familiar to the Court, having applied it in various contexts in recent years.[83] In employing a

78. *See id.* at 16 (explaining that because the British law disenfranchises people sentenced for more minor offenses than the Italian law, it is less proportionate).

79. *See id.* (citing the Italian sentencing guidelines as a factor supporting the proportionate nature of the sentence because the length of sentence determines disenfranchisement).

80. *See id.* (emphasizing the possibility of early release and rehabilitation as major factors for finding the Italian system proportionate).

81. *See* Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 (allowing for subsequent applications of the treaty to be used to interpret both the treaty's context and application).

82. *See* Julian Arato, *Constitutional Transformation in the ECTHR: Strasbourg's Expansive Recourse to External Rules of International Law*, 37 BROOK. J. INT'L L. 349, 355 (2012) (emphasizing that a 31(3)(c) analysis should derive new meaning for a provision of a treaty from external sources).

83. *See, e.g.*, Demir v. Turkey, App. No. 34503/97, 48 Eur. H.R. Rep. 54 (2008) (interpreting municipal employees collective bargaining rights); Al-Adsani v. United Kingdom, App. No. 35763/97, 34 Eur. H.R. Rep. 11 (2002) (analyzing sovereign immunity).

31(3)(c) analysis, the Court examines a variety of documents, including other treaties, non-binding documents published by bodies of the Council of Europe, and non-binding documents of other international organizations.[84] This is shown in both the *Scoppola* (*No. 3*) and *Hirst* (*No. 2*) decisions, which reprint sections of relevant international documents, though neither case directly cites Article 31(3)(c) of the Vienna Convention.[85]

D. RELEVANT INTERNATIONAL DOCUMENTS ON VOTING RIGHTS AND THE RIGHTS OF PRISONERS

Having established that international documents can play a significant role in interpreting the Convention, it is important now to examine relevant documents on the rights of prisoners and the right to vote. The International Covenant on Civil and Political Rights is the predominant international treaty in these areas, though several other European and international documents provide additional clarity.[86]

1. International Documents on the Rights of Prisoners Emphasize the Reintroduction of the Prisoner to Society as the Primary Goal of Incarceration

Article 10 of the ICCPR relates to the general treatment of prisoners, mandating that they be treated with the respect and the dignity of the human person and that the primary aim of the

84. *See* Arato, *supra* note 82, at 376–77 (demonstrating the Court's use of the nonbinding recommendations of the Council of Europe's European Commission for Democracy Through Law ("Venice Commission") as well as the nonbinding recommendations of two committees of the International Labor Organization).

85. *See* Hirst v. United Kingdom (No. 2), App. No 74025/01, 2005-XI Eur. Ct. H.R. 193, 198–99 (2005) (citing the ICCPR, the CoE's European Prison Rules, and a report of the Venice Commission); *see also* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 7 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-111044 (citing the ICCPR, the Venice Commission report, as well as a report of the United Nations Human Rights Committee as relevant international materials on the issues of prisoners' rights and voting rights).

86. *See* International Covenant on Civil and Political Rights art. 25, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also Chart of Signatures and Ratifications*, UNITED NATIONS TREATY COLLECTION, (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 19, 2012) (noting that all members of the Council of Europe are also signatories to the ICCPR).

penitentiary system be the reformation and social rehabilitation of the prisoner.[87] There are several other international documents that reaffirm Article 10's principles; for example, Principle Ten of the United Nations Basic Principles for the Treatment of Prisoners states that "favourable conditions shall be created for the reintegration of the ex-prisoner into society."[88] Aside from other international organizations, the Council of Europe itself stated these principles in several different documents, including the European Prison Rules.[89]

2. International Documents Regarding Voting Rights and Criminal Disenfranchisement Recommend the Abolition of Criminal Disenfranchisement in Most Contexts

Article 25 of the ICCPR mandates that the right to vote not be impeded by "unreasonable restrictions."[90] The meaning of this article is not clear on its face; however, it has been interpreted as prohibiting all but the most narrowly defined criminal

87. *See* ICCPR, *supra* note 86, art. 10(1) (stating that prisoners are entitled to a basic level of human dignity and that the goal of the penitentiary system shall be the rehabilitation of the prisoner).

88. Basic Principles for the Treatment of Prisoners, G.A. Res. 45/111, U.N. Doc A/RES/45/111 (Mar. 28, 1991); *see also* First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 30, 1955, *Standard Minimum Rules for the Treatment of Prisoners*, Rule 61, *available at* http://www.unhcr.org/refworld/docid/3ae6b36e8.html (stating that the treatment of prisoners shall emphasize their continuing part in society, not their exclusion from it).

89. *See* COUNCIL OF EUROPE, *Recommendation Rec(2006)(2) of the Comm. of Ministers to Member States on the European Prison Rules*, Rules 5–7 (adopted Jan. 11, 2006), https://wcd.coe.int/ViewDoc.jsp?id=955747&Site%20=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (last visited Dec. 19, 2012) [hereinafter European Prison Rules] (emphasizing that life in prison should approximate life outside of prison as closely as possible); *see also* COUNCIL OF EUROPE, *Recommendation Rec(2003)23 of the Committee of Ministers to Member States on the Management by Prison Administrators of Life Sentence and other Long-term Prisoners*, Recommendations 2–5, *available at* https://wcd.coe.int/ViewDoc.jsp?id=75267&Site=CM (recommending prisoners' day to day lifestyle be comparable to the safety, organization, and level of personal responsibility experienced in society).

