James emerges into freedom from an Alabama penitentiary after three years of incarceration on a felony drug charge. Although prior to his incarceration he dealt drugs in his neighborhood, he is now ready to rejoin society as a law-abiding citizen. He has paid his debt to society, pursued an education within the prison walls, and heads out into his home state to reintegrate into society. He knows that his past will appear unfavorable to employers, and expects some difficulty in finding housing and credit. However, he expects that now that he has served his time he will be able to enjoy all the rights and privileges of a free man.

Although James had never exercised his right to vote, his new desire to participate in society leads him to his local Post Office to register to vote. After a brief wait, the clerk informs James that he is ineligible to vote because of his ex-felon status. In fact, if he remains in Alabama, James will never be able to vote.

Unfortunately, James’ story is not unique. In thirteen states, felons are denied the right to vote either permanently or for some finite period after their supervision by the state ends. Although the Supreme Court has recognized that voting is a fundamental right, if not the fundamental right, the Court has also held that the states may constitutionally deny this right to individuals who have been convicted of a felony. In a nation that prides itself on being a model for democracy, it is time to challenge felon disenfranchisement not only in the state legislatures, but in the judicial arena. One
method of challenging this practice may be the Eighth Amendment’s ban on cruel and unusual punishment.

To the average citizen, the mention of cruel and unusual punishment brings to mind the brutal tortures of medieval Europe. However, in our civilized society, this protection also extends to punishments that are unnecessary, degrading, and have no valid penological purpose. This paper will discuss the merits of a contemporary Eighth Amendment challenge to the disenfranchisement of felons who are no longer under the supervision of the state. The first section will chronicle the history of felon disenfranchisement, both in the United States and Europe. The second section will discuss constitutional and statutory challenges to felon disenfranchisement. The third section will explore whether felon disenfranchisement can withstand strict scrutiny analysis, notwithstanding the “implicit authorization” of felon disenfranchisement found in Section Two of the Fourteenth Amendment. The fourth section will discuss the evolution and application of the Eighth Amendment’s prohibition on cruel and unusual punishment. Finally, the fifth section will explore whether the disenfranchisement of felons not supervised by the state violates the Eighth Amendment.

I. Overview of Disenfranchisement History

A. Early Greek and Roman Civilizations

Felon disenfranchisement had its recorded origins in ancient Greek civilization.\(^1\) In ancient Greece, those who committed a crime would be labeled “infamous” and would be subject to a range of disabilities, including prohibitions on voting, making speeches,

appearing in court, serving in the army, or appearing in the Greek assembly.\textsuperscript{2} This concept of infamy later found its way to ancient Roman civilization, where individuals convicted of serious crimes would be subject to the penalty of “infamia.”\textsuperscript{3} Individuals tainted with “infamia” could not vote, hold office, or serve in the Roman legions.\textsuperscript{4}

The severity of these disqualifications was compounded by the deep importance that Greek and Roman culture placed in citizenship and participation in the political process.\textsuperscript{5} Since removing those rights deeply impacted one’s ability to exercise privileges highly cherished by the two respective cultures, it has been suggested that such penalties were motivated primarily by retribution and deterrence.\textsuperscript{6} Therefore, by isolating criminals from the acceptance of society, the Greek and Roman civilizations attempted to both punish the individual actor for his transgressions and deter other individuals from similar conduct.\textsuperscript{7}

B. Middle Ages

As the Roman Empire expanded north, so did the concept of infamy and other disqualifications. Among the Germanic tribes, the concept of “outlawry” was employed

\begin{itemize}
\item [\textsuperscript{3}] Ewald, supra note 2, at 1060-61.
\item [\textsuperscript{4}] Id.; Howard Itzkowitz & Lauren Oldak, Restoring the Ex-Offender’s Right to Vote: Background and Developments, 11 Am. Crim. L. Rev. 721, 722-23 (1973).
\item [\textsuperscript{5}] Collateral Consequences, supra note 1, at 941-42.
\item [\textsuperscript{6}] Id.
\item [\textsuperscript{7}] Id.
\end{itemize}
as a method of punishing those who committed serious crimes against the community.\textsuperscript{8} The “outlaw” was banished from the community and consequently deprived of all civil rights and protections.\textsuperscript{9} In essence, the outlaw then existed at the mercy of the community, since he lost all property rights and could be injured or even killed with impunity.\textsuperscript{10}