90. *See* ICCPR, *supra* note 86, art. 25 ("Every citizen shall have the right and opportunity . . . without unreasonable restrictions: (b) To vote and to be elected at genuine periodic elections which shall be held by . . . secret ballot, guaranteeing the free expression of the will of the electors.").

disenfranchisement laws.[91] Several documents promulgated by the Council of Europe make a clearer distinction, particularly Resolution 1459 of the Parliamentary Assembly, issued in 2005, which recommends restriction of disenfranchisement to crimes against the democratic process.[92] Furthermore, in 2002 the European Commission for Democracy Through Law (Venice Commission), an advisory body of the Council of Europe, made official recommendations that disenfranchisement only be imposed for serious criminal offenses, and even then only by the express decision of a court of law.[93]

III. ANALYSIS

This section will argue that the decision in *Scoppola* (*No. 3*) is inconsistent with the European Convention on Human Rights. This section will look first at how the analysis of proportionality in *Scoppola* (*No. 3*) is inconsistent with the analysis employed by the Court in *Hirst* (*No. 2*). Second, it will examine how the decision in *Scoppola* (*No. 3*) conflicts with western European norms as reflected in the margin of appreciation and an evolutive interpretation of the Convention. Finally, the last part of this section will employ an analysis of the Convention under Article 31(3)(c) of the Vienna Convention on the Law of Treaties to show that the decision in *Scoppola* (*No. 3*) conflicts with more recent international and European norms regarding voting rights and the treatment of prisoners.

91. *See generally* Macdonald, *supra* note 3 (categorizing global criminal disenfranchisement laws based on their compliance with the ICCPR).

92. *See* EUR. PARL. ASS., *Abolition of Restrictions on the Right to Vote*, Res. 1459 (2005) (justifying the limitations on disenfranchisement by reinforcing the importance of the right to vote and the rehabilitative nature of imprisonment).

93. *See* European Commission for Democracy Through Law, July 5–6, Oct. 18–19, 2002 *Code of Good Practice in Electoral Matters*, Op. No. 190/2002, Section 1.1(d)(iv)–(v) (Oct. 20 2002), http://www.venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.pdf [hereinafter Venice Commission] (predicating disenfranchisement and the loss of political rights only in cases of mental incapacity or criminal convictions).

A. THE PROPORTIONALITY ANALYSIS IN *SCOPPOLA* (*NO. 3*) IS INCONSISTENT WITH THE PROPORTIONALITY ANALYSIS IN *HIRST* (*NO. 2*)

The European Court of Human Rights employs a proportionality analysis to determine if a State exceeds its margin of appreciation, by weighing the limitation of the right against the discretion afforded the state in forming its national policies.[94] The Court, however, is not strictly bound by its own precedent; in other words, the Court is not absolutely required to follow its own judgments.[95] The Court does not depart from its own decisions lightly, but it has done so with its analysis of proportionality in *Scoppola*.[96]

The first aspect of the proportionality analysis employed by the Court in both cases is the analysis of the indiscriminate nature of the disenfranchisement.[97] Where the Court in *Hirst* (*No. 2*) felt that the disenfranchisement of all convicted prisoners serving custodial sentences was indiscriminate, the Court in *Scoppola* (*No. 3*) felt that the disenfranchisement of all those convicted to sentences of three years or more was not indiscriminate.[98] The conclusion reached by the Court in *Scoppola* (*No. 3*) is inconsistent with *Hirst* (*No. 2*) because it focuses on the length of the sentence when the determinative factor should be that the penalty applies without regard to particulars of the crime, which is cited as a major factor in the

94. *See* ARAI-TAKAHASHI, *supra* note 8, at 14 (emphasizing that an intense standard of proportionality review reflects a narrow margin of appreciation).

95. *See* Goodwin Christine v. United Kingdom, 2002-VI Eur. Ct. H.R. 471 ("While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases."); *see also* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 14 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx? i=001-111044 (applying the principle stated in the Goodwin case to the *Scoppola* (*No. 3*) case).

96. *See Scoppola*, App. No. 126/05, at 14 (deciding that comparative-law is inclined to be more liberal with granting prisoners voting rights).

97. *See* Hirst v. United Kingdom (No. 2), App. No 74025/01, 2005-IX Eur. Ct. H.R. 193, 216 (2005) (emphasizing the blunt nature of the 1983 Representation of the People Act because it strips the convention-protected right to vote from a significant number of people in an indiscriminate manner).

98. *See Scoppola*, App. No. 126/05, at 16 (finding the Italian disenfranchisement law proportionate in part because it lets prisoners serving less than three years retain their voting rights).

Hirst (*No. 2*) decision.[99] This inconsistency is noted in Judge Björgvinsson's dissent in *Scoppola* (*No. 3*).[100] It is also noted in the *Scoppola* (*No. 3*) Chamber opinion.[101] Furthermore, while the Court in *Scoppola* (*No. 3*) refers to the Italian sentencing guidelines as a factor weighing against finding the law indiscriminate, the Court in *Hirst* (*No. 2*) considered no such guidelines in that decision.[102]

Another element of inconsistency arises from the Court's point in *Hirst* (*No. 2*) that the proportionality of the punishment is affected by whether or not it is specifically announced at sentencing.[103] The Court in *Hirst* (*No. 2*) points to this as a factor in finding the law disproportionate, even going so far as to imply that disenfranchisement should be considered as a separate issue at sentencing.[104] This concept does not appear at all in the Court's analysis in *Scoppola* (*No. 3*), a point seized upon by the dissent.[105]

99. *See Hirst*, 2005-IX Eur. Ct. H.R., at 216 (describing the disproportionate nature of the English disenfranchisement law as applying automatically, indiscriminately, and without regard to any individual circumstances of the crime).

100. *See Scoppola*, App. No. 126/05, at 19 (Björgvinsson, J., dissenting) ("While the Italian legislation may seem for this reason to be more lenient in comparison with that of the United Kingdom, it is stricter in the sense that it deprives prisoners of their right to vote beyond the duration of their prison sentence and, for a large group of prisoners, for life.").

101. *See id.* at 10 (making the point that the only factor in the disenfranchisement was the length of the custodial sentence). It is unclear what other particular arguments were raised in the Chamber decision in *Scoppola* (*No. 3*), as that judgment has not yet been translated into English.

102. *See id.* at 16 ("In the Court's opinion the legal provisions in Italy defining the circumstances in which individuals may be deprived of the right to vote show the legislature's concern to adjust the application of the measure to the particular circumstances of the case in hand, taking into account such factors as the gravity of the offense committed and the conduct of the offender.").

103. *See Hirst*, 2005 IX Eur. Ct. H.R. at 215869 (explicitly noting that British courts do not announce the disenfranchisement penalty at sentencing).

104. *See id.* at 212–213 (stating that an independent court and an adversarial procedure provide a safeguard against arbitrariness and disproportionality).

105. *See Scoppola*, App. No. 126/05, at 19 (Björgvinsson, J., dissenting) ("[T]he Italian courts did not make any specific reference to [Scoppola's] disenfranchisement, and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of his case and the removal of his right to vote"); *see also* Frodl v. Austria, App. No. 20201/04, Eur. H.R. Rep. (2010), 8 http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-98132 (interpreting *Hirst* (*No. 2*) as requiring the independent determination of a judge to impose disenfranchisement, a proposition rejected by the *Scoppola* (*No. 3*) Court).

Indeed, in the *Labita* case, the Italian government explicitly argued for disenfranchisement because of the unique threats posed by the mafia to the Italian legal system.[106] Ultimately, because the Italian law buries the disenfranchisement penalty as an ancillary penalty to the loss of the right to hold public office whereas the English law states it outright, the English law is actually more proportionate in this respect than the Italian law.[107]

The final element of the proportionality analysis employed in *Hirst* (*No. 2*) is the use of the margin of appreciation to examine the nature of domestic legislation.[108] In *Hirst* (*No. 2*), the fact that Parliament never considered the proportionality of the law weighed heavily in the Court's decision to find the law disproportionate.[109] In *Scoppola*, however, the Court engaged in no such discussion of legislative history, and indeed seemed not to factor legislative history into its decision at all, though its conspicuous absence was noted by the dissent.[110]

The analysis of proportionality in the *Scoppola* (*No. 3*) case is inconsistent with the analysis in the *Hirst* (*No. 2*) case. Of particular note are the indiscriminate nature of the disenfranchisement, the

106. *See* Labita v. Italy, 2000-IV Eur. Ct. H.R. 99, 148 (declaring that the aim of the government in disenfranchising Labita was to prevent the mafia from influencing elections by voting for pro-mafia politicians, which the court recognized may pose a threat to Italian politics); *see also* HARRIS ET AL., *supra* note 5, at 717 (discussing how the court explicitly linked restrictions on the right to vote based on age and citizenship to specific issues in the electoral system).

107. *Compare Scoppola*, App. No. 126/05, at 5 ("In the event of a lifetime ban from public office . . . the convicted person shall be deprived of the right to vote . . . and all other political rights."), *with Hirst*, 2005-IX Eur. Ct. H.R., at 197 ("A convicted person during the time that he is detained in a penal institution in pursuance of his sentence . . . is legally incapable of voting at any parliamentary or local election."). *See also Scoppola*, App. No. 126/0519, at 19 (Björgvinsson, J., dissenting) (emphasizing that there is no clear link between denying a person the right to run for office and denying a person the right to vote).

108. *See* Powers, *supra* note 54, at 287 (discussing how the Chamber in *Hirst* (*No. 2*) evaluated the conduct of the Parliament in passing the RPA).

109. *Hirst*, 2005-IX Eur. Ct. H.R., at 197 (describing the debates of Parliament on the 1983 Representation of the People Act as completely lacking in any substance regarding the proportionality of or justifications for disenfranchisement).

110. *See Scoppola*, App. No. 126/05, at 19 (Björgvinsson, J., dissenting) (opining that the Italian legislature, like the British Parliament, never assessed the proportionality of the measure, and emphasizing that the law disenfranchises a large number of Italian criminals beyond the length of their custodial sentence).

automatic nature of the disenfranchisement, applying the disenfranchisement upon sentencing without notifying the convict, and the fact that neither country ever considered proportionality when passing its respective laws. If the Court had applied the proportionality analysis consistently, it would have found the Italian law just as disproportionate as the British law was seven years prior.

B. THE DECISION IN *SCOPPOLA* (*NO. 3*) IS INCONSISTENT WITH WESTERN EUROPEAN NORMS OF PENAL CONDUCT

At its ratification, the Council of Europe intended the European Convention on Human Rights to be a statement of the common values of democracy and the rule of law held by the western European states.[111] Since the end of the Cold War, however, the integration of eastern European states that do not share these common historical values has caused some difficulty in reconciling the new signatories with the existing norms under the Convention, which is reflected in *Scoppola* (*No. 3*).[112]

1. The Decision in Scoppola (No. 3) *Reflects an Overly Broad Margin of Appreciation in the Area of Voting Rights*

One of the arguments advanced by the Italian government in *Scoppola* (*No. 3*) is that there is no European consensus on criminal disenfranchisement and that this allows the Court to construe the margin of appreciation broadly.[113] Accordingly, the breadth of the margin of appreciation on this issue is repeatedly referred to by the Court in making its decision.[114] While it is true that there is no single

111. *See* ECHR, *supra* note 5, at 5 (explaining that states that ratified the Convention shared political traditions and ideals of freedom and rule of law).

112. *See* ARAI-TAKAHASHI, *supra* note 8, at 216 (expressing the difficulty of applying European consensus views when consensus views do not reflect a more progressive construction of the Convention).

113. *See Scoppola*, App. No. 126/05, at 11 (explaining the argument of the Italian government that there has historically been a broad margin of appreciation in the area of criminal disenfranchisement). *Contra id.* at 17 (Björgvinsson, J., dissenting) (opining that while the margin of appreciation for the development of a national electoral system is appropriately broad, the margin of appreciation for a withdrawal of the right to vote, which directly affects the individual's ability to participate in the political process, should be much narrower).