The concept of outlawry survived beyond the Middle Ages to the continental concept of “civil death.”\textsuperscript{11} Civil death was placed upon those individuals convicted of a “capital crime,” and was intended to deprive the individual of his legal existence.\textsuperscript{12} Civil death resulted in a loss of “the right to sue, to testify, to make a will or take under a will, [and] to transfer or take by gift.”\textsuperscript{13} Although civil death did not destroy the ability to contract or marry, the children of such a union were incapable of inheriting from either parent.\textsuperscript{14} In addition to civil death, continental Europe retained “infamy” as a penalty for lesser crimes.\textsuperscript{15}

C. England and Early America

\textsuperscript{8} Id. at 942.

\textsuperscript{9} Itzkowitz, supra note 4, at 722-23.

\textsuperscript{10} Id.

\textsuperscript{11} Ewald, supra note 2, at 1060.

\textsuperscript{12} Itzkowitz, supra note 4, at 723.

\textsuperscript{13} Id. (citations omitted).

\textsuperscript{14} Id.

\textsuperscript{15} Id. at 723-24.
During the same period, England developed different methods of disqualifying convicted individuals from the privileges and rights of society. Any individual convicted of a felony or treason in England during this period could be declared “attainted,” resulting in several dire consequences.\textsuperscript{16} First, the felon or traitor experienced a concept similar to civil death, in which he lost most civil and proprietary rights.\textsuperscript{17} Second, the individual forfeited his real and personal property to the crown or mesne lord.\textsuperscript{18} Felons and traitors were also subject to “corruption of the blood,” which prohibited the convicted individual from transferring his property to his family by grant or devise.\textsuperscript{19}

Several of these disqualifications found their way to the American colonies. Early colonial law prescribed “good behavior” requirements for exercising the vote, and explicitly disenfranchised individuals convicted of certain crimes, usually those involving perceived moral shortcomings.\textsuperscript{20} In Massachusetts, for example, an individual could be disenfranchised for “fornication” or any “shamefull and vitious crime.”\textsuperscript{21} In Maryland, individuals convicted of their third drunkenness offense would lose the ability to exercise the vote.\textsuperscript{22}

D. American Revolution and Pre-Civil War America

\textsuperscript{16} Id. at 724.

\textsuperscript{17} Collateral Consequences, supra note 1, at 942-43.

\textsuperscript{18} Id. at 943.

\textsuperscript{19} Id.

\textsuperscript{20} Ewald, supra note 2, at 1061-62.

\textsuperscript{21} Id. at 1061.

\textsuperscript{22} Id. at 1062.
It was not until after the American colonies gained independence that the American people rejected some of the disqualifications inherited from English law.\textsuperscript{23} Indeed, the original text of the U.S. Constitution explicitly prohibits the English concepts of attainder and corruption of the blood (except during the life of a traitor).\textsuperscript{24} In addition, civil death was rejected as part of American common law.\textsuperscript{25} Although some states passed “civil death” statutes, these laws were limited both by the explicit prohibitions of the Constitution and the progressing attitude reflected in the rejection of English disqualification tradition.\textsuperscript{26}

However, many of the states retained the concept of felon disenfranchisement. During the period from 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or authorized their legislatures to do so.\textsuperscript{27} Furthermore, prior to the Civil War, 19 of the 34 states had some form of disenfranchisement for serious offenders.\textsuperscript{28}

\textsuperscript{23} \textit{Id.} at 1062-63.

\textsuperscript{24} See U.S. CONST., art. I, § 9, cl. 3 (providing that “No Bill of Attainder … shall be passed” by Congress); U.S. CONST., art. I, § 10, cl. 1 (providing that no state shall “pass any Bill of Attainder”); U.S. CONST., art. III, § 3, cl. 2 (stating that “[t]he Congress shall have the Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted”).

\textsuperscript{25} Ewald, \textit{supra} note 2, at 1062-63.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} See \textit{Green v. Bd. of Elections}, 380 F.2d 445, 450 n.4 (2d Cir. 1967) (listing the eleven states and their respective constitutional provisions).

\textsuperscript{28} Itzkowitz, \textit{supra} note 4, at 725.
E. Post-Civil War

After the American Civil War, several developments occurred that have had a deep impact on felon disenfranchisement. First, the Civil War amendments to the Constitution placed a substantial limit on the states’ power, especially in the realm of race and voting. Second, several Southern states readmitted into the union enacted constitutional provisions that had the aim and effect of disenfranchising a significant portion of their black population through seemingly race-neutral felon disenfranchisement provisions and statutes.

After the ratification of the Fifteenth Amendment, several Southern states forced to allow blacks to vote turned to more subtle methods of denying them the franchise. Among other methods, black disenfranchisement was accomplished through the disenfranchisement of those convicted of crimes commonly thought to be committed more frequently by blacks. Though their intent was strikingly clear, the felon disenfranchisement provisions adopted by the Southern states appeared race-neutral.

29 U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV.
31 Ewald, supra note 2, at 1089-95.
32 During his opening remarks to the Alabama constitutional convention of 1901 (where the disenfranchisement provisions discussed in Hunter were adopted), John B. Knox articulated the goals of the convention: “What is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” Ewald, supra note 2, at 1090.
33 See Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating Alabama’s disenfranchisement provision because it was enacted with a discriminatory intent, despite the fact that it was race neutral on its face).
Particularly striking was the accepted notion among Southern states that blacks, due perhaps to their previous condition of servitude, possessed “peculiar characteristics” that caused that race to have a propensity to commit certain crimes. With that in mind, many states disenfranchised individuals convicted of “black” crimes such as theft, arson, perjury, wife-beating and vagrancy, yet did not disenfranchise individuals convicted of “white” crimes, such as crimes of violence, including sometimes murder.

As the Supreme Court later determined in *Hunter v. Underwood*, these methods of disenfranchisement had their intended effects. For example, an Alabama historian found that only two years after the revised 1901 Alabama constitution, the new provisions had disenfranchised ten times as many blacks as whites.

F. Post-Civil Rights Era America

During the tenure of Chief Justice Earl Warren, the Supreme Court decided a serious of cases that held that voting is a fundamental right, and could only be abridged if a law or constitutional provision survived strict scrutiny review. Although the Court later found that the Equal Protection clause, and thus strict scrutiny review, did not apply

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34 Ewald, *supra* note 2, at 1092-95.

35 *Id.*


37 Ewald, *supra* note 2, at 1092-95.

38 *Id.* (citations omitted).

39 *See, e.g., Carrington v. Rash*, 380 U.S. 89, 93-94 (1965) (holding that because voting was a fundamental right, a jurisdiction could not “fence out” a certain segment of the voting population based on perceptions as to how that population would vote).
to felon disenfranchisement, several states began to reexamine the rationales behind their disenfranchisement provisions.

Several changes in felon disenfranchisement occurred subsequent to the Civil Rights era. Arkansas became the first Southern state to repeal an ex-felon disenfranchisement law in 1964. During this period several other states moved away from a system of disenfranchising ex-felons, and restored voting rights upon the completion of a sentence. However, in 1973, the picture of felon disenfranchisement in America was grim. While four states did not deprive criminals of the right to vote, and half had some sort of automatic restoration provisions, nearly half of the states disenfranchised convicted criminals for the rest of their lives.

G. Modern America

1. Felon Disenfranchisement in 1993

Since the 1960s, the states have begun to slowly reject the concept of felon disenfranchisement. Although in 1993 only three states allowed incarcerated felons to vote, 35 states disenfranchised felons only during their supervision by the state. In

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42 Id.

43 Itzkowitz, supra note 4, at 727-28.

addition, now only fourteen states disenfranchised felons either for life or some finite period beyond the completion of their sentence.\textsuperscript{45}

2. Felon Disenfranchisement in 2003

Throughout the remainder of the 1990s, the states continued to liberalize their felon disenfranchisement laws. While only two states currently do not deprive the vote to felons in any manner,\textsuperscript{46} an overwhelming majority of states do not abridge a felon’s right to vote subsequent to state supervision.\textsuperscript{47} Fifteen states deny the franchise to felons only while they are incarcerated.\textsuperscript{48} Four states deny the vote both to incarcerated felons and