114. *See id.* at 11, 17 ("The rights enshrined in Article 3 of Protocol No. 1 are not absolute . . . . There are numerous ways of organizing and running electoral

European approach on the issue, there is more nuance among European states than is initially apparent. As of the *Scoppola* (*No. 3*) decision, nineteen of forty-three Contracting States had no restrictions on prisoner voting, seven imposed a ban on all incarcerated prisoners, and the remaining sixteen adopted an intermediate approach, disenfranchising some prisoners.[115]

The Court in *Scoppola* (*No. 3*) states that the purpose of the margin of appreciation on the issue of electoral systems is to allow a State to incorporate its own cultural history and diversity into a unique democratic vision.[116] However, of the seven Contracting Parties that disenfranchise all prisoners, all but the United Kingdom are former Soviet states without a strong history of democracy and the rule of law, having joined the Convention in the last twenty years.[117] Indeed, a study of European disenfranchisement laws found that general criminal disenfranchisement is associated with a significantly lower level of political democratization.[118] General disenfranchisement policies are also highly correlated with the death penalty, a practice that the Council of Europe recommends be abolished, further showing that the penal policies of these post-Soviet nations are out of step with the norms of the rest of Europe.[119]

systems and a wealth of differences . . . in historical development, cultural diversity, and political thought within Europe.").

115. *See id.* at 10–11 (categorizing the practices of the Council of Europe member states on the issue of criminal disenfranchisement). *See generally* Greens and M.T. v. United Kingdom, App. Nos 60041/08 and 60054/08, 53 Eur. H.R. Rep 21 (2011) (noting that Parliament failed to take action to change the law that was found in violation in *Hirst* (*No. 2*)).

116. *See Scoppola*, App. No. 126/05, at 17 (emphasizing the variety of political systems possible under the democratic process).

117. *See* COUNCIL OF EUROPE, *Convention for the Protection of Human Rights and Fundamental Freedoms Chart of Signatures and Ratifications*, http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=&DF=&CL=ENG (last visited Dec. 20, 2012) [hereinafter Council of Europe Signatures and Ratifications] (showing that Armenia, Bulgaria, Estonia, Georgia, Hungary, and Russia all ratified the First Protocol between the years 1992 and 2002).

118. *See* Christopher Uggen et al., *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, *in* CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 71 (Alec Ewald & Brandon Rottinghaus eds., 2009) (finding that European nations with no criminal disenfranchisement had a mean democratization index score of 30.15, whereas nations with full criminal disenfranchisement had a mean score of 24.49).

119. *See id.* (showing that the mean likelihood of a nation maintaining the death

Further reducing the clarity on this issue is the vast disparity of practices among the sixteen states that impose a limited form of criminal disenfranchisement.[120] At one end of the spectrum, there are States such as Italy, which disenfranchise a significant number of offenders based on the length of sentence. On the other end are States like Germany, which restrict criminal disenfranchisement to particular crimes and leave the determination of whether to impose disenfranchisement to the discretion of a court.[121]

The degree of variation in penal policy is significantly reduced when one looks at States that ratified the Convention at or near its inception, like Italy.[122] Of these fifteen states, Italy stands only with the United Kingdom and Turkey in maintaining an automatic criminal disenfranchisement law that does not provide for judicial determination of the penalty.[123] If the consensus view of only these

penalty was 0.333 for general disenfranchisement countries and 0.083 for non-disenfranchising countries); *see also* EUR. PARL. ASS., *Position of the Parliamentary Assembly as Regards the Council of Europe Member and Observer States Which Have not Abolished the Death Penalty*, Doc. No. 10911, http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10911.htm, Apr. 21, 2006 (recommending that all member and observer countries to the Council of Europe abolish the death penalty in accordance with previous Council recommendations).

120. *Scoppola*, App. No. 126/05, at 11 (listing Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Romania, San Marino, Slovakia, and Turkey as states that have limited criminal disenfranchisement).

121. *See* Nora V. Demleitner, *U.S Felon Disenfranchisement: Parting Ways with Western Europe*, *supra* note 188, at 86 (characterizing German law as only allowing disenfranchisement as a separate punishment for a narrowly defined set of crimes either directly relating to voter fraud or that target the foundations of the German state; in the year 2003, only two people were sentenced to disenfranchisement under these laws); *see also* LALEH ISPAHANI, *Voting Rights and Human Rights: A Comparative Analysis of Criminal Disenfranchisement Laws*, *in* CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 29 (Alec Ewald & Brandon Rottinghaus eds., 2009) (offering Norway as an example where the law specifically states that a court must explicitly impose disenfranchisement, and pointing out that such punishment is "very rare").

122. *See* Council of Europe Signatures and Ratifications, *supra* note 117 (showing that Austria, Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom all ratified the First Protocol before 1960).

123. *See Scoppola*, App. No. 126/05, at 11 (differentiating the sixteen states with limited disenfranchisement according to whether the decision to impose disenfranchisement remains in the discretion of the court).

states were to apply in forming a margin of appreciation, the Court in *Scoppola* (*No. 3*) would have almost certainly found that the Italian disenfranchisement law violated the Convention because it does not provide for such judicial discretion, especially considering that the Court had previously held that a similar British law violated the Convention.[124] Ultimately, the end of the cold war and the resulting expansion of the Council of Europe created a wide variation in criminal disenfranchisement policies among its Contracting States. This expansion broadened the margin of appreciation on criminal disenfranchisement, allowing the Italian law to be upheld in *Scoppola* (*No. 3*) even though it is out of step with the majority of western European nations.

2. The Decision in Scoppola (No. 3) *Has a Deleterious Effect on Evolutive Interpretation*

The broadening of the margin of appreciation, as seen in *Scoppola* (*No. 3*), also has implications for the use of evolutive interpretation by the Court, specifically the possibility that the adoption of consensus views drags the standard of human rights down to the lowest common denominator.[125] Evolutive interpretation is based on the principle that changing social attitudes should be accounted for when broadening the protections under the convention.[126] The decision in *Scoppola* (*No. 3*) therefore can be viewed as a kind of devolutive judgment, removing the protections seemingly guaranteed by *Hirst* (*No. 2*), a view expressed by Judge Björgvinsson in his dissent.[127]

124. *See* discussion *supra* Part II.B.2.ii (discussing the resolution of the *Hirst* (*No. 2*) case).