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\textsuperscript{45} Id. \\
\textsuperscript{46} See Felony Disenfranchisement Laws in the United States, (October 31, 2003), available at http://www.sentencingproject.org/pdfs/1046.pdf (stating that only Maine and Vermont permit inmates to vote). \\
\textsuperscript{47} Id. \\
\textsuperscript{48} Note, One Person, No Vote: The Laws of Felon Disenfranchisement, 115 HARV. L. REV. 1939, 1942-43 (2002). The states that only disenfranchise felons while they are incarcerated are Hawaii, Idaho, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota and Utah. While at the time One Person, One Vote was published sixteen states only disenfranchised felons while they are incarcerated, in 2002 Kansas added probationers to the category of disenfranchised felons. Felony Disenfranchisement Laws in the United States, supra note 46.
\end{flushright}
parolees, but not felony probationers.\textsuperscript{49} Sixteen states deny the vote both to incarcerated felons and felons on parole or probation.\textsuperscript{50}

However, thirteen states still disenfranchise at least a portion of their ex-felon population for a period after state supervision ends. Six of these states disenfranchise individuals for life upon conviction for a first-time felony, although some of these states have begun the process of liberalizing restoration provisions.\textsuperscript{51} In addition, seven states disenfranchise some, but not all, of their ex-felons.\textsuperscript{52} Among them is Delaware, where a recently passed statute restores a felon’s voting rights upon executive pardon, or five years after the expiration of his or her sentence, whichever comes first.\textsuperscript{53} In addition, Tennessee and Washington, though they no longer disenfranchise ex-felons, have never provided a mechanism for restoring the right to vote to those individuals who were disenfranchised before the amendments to those laws.\textsuperscript{54} Although Maryland used to disenfranchise second-time felons, this law was repealed (with the exception of

\textsuperscript{49} One Person, No Vote, supra note 48, at 1942-43. These four states are California, Colorado, Connecticut, and New York.

\textsuperscript{50} Id. These sixteen states are Alaska, Arkansas, Georgia, Kansas, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin.

\textsuperscript{51} Felony Disenfranchisement Laws in the United States, supra note 46. These six states are Alabama, Florida, Iowa, Kentucky, Mississippi, and Virginia.

\textsuperscript{52} Id. These seven states are Arizona, Delaware, Maryland, Nevada, Tennessee, Washington, and Wyoming.

\textsuperscript{53} Id.

\textsuperscript{54} One Person, One Vote, supra note 48, at 1948-49.
individuals with two violent felonies) and was replaced in 2002 with a provision allowing restoration after a three-year waiting period.\textsuperscript{55}

Although many states have repealed or liberalized their felon disenfranchisement provisions, the impact of these provisions is nonetheless significant, especially when viewed in the context of race. An estimated 3.9 million Americans are currently without the right to vote because they are incarcerated or have been disenfranchised for life.\textsuperscript{56} Among this astounding number is 1.4 million black men, half a million women voters, and 1.4 million individuals who have completed their sentences.\textsuperscript{57} These disenfranchised blacks represent 13 percent of black men nationwide.\textsuperscript{58} In addition, in the six states that disenfranchise ex-felons, one in four black men has been permanently disenfranchised.\textsuperscript{59}

H. Public Attitudes

Disenfranchisement researchers have found that the majority of Americans do not approve of any type of disenfranchisement for felons who have completed their sentence.\textsuperscript{60} In a July 2002 survey conducted by Harris Interactive, 80\% of respondents expressed a belief that “all ex-felons, individuals who have served their entire sentence

\textsuperscript{55} Felony Disenfranchisement Laws in the United States, supra note 46.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

and are now living in their communities, should have the right to vote.\textsuperscript{61} In another survey conducted by the Department of Political Science at Rutgers University, the researchers found that 81.7 percent of respondents “rejected the policy of permanent disenfranchisement for convicted felons.”\textsuperscript{62} Although respondents’ support for re-enfranchisement in the Harris Interactive survey dropped slightly when asked whether specific felons should be re-enfranchised (such as sex offenders), support for specific felon re-enfranchisement never fell below 52 percent.\textsuperscript{63}

In addition, the survey found that a majority of respondents supported allowing probationers and parolees to vote.\textsuperscript{64} However, the study also found that only one third of respondents supported extending the franchise to currently incarcerated felons.\textsuperscript{65}

J. International Disenfranchisement Practice

Other nations have taken diverse strategies toward the issue of felon disenfranchisement. Even within cultures and geographic region, there is considerable variety as to whether nations allow their prisoners and ex-felons to vote.

Approximately 43 countries allow incarcerated felons the right to vote, although some do so under specific restrictions.\textsuperscript{66} These nations include many European nations,

\textsuperscript{61} Id.

\textsuperscript{62} Brian Pinaire et al., \textit{Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons}, (October 31, 2003), available at http://www.sentencingproject.org/pdfs/PinairePublicOpinion.pdf.

\textsuperscript{63} Public Attitudes Towards Felon Disenfranchisement in the United States, supra note 60.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.
but also include some African nations such as Zimbabwe, Kenya and South Africa, Latin American nations such as Peru and Belize, and Asian nations such as Japan, China, and Pakistan.  

Approximately 52 nations do not allow those currently in prison to vote. While a majority of these nations are located in Africa and Latin America, many Eastern European nations (including Russia) do not extend the franchise to prisoners. In addition, while few Western European nations fail to allow prisoners to vote, it is notable that the United Kingdom fits this category.

However, the United States finds itself in the company of seven other nations that both do not allow prisoners to vote and further restrict the franchise after a prison term is complete. Although these eight nations fit no pattern, either geographically, culturally, or otherwise, a review of each nation’s policies reveals that the United States has the most restrictive laws in regard to felon disenfranchisement (at least in those states that permanently disenfranchise ex-felons). When all disenfranchised individuals are taken

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67 Id. 
68 Id. at 24. 
69 Id. 
70 Id. 
71 Id. at 25. These seven other nations are Armenia, Cameroon, Chile, Belgium, Finland, New Zealand, Philippines. 
72 Id. at 24
collectively, just over four and a quarter million individuals worldwide are denied the vote because they have committed a crime.\textsuperscript{73}

II. Challenges to Felon Disenfranchisement

This section explores the early and contemporary judicial challenges to felon disenfranchisement. Beginning with the early cases attacking the federal government’s authority to deny voting “privileges,” this section traces the evolution of disenfranchisement equal protection challenges, challenges under the Eighth Amendment’s prohibition on cruel and unusual punishment, and statutory challenges under the Voting Rights Act.

A. Early Cases

Although many American states disenfranchised many or all of their felons from the beginning of their statehood,\textsuperscript{74} it was not until after the Civil War Amendments to the Constitution that individuals began to attack felon disenfranchisement provisions as unconstitutional. However, many of these early attempts failed not only on the courts’ recognition of a rational basis for disenfranchising felons, but also because the federal and state judiciaries did not recognize voting as a fundamental right.\textsuperscript{75}

\textsuperscript{73} Id. at 25-26.

\textsuperscript{74} See Green v. Bd. of Elections, 380 F.2d 445, 450 n.4 (2d Cir. 1967) (listing the states and their respective constitutional provisions).

\textsuperscript{75} See Washington v. State, 75 Ala. 582, 584 (1884) (stating that “[n]o one can lawfully vote under any government of laws except those who are expressly authorized by law”).
In *Washington v. State*, the Supreme Court of Alabama found that state’s felon disenfranchisement provision of its state constitution to be valid under the federal Constitution. The court based its holding mainly of the notion that because voting is a “privilege” and “not an absolute or natural right,” it was up to the states to determine who was fit to exercise the franchise. The court found that like idiots and the insane, those convicted of an infamous crime lacked the “requisite judgment and discretion” to properly exercise the privilege to vote. In an oft-quoted passage, the court enunciated and approved of the disenfranchisement provision’s purpose of “preserv[ing] the purity of the ballot box.” The court appeared especially concerned that allowing felons to vote would “hazard the welfare of communities” insomuch as a felon’s vote, in the court’s view, was on par with votes tainted by corruption, ignorance, incapacity, or tyranny.