125. *See* ARAI-TAKAHASHI, *supra* note 8, at 196 (theorizing that an evolutive interpretation may result in sacrificing the quality of the Convention standard of human rights in search of a uniform European approach); *see also* Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1231 (1998) (opining that the integration of eastern European nations with divergent legal and political traditions will necessarily result in a lowering of established standards).

126. *See* discussion *supra* Part II.A.1 (discussing the rationale underlying the doctrine of evolutive interpretation).

127. *See Scoppola*, App. No. 126/05, at 26–29 (Björgvinsson, J., dissenting) (lamenting that the decision in *Scoppola* (*No. 3*) has rolled back any protections for prisoner's voting rights that were gained in the *Hirst* (*No. 2*) decision).

In *Scoppola* (*No. 3*), the Court took the protection granted in *Hirst* (*No. 2*) and, mindful of the lack of a European consensus on the issue, still decided to reverse itself.[128] The use of comparative law in evolutive interpretation is legitimized because it brings interpretation of the Convention in line with recognized human rights standards.[129] Therefore, the judgment in *Scoppola* (*No. 3*) caused the Court to become inconsistent with the recognized human rights standard, which disfavors criminal disenfranchisement in almost all contexts, especially when there is no judicial determination of the disenfranchisement penalty.[130]

Beyond simply reversing the evolutive trend of the Court in the area of criminal disenfranchisement, the decision in *Scoppola* (*No. 3*) also raises concerns about the legitimacy of the Court, as it makes the Court seem inconsistent and unpredictable.[131] The inconsistency is particularly problematic in this instance because the judgment in *Scoppola* (*No. 3*) drastically reduces the scope of a protection that had seemingly been granted in *Hirst* (*No. 2*), contrary to the purpose of evolutive interpretation, which is to broaden the Court's interpretation of Convention terms and bring that interpretation in line with modern norms.[132]

128. *See id.* at 11, 23-24 (emphasizing the lack of European consensus on the issue of disenfranchisement, especially on whether an independent determination of the penalty is necessary).

129. *See* HARRIS et al., *supra* note 5, at 9 (asserting that the Court should be aware that just because a practice is the European consensus, that does not necessarily make it an admirable standard).

130. *See* discussion *supra* Part II.C.2 (highlighting key documents of the Council of Europe Parliamentary Assembly and the Venice Commission which recommend limits on criminal disenfranchisement).

131. *See* Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 GERMAN L.J. 1730, 1742 (2011) (emphasizing that the Court needs to make evolutive interpretation more predictable to maintain process legitimacy); *see also* FRANÇOISE TULKENS, EUR. COURT OF HUMAN RIGHTS, DIALOGUE BETWEEN JUDGES 2011: WHAT ARE THE LIMITS TO THE EVOLUTIVE INTERPRETATION OF THE CONVENTION? 8 (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/D901069F-76A0-401F-BF48-248FC80E728A/0/DIALOGUE_2011_EN.pdf (commenting as a Section President of the ECHR, Tulkens noted that one of the major criticisms of evolutive interpretation is that it threatens democratic legitimacy).

132. *See* ARAI-TAKAHASHI, *supra* note 8, at 196 ("[T]he comparative method should be better employed to construe the meaning and scope of the Convention

C. THE DECISION IN *SCOPPOLA* (*NO. 3*) IS INCONSISTENT WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS WHEN ANALYZED IN THE CONTEXT OF RECENT INTERNATIONAL VOTING RIGHTS AND PRISONERS' RIGHTS DOCUMENTS UNDER ARTICLE 31(3)(C) OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

The text of Article 3 of the First Protocol to the European Convention on Human Rights states simply that the Contracting Parties shall hold free elections, at regular intervals, under conditions that ensure the free expression of the people in the choice of legislature.[133] This does not answer the question of whether the Court was correct in upholding the Italian disenfranchisement law in *Scoppola* (*No. 3*); in this situation, it is instructive to use Article 31(3)(c) of the Vienna Convention to evaluate whether the Italian law is consistent with international norms.

1. The Stated Aims of Criminal Disenfranchisement in the Scoppola (No. 3) *Decision Are Inconsistent with International Norms of Penal Policy*

Article 10 of the International Covenant on Civil and Political Rights covers the general treatment of prisoners, mandating that they be treated with the respect and dignity of the human person and that the primary aim of the penitentiary system be the reformation and social rehabilitation of the prisoner.[134] This formulation necessarily invites an analysis of whether the aims of criminal disenfranchisement enumerated by the Italian government in *Scoppola* (*No. 3*) conform to this mandate.

The Court in *Scoppola* (*No. 3*) accepted wholesale the Grand Chamber's analysis in *Hirst* (*No. 2*) that the criminal disenfranchisement law served the legitimate aims of "preventing crime and enhancing civic responsibility for the rule of law."[135]

terms in such a way as to reinforce and widen the protection of rights and freedoms.").

133. First Protocol, *supra* note 2, art. 3.

134. ICCPR, *supra* note 86, art. 10(1), (3) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person . . . The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.").

135. *See* Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. 13 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044 (citing

Evaluating both of these aims in light of Article 10 of the ICCPR demonstrates their inconsistency with international norms.

The first aim purports to enhance civic responsibility and respect for the rule of law. Disenfranchisement does precisely the opposite.[136] In a democratic society, the legitimacy of the government is derived from the will of the people; for the legislature, elected by the people, to restrict the right of some people to choose the legislature is inherently delegitimizing.[137] Furthermore, criminal disenfranchisement is contrary to the principle of universal suffrage, which the European Court of Human Rights has called the baseline of protection.[138]

The governments in both the *Scoppola* (*No. 3*) and *Hirst* (*No. 2*) cases argue that criminal disenfranchisement is necessary to teach convicts respect for the rule of law.[139] Disenfranchisement achieves the opposite end here, as well.[140] The clearest lesson that

to sections 74 and 75 of the *Hirst* (*No. 2*) decision for the statement of the legitimate aim).

136. *See* Sauvé v. Canada (No. 2), [2002] 3 S.C.R. 519, ¶ 31 (Can.) (stating that denying inmates the right to vote undermines the rights of all Canadians by misrepresenting the nature of the right).