A few years later, the Supreme Court decided two similar cases concerning the constitutionality of statutes disenfranchising individuals practicing polygamy in the American western territories. In *Murphy v. Ramsey*, the Supreme Court held that since voting was not a fundamental right, Congress was well within its scope of authority

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76 75 Ala. 582 (1884).
77 Id. at 586-87.
78 Id. at 584.
79 Id. at 585.
80 Id. The court also determined that the “purity of the ballot box” was “the only sure foundation of republican liberty, [and needed] protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.” Id.
81 Id.
83 114 U.S. 15 (1885).
to decide who could participate in the election of those who would subsequently make the laws.\textsuperscript{84} The Court also approved of the policy of disenfranchising polygamists, finding it necessary to secure a respect for family and marriage in the western territories.\textsuperscript{85}

B. Pre-\textit{Richardson} Disenfranchisement Challenges

On the heels of the Supreme Court’s determination in the 1960s that voting was indeed a fundamental right,\textsuperscript{86} the federal and state courts saw renewed attempts to attack felon disenfranchisement statutes as unconstitutional. While most challenges alleged violations of the Equal Protection Clause, some courts entertained allegations that felon disenfranchisement violated the Eighth Amendment’s prohibition of cruel and unusual punishment.

1. Equal Protection Challenges

In its 1967 decision, \textit{Green v. Board of Elections},\textsuperscript{87} the United States Court of Appeals for the Second Circuit held that New York’s felon disenfranchisement statute did not violate the Equal Protection clause of the U.S. Constitution.\textsuperscript{88} After first rejecting the plaintiff’s argument that the law was unconstitutional as a bill of attainder, the court then considered plaintiff’s claim that the recently decided voting rights cases mandated that

\begin{itemize}
  \item \textsuperscript{84} \textit{Id.} at 44-45.
  \item \textsuperscript{85} \textit{Id.} at 45.
  \item \textsuperscript{86} See, e.g., \textit{Harper v. Va. Bd. of Elections}, 383 U.S. 663 (1966) (holding Virginia’s poll tax unconstitutional because it was an abridgment of a fundamental right).
  \item \textsuperscript{87} 380 F.2d 445 (2d Cir. 1967).
  \item \textsuperscript{88} \textit{Id.} at 451-52.
\end{itemize}
felon disenfranchisement could not be permitted under the Equal Protection Clause. Judge Friendly, writing for the court, held that the recent voting rights cases had no bearing on the felon disenfranchisement debate. The court instead recognized that the Supreme Court, while not directly addressing the issue, had on several occasions approved of felon disenfranchisement in dicta. The court then proceeded to apply a rational basis review to the concept of felon disenfranchisement.

The court found at least two rationales for denying felons the vote. First, the court found that felon disenfranchisement could be justified by Locke’s social contract theory, which posits that every individual that breaks the law has given up his or her right to participate in the process by which laws are made. The court also found that states could disenfranchise felons based on the concept that it would be unreasonable to allow lawbreakers to participate in the election of those officials responsible for enforcing those same laws under which they had been convicted.

Finally, as a foreshadow to the Supreme Court’s reasoning in *Richardson v. Ramirez*, the Second Circuit held that because Section Two of the Fourteenth

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89 Id. at 449, 451.

90 Id. at 451.

91 Id. (listing cases).

92 Id.

93 Id.

94 Id. at 451-52 (stating that a “contention that the equal protection clause New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be”).

Amendment\textsuperscript{96} explicitly authorizes the disenfranchisement of felons, it was not logical to suggest that Section One (the Equal Protection Clause) could override that authorization.\textsuperscript{97} The refusal to find that the Equal Protection clause applied to Section Two of the Fourteenth amendment found approval in other courts in North Carolina\textsuperscript{98} and Georgia.\textsuperscript{99} In addition, the court in Beacham v. Braterman\textsuperscript{100} used the reasoning in \textit{Green} to find that the discretionary use of the pardon power to restore felon’s voting rights was immune from equal protection review.\textsuperscript{101}

However, other courts were more willing to find that the Equal Protection Clause did apply to felon disenfranchisement. In \textit{Otsuka v. Hite},\textsuperscript{102} the Supreme Court of California found that the recent voting rights cases mandated that strict scrutiny be

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\textsuperscript{96} Section Two of the Fourteenth Amendment states: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” U.S. \textsc{const.} amend XIV, § 2.

\textsuperscript{97} \textit{Green}, 380 F.2d at 452.


\textsuperscript{100} 300 F. Supp. 182 (S.D.Fla. 1969).

\textsuperscript{101} \textit{Id.} at 184.

\textsuperscript{102} 64 Cal.2d 596, 414 P.2d 412 (1966).
\end{flushleft}
applied to felon disenfranchisement provisions. The court found that felon disenfranchisement served the compelling state interest of preserving “the purity of the ballot box” by removing from the electorate those individuals who, by their criminal conviction, have demonstrated their moral corruptness. Specifically, the court stated that preventing election fraud, such as the sale of votes, “is an adequately compelling state interest to justify an appropriate restriction on the right to vote.”

The Otsuka court next determined whether the California disenfranchisement restrictions were drawn with sufficient specificity. The plaintiff in Otsuka had been convicted of violating the Selective Service Act nearly 20 years prior as a conscientious objector. Because the California provisions disenfranchised only those convicted of “infamous crimes,” the court held that such a violation could not constitutionally be considered an “infamous crime.” Therefore, the court found, the disenfranchisement provision was not sufficiently narrow because it included many felonies that did not bear any relation to the “purpose of protecting the integrity of the elective process.” The court held that it would be patently unreasonable to deny the vote to some individuals convicted of felonies that by contemporary standards were relatively minor.

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103 Id. at 601-02, 414 P.2d at 416.
104 Id. at 602-03, 414 P.2d at 416-17.
105 Id. at 603, 414 P.2d at 417.
106 Id.
107 Id. at 599-600, 414 P.2d at 415.
108 Id. at 605, 414 P.2d at 418.
109 Id.
110 Id.
Specifically, the court highlighted the ridiculous outcome of being disenfranchised for such felonious crimes as “conspiracy to operate a motor vehicle without a muffler.”

In addition, in *Stephens v. Yeomans*, the United States District Court for the District of New Jersey found that the Equal Protection Clause applied to felon disenfranchisement. By relying on the recent voting rights cases, the court applied strict scrutiny to hold that the felony disenfranchisement provisions of the state constitution violated the Equal Protection Clause. The court held that New Jersey’s “totally irrational and inconsistent [disenfranchisement] classification[s]” could not be rationally based on any justification, especially that of preserving “the purity of the ballot box.”

Furthermore, the United States Court of Appeals for the Ninth Circuit held in *Dillenburg v. Kramer* that the disenfranchisement of felons did not serve any legitimate state interest. Specifically, the court found that Washington state could not demonstrate that its distinctions for who would retain the franchise could bear a “rational connection to a legitimate state aim.”

111 Id.
113 Id. at 1186-87 (stating that “it is now clear that the entire section 2 [of the Fourteenth Amendment] imposes no limitation on Section 1”).
114 Id. at 1186.
115 Id. at 1188.
116 469 F.2d 1222 (9th Cir. 1972).
117 Id. at 1224 (stating that “[c]ourts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes”).
118 Id. at 1225.
2. Eighth Amendment challenges

Few courts have faced the issue of whether felon disenfranchisement provisions violate the Eighth Amendment’s ban on cruel and unusual punishment. However, those courts that have seriously entertained such claims have all found such an argument to be lacking.

In *Green v. Board of Elections*,\(^\text{119}\) the United States Court of Appeals for the Second Circuit found an Eighth Amendment challenge to felon disenfranchisement unconvincing.\(^\text{120}\) First, the court determined that disenfranchisement was not a punishment, relying on dicta in the 1958 Supreme Court case of *Trop v. Dulles*.\(^\text{121}\) Even if it were punishment, the court held, felon disenfranchisement was neither cruel nor unusual since it had been a “usual” punishment since the founding of the United States and prevalent in England before that.\(^\text{122}\) In addition, the court relied on the fact that a significant number of states disenfranchised their felons to find that such a practice did not offend “evolving standards of decency that mark the progress of a maturing society.”\(^\text{123}\) In addition, the United States District Court for the District of North Carolina in *Fincher v. Scott*\(^\text{124}\) also found a felon’s Eighth Amendment claim without merit based on the large number of states that at that time excluded felons from the franchise.\(^\text{125}\)

\(^{119}\) 380 F.2d 445 (2d Cir. 1967).

\(^{120}\) *Id.* at 450.