137. *See id.* at ¶ 34 ("A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers."); *see also Scoppola*, App. No. 126/05, at 18 (acknowledging that departures from universal suffrage undermine the democratic validity of the legislature and the laws that it promulgates, and such departures cannot be made without justification).

138. *See Scoppola*, App. No. 126/05, at 17 (restating the principle from *Mathieu-Mohin* that, in a democratic society, there is a presumption against restrictions on the franchise because voting is a right, not a privilege); *see also Hirst*, 2005-IX Eur. Ct. H.R. at 209 (using the United Kingdom's gradual expansion of the franchise to all groups to demonstrate the transition from the view of voting as a privilege to voting as a right).

139. *See id.* at 207 ("The Government argued that the disqualification in this case pursued the intertwined legitimate aims of preventing crime and punishing offenders and enhancing civic responsibility and the rule of law.").

140. *See* Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 92 (2006) ("Given that over 95% of prisoners and all parolees and probationers are re-released into the community, the edification of convicts' virtue is a matter of pressing importance . . . . By placing a mark of infamy on convicts, disenfranchisement can . . . increase the incidence of recidivism and impede the assimilation of released offenders.").

disenfranchisement teaches the offender is that he is less than others.[141] Indeed, the United Kingdom made clear in *Hirst* (*No. 2*) that it believed prisoners, by virtue of their imprisonment, lost the moral authority to participate in the decisions of society.[142] Furthermore, the Italian law at issue in *Scoppola* (*No. 3*) does not even mandate that the disenfranchisement penalty be announced at sentencing, delaying any educative impact until the prisoner discovers his disenfranchisement on his own.[143]

The final aim of the disenfranchisement law, preventing crime by enhancing punishment, is so broad and vague an aim that it could be said of nearly all penal measures.[144] It also implies that the withdrawal of vital human rights beyond the right of liberty is a justifiable punishment, a concept that conflicts with the European Prison Rules promulgated by the Council of Europe.[145]

The aims articulated by the Italian government in *Scoppola* (*No. 3*) do not emphasize the reintegration and reintroduction of the offender into society and indeed may actually achieve the opposite, further alienating the offender from society and exacerbating the difficulty of reentry into society. Evaluating these aims in light of contemporary international documents such as the ICCPR, the European Prison Rules, and the United Nations Basic Principles for

141. *See* Lukas Muntingh & Julia Sloth-Nielsen, *The Ballot as a Bulwark: Prisoners' Right to Vote in South Africa*, *supra* note 117, at 234 (quoting a South African Constitutional Court case stating that the vote is a classless signifier of unity among democratic citizens); *see also Hirst*, 2005-IX Eur. Ct. H.R. at 207–08 (including in the decision third-party prisoners' rights campaigners who argued that disenfranchisement furthers the exclusion of the convict); *Sauvé*, 3 S.C.R. 519, ¶ 35 (citing to the same South African case, which holds that the vote signifies that "everybody counts").

142. *See Hirst*, 2005-IX Eur. Ct. H.R. at 207 (stating the opinion of the British government that criminals, by virtue of their crime, violated the social contract and were no longer entitled to have a say in the governance of their country).

143. *See Scoppola*, App. No. 126/05, at 27 (Björgvinsson, J., dissenting) (noting that beyond imposing a sentence of greater than three years imprisonment, the Italian courts do not inform the prisoner that he is being disenfranchised).

144. *See Sauvé*, 3 S.C.R. 519, ¶ 22 (stating that a broad and abstract objective, such as enhancing respect for the rule of law and ensuring appropriate punishment, are susceptible to different meanings in different contexts and, consequently, to distortion and manipulation).

145. *See* European Prison Rules, *supra* note 89, Rule 102.2 ("Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment.").

the Treatment of Prisoners under Article 31(3)(c) of the Vienna Convention, demonstrates that criminal disenfranchisement, at least for the aims articulated in *Scoppola* (*No. 3*), are not consistent with the obligation to hold free elections under Article 3 of the First Protocol.

2. Contemporary International Documents on Voting Rights Recommend the Abolition of Criminal Disenfranchisement in Nearly Every Context

Article 25 of the ICCPR only prohibits "unreasonable restrictions" on the right to vote, an inherently subjective criterion that does not definitively answer whether the Italian criminal disenfranchisement law at issue in the *Scoppola* (*No. 3*) case would violate that provision. However, the analysis of the Court in *Scoppola* (*No. 3*) is demonstrably inconsistent with recommendations of both the Council of Europe Parliamentary Assembly and the Venice Commission. Both bodies indicate which restrictions on the right to vote are acceptable by recommending that criminal disenfranchisement as punishment for a crime be imposed only for crimes against the political process and by the express decision of a court of law.[146]

The Court in *Scoppola* (*No. 3*) touches on both of these issues in its analysis of proportionality.[147] With respect to the recommendation that disenfranchisement only be imposed for serious crimes, the Court actually stated that this factor weighed in favor of finding the law proportionate because the Italian law does not disenfranchise those convicted with sentences of less than three years.[148] The Court also heavily emphasizes that another factor in finding the disenfranchisement law proportionate as a whole is that it also provides for disenfranchisement of those convicted of crimes against

146. *See* discussion *supra* Part II.D.2 (discussing recent international documents that recommend restrictions on criminal disenfranchisement).

147. *See* discussion *supra* Part III.A (analyzing the inconsistency between the Court's analysis of proportionality in *Scoppola* (*No. 3*) and *Hirst* (*No. 2*)).

148. *See Scoppola* (*No. 3*), App. No. 126/05, at 23 (opining that, because the Italian law does not disenfranchise those convicted to sentences of less than three years, the Italian government has taken care to ensure that disenfranchisement is limited to being a punishment for major crimes).

the State or judicial system, as in the Labita case.[149] The Court's interpretation of the Italian law remains inconsistent with the 2005 recommendation of the Parliamentary Assembly, which recommends that disenfranchisement be applied only to crimes against the State or democratic process; whether an unacceptable restriction on the right to vote adjoins an acceptable restriction should not be a factor in finding the unacceptable restriction acceptable.[150]

The *Scoppola* (*No. 3*) Court in its proportionality analysis explicitly rejects the recommendation that disenfranchisement should only be imposed by the express decision of a court.[151] The Court relies instead on the Italian guidelines for determining the length of a sentence, which allow for consideration of individual circumstances in deciding the length of the sentence and whether disenfranchisement is imposed.[152] This interpretation does not conform to the Venice Commission's recommendations, which specifically state that the removal of voting rights can only be a subsidiary penalty where there is a judicial determination of mental incapacity and not merely a criminal conviction.[153]

The Venice Commission's recommendations also state that the standard for the removal of the right to run for public office may be less strict than for the removal of voting rights.[154] This

149. *See id.* at 22-23 (acknowledging that the Italian law also provides for disenfranchisement based on other criteria besides length of sentence, even though the situation in the case only involved disenfranchisement by length of sentence).

150. *See Abolition of Restrictions on the Right to Vote*, *supra* note 92, ¶ 8 (referencing the judgment in *Hirst* (*No. 2*) when urging Member States to reconsider all disenfranchisement laws not specifically tied to crimes against the democratic process).

151. *See Scoppola*, App. No. 126/05, at 21 (finding that while judicial intervention is useful for determining whether a measure is proportionate, a measure should not be automatically found to be disproportionate if it was not issued by a judge).

152. *See id.* at 22–23 (emphasizing the discretion of the Italian judicial system in determining the length of the sentence as a factor in finding the Italian law proportionate).

153. *See* Venice Commission, *supra* note 93, at 15 (explaining that the automatic removal of a person's voting rights by operation of law is only acceptable when there is a finding of mental incapacity).

154. *See id.* (asserting that the bar may be lower for the removal of the right to run for public office because there is a greater public interest in preventing dangerous people from obtaining public office than merely preventing them from voting).

recommendation creates inconsistency with the Italian law, which explicitly frames the removal of voting rights as a subsidiary penalty to the loss of the right to run for public office.[155] Furthermore, the Italian law does not require courts to announce an offender's disenfranchisement at sentencing, so the offender may not even be aware that he has lost the right to vote.[156]

The *Scoppola* (*No. 3*) Court points to the possibility of early release from prison and of a rehabilitation hearing reinstating the offender's right to vote as factors for finding the Italian system proportionate.[157] This interpretation runs counter to the Venice Commission's recommendations, allowing for an express hearing on disenfranchisement only after it has already been imposed, rather than before.[158]

Lastly, the decision of the *Scoppola* (*No. 3*) Court is inconsistent with these international norms because it upholds a law that neither provides for an independent judicial determination of the disenfranchisement penalty nor restricts disenfranchisement to political crimes or crimes against the democratic process.

IV. RECOMMENDATIONS

The inconsistent ruling of the European Court of Human Rights in *Scoppola* (*No. 3*) creates uncertainty in the international legal community about how States should adjust their laws to comport with minimum Convention standards.[159] To that end, there are

155. *See Scoppola*, App. No. 126/05, at 28 (Björgvinsson, J., dissenting) (opining that there is no link between the loss of the right to run for public office and the loss of the right to vote).

156. *See id.* at 27 (Björgvinsson, J., dissenting) (noting that the Italian law, as applied to Mr. Scoppola, did not notify him of his disenfranchisement at his sentencing except that he was sentenced to imprisonment for greater than five years).

157. *See id.* at 23 (emphasizing that the possibility of early release and rehabilitation show that the Italian system is not "excessively rigid").

158. *See* Venice Commission, *supra* note 93, at 15 (emphasizing that the express decision of a court of law must be applied to the withdrawal of political rights, not their reinstatement).

159. *See generally* Cesare Pitea, Scoppola v. Italy *(*no. 3*): The Grand Chamber Faces the "Constitutional Justice vs. Individual Justice" Dilemma (But It Doesn't Tell)*, 3 Strasbourg Observers (June 20, 2012), http://strasbourgobservers.com/2012/06/20/scoppola-v-italy-no-3-the-grand-chamber-faces-the-constitutional-justice-vs-individual-justice-dilemma-but-it-

changes that should be made to both the Convention and the Court's jurisprudence that would produce more consistent results and provide better guidance to the Contracting Parties.

A. THE CONVENTION SHOULD BE AMENDED TO ADD AN EXPLICIT LIMITATIONS CLAUSE TO ARTICLE 3 OF THE FIRST PROTOCOL

The Council of Europe should amend Article 3 of the First Protocol by adding an explicit limitations clause to narrow the margin of appreciation in the area of voting rights, similar to those found in Articles 8 through 11 of the Convention that impose specific limitations on how States may violate rights protected by the Convention.[160] For example, Article 9(2) reads that a State may only violate a person's freedom of religion if it is prescribed by law, necessary in a democratic society, done for the protection of public order, health, or morals, or to protect the rights and freedoms of others.[161] Such a limitations clause, added to Article 3 of the First Protocol, should prohibit the disenfranchisement of criminals except when necessary for the preservation of a democratic society. This result would reflect the narrow margin of appreciation for restrictions on the right to vote advocated by Judge Björgvinsson in his *Scoppola* (*No. 3*) dissent.[162]

B. THE COUNCIL OF EUROPE SHOULD CONVENE A COMMITTEE TO STUDY HOW THE INTEGRATION OF POST-SOVIET EASTERN EUROPEAN STATES HAS AFFECTED THE MARGIN OF APPRECIATION

The European Court of Human Rights maintains a unique position: balancing principles like "effective political democracy" and the "rule of law" on the one hand, while basing its decisions in the consent of the Member States on the other.[163] A major issue with

doesnt-tell/ (lamenting the *Scoppola* (*No. 3*) Court's lack of guidance to States that desire to bring their policies in line with the Convention).

160. *See* HARRIS et al., *supra* note 5, at 344 ("The conditions upon which a state may interfere with the enjoyment of a protected right are set out in elaborate terms in the second paragraphs of Articles 8–11.")

161. ECHR, *supra* note 5, art. 9(2) (imposing express limitations on the ability of States to limit the freedom of religion).

162. *See Scoppola*, App. No. 126/05, at 17 (contrasting the broad margin of appreciation on the issue of electoral systems with the narrow margin of appreciation on the issue of individual voting rights).

163. *See* Carozza, *supra* note 125, at 1232 ("[T]he Court is at one and the same

maintaining the consent of the governed is the broadening of the margin of appreciation due to the inclusion of post-Soviet states that do not share the western European heritage of democracy and the rule of law. To that end, the Council of Europe should convene a committee to evaluate whether the margin of appreciation on criminal disenfranchisement has grown over the two decades since the fall of communism. This does not necessarily require the Council to take any action beyond studying the issue; however, the lack of clarity in this area leads to inconsistent outcomes, as demonstrated in the *Hirst* (*No. 2*) and *Scoppola* (*No. 3*) cases.

C. THE COURT SHOULD CHANGE ITS PROPORTIONALITY ANALYSIS TO REQUIRE THAT DISENFRANCHISEMENT ONLY BE ALLOWABLE BY THE EXPRESS DECISION OF A COURT

The Council of Europe should adopt into the Convention the recommendations of the Venice Commission issued in its 2002 Code of Good Practice in Electoral Matters.[164] Adopting these recommendations would help the Court uphold the mandate of the Convention to sustain "effective political democracy" when assessing criminal disenfranchisement.[165] The 2002 Code of Good Practice recommends that the withdrawal of any political rights must only be possible through the express decision of a court. [166] Incorporating this recommendation into the Convention would help clarify how courts should approach arbitrary and indiscriminate laws like those struck down by the Court in *Hirst* (*No. 2*) and upheld in *Scoppola* (*No. 3*). This change would require courts to independently

time caught between the need to uphold a set of normative principles that are outside the will of the Member States and the need to ground its decisions to some degree in the consent of the Member States.").

164. *See* Venice Commission, *supra* note 93, at 15 (enumerating the conditions under which a person may be deprived of the right to vote).

165. *See generally Council of Europe Venice Commission*, COUNCIL OF EUROPE, http://www.venice.coe.int/site/main/Presentation_E.asp, (last visited Dec. 20, 2012) [hereinafter Venice Commission Website] (explaining the role of the Commission as an advisory board of academics convened on behalf of the Council of Europe to advise the Council members on Constitutional matters, and noting that all members of the Council of Europe are members of the Commission); *see also Scoppola*, App. No. 126/05, at 10 (citing the above noted provisions of the Venice Commission document, such as how the proportionality principle must be observed).

166. Venice Commission, *supra* note 93, at 6.

consider disenfranchisement as a punishment, not as an ancillary penalty[167] or one conferred automatically upon conviction.[168] Considering that as of the *Scoppola* (*No. 3*) decision on May 12, 2012, thirty-six of the forty-three Convention Contracting Parties impose some kind of restrictions on criminal disenfranchisement,[169] requiring that courts independently consider disenfranchisement as a punishment based on the circumstances of the crime should easily fall within the evolutive interpretation of the Convention.[170]

More drastic measures may be necessary, however; if that is the case, the Court should adopt a proportionality analysis similar to the analysis in *Sauvé v. Canada* (*No. 2*), which requires a rational relationship between the legitimate aim and the measure intended to further it.[171] This is especially pertinent where there is evidence that the State's measures work counter to the aim they purport to pursue.[172]

Adopting this standard would not invalidate all criminal disenfranchisement laws. In fact, laws such as the one upheld in *Labita* would still be presumptively valid. Preventing an accused or convicted mafioso from voting is rationally related to maintaining an "effective political democracy" and is consistent with the *Hirst* (*No. 2*) Court's explicit allowance for disenfranchisement laws that protect the political system.[173]

167. *Scoppola*, App. No. 126/05, at 6 ("In the Italian legal system a ban from public office is an ancillary penalty which entails forfeiture of the right to vote.").

168. *Hirst*, 2005-IX Eur. Ct. H.R. at 197 (describing the British criminal disenfranchisement statute).

169. *Scoppola*, App. No. 126/05, at 10–11 (summarizing the state of criminal disenfranchisement laws among the Contracting Parties). *See generally* Macdonald, *supra* note 3, at 1386–87 (discussing the various forms of criminal disenfranchisement laws, including a reference to a Luxembourg law that allowed criminals to regain the right to vote by determination of the Grand Duke, which received negative feedback from the Human Right Council).

170. *See* discussion *supra* Part II (explaining the "great majority" standard in the evolutive interpretation).

171. *See* discussion *supra* Part III (providing further analysis of the *Sauvé* (*No. 2*) standard).

172. *See* Sauvé v. Canada (No. 2), [2002] 3 S.C.R. 519, 555 (Can.) ("Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and rehabilitation acknowledged since the time of [John Stuart] Mill, and it undermines correctional law and policy directed towards rehabilitation and integration.").

173. *Hirst*, 2005-IX Eur. Ct. H.R. at 212 (stating that while tolerance and

V. CONCLUSION

The judgment of the European Court of Human Rights in the case of *Scoppola v. Italy* (*No. 3*) demonstrates how contentious the issue of criminal disenfranchisement is in Europe. Not only is the judgment in that case inconsistent with the previous analysis of the Court in the *Hirst v. United Kingdom* (*No. 2*) case, it also demonstrates how the current analysis is inconsistent with an evolutive interpretation of the European Convention on Human Rights. By analyzing the Convention in the context of recent international documents on voting rights and prisoner's rights under Article 31(3)(c) of the Vienna Convention, the current analysis allowing general disenfranchisement is untenable in a world where prisoners are regarded as citizens and the ballot is a right, not a privilege. While the current approach is the source of much confusion, there is an opportunity here for the Council of Europe to clarify the Convention to ensure that the voting rights of prisoners are protected to the full extent promised by the Convention.

broadmindedness are hallmarks of a democratic society, such a society need not tolerate activities which are designed to destroy rights protected by the Convention).