\(^{121}\) *Id.* at 450-51 (citing *Trop v. Dulles*, 356 U.S. 86, 97 (1958)).

\(^{122}\) *Id.* at 450-51.

\(^{123}\) *Id.* (quoting Trop, 356 U.S. at 101).

\(^{124}\) 352 F. Supp. 117 (M.D.N.C. 1972).
In *Thiess v. State Administrative Board of Election Laws*,\(^{126}\) the United States District Court for the District of Maryland determined that Maryland’s felon disenfranchisement law did not violate the Eighth Amendment.\(^{127}\) Although the court conceded that disenfranchisement was a punishment,\(^{128}\) the court rejected plaintiff’s claim on several grounds. First, the court stated that disenfranchisement could not violate the Eighth Amendment because the Fourteenth Amendment, which was enacted after the Eighth Amendment, specifically endorsed felon disenfranchisement.\(^{129}\) Second, the court found that disenfranchisement, unlike the expatriation found unconstitutional in *Trop v. Dulles*,\(^{130}\) was not “so grossly disproportionate to the crime as to be proscribed by the Eighth Amendment.”\(^{131}\)

C. *Richardson v. Ramirez*

In 1972 the Supreme Court of the United States finally weighed in on the issue of felon disenfranchisement. In *Richardson v. Ramirez*,\(^{132}\) the plaintiffs claimed that California’s felon disenfranchisement provisions violated the Equal Protection Clause of

\(^{125}\) Id. at 120.


\(^{127}\) Id. at 1042.

\(^{128}\) Id. (stating that the court could not “conclude that such disenfranchisement as has been decreed by the State of Maryland is a *punishment* so grossly disproportionate to the crime as to be proscribed by the Eighth Amendment” (emphasis added)).

\(^{129}\) Id.

\(^{130}\) 356 U.S. 86 (1958).

\(^{131}\) *Thiess*, 387 F. Supp. at 1042.

the U.S. Constitution.\textsuperscript{133} However, the Court found that plaintiffs’ claims had to fail because Section Two of the Fourteenth Amendment explicitly authorized the disenfranchisement of felons and therefore Section One (the Equal Protection Clause) could not override that provision.\textsuperscript{134} Justice Rehnquist, writing for the majority, reviewed the history of Section Two of the Fourteenth Amendment to find that the practice of felon disenfranchisement was a deeply entrenched concept in American jurisprudence.\textsuperscript{135} Although the Court’s voting rights cases were still a recent memory,\textsuperscript{136} the majority held that the strict scrutiny reserved for voting cases did not apply when the Constitution had explicitly authorized the states to remove the vote from those convicted of crime.\textsuperscript{137} Therefore, the Court held, it was up to the legislatures of the states to determine whether they wished to extend the franchise to felons.\textsuperscript{138}

Justice Marshall dissented, arguing that the Equal Protection Clause did indeed apply to Section Two of the Fourteenth Amendment.\textsuperscript{139} Justice Marshall first dismissed the idea that Section Two contained the sole source of federal authority to regulate the states’ voting practices.\textsuperscript{140} While Justice Marshall categorized Section Two as merely a

\textsuperscript{133} \textit{Id.} at 26.

\textsuperscript{134} \textit{Id.} at 54-55.

\textsuperscript{135} \textit{Id.} at 41-54.

\textsuperscript{136} See, e.g., \textit{Kramer v. Union Free School District No. 15}, 395 U.S. 621 (1969) (holding that the right to vote could not be restricted to interests who owned property or otherwise had a heightened interest in the outcome of an election).

\textsuperscript{137} \textit{Richardson}, 418 U.S. at 54-55.

\textsuperscript{138} \textit{Id.} at 55.

\textsuperscript{139} \textit{Id.} at 74-75 (Marshall, J., dissenting).

\textsuperscript{140} \textit{Id.} at 74.
product of the time when it was enacted, he found the Equal Protection Clause to be a flexible doctrine “not shackled to the political theory of a particular era.”\(^{141}\) Therefore, Justice Marshall argued that because the Court had recently found that voting was a fundamental right, the Equal Protection Clause could override Section Two’s alleged authorization of felon disenfranchisement.\(^{142}\)

Applying the Equal Protection Clause to felon disenfranchisement, Justice Marshall found that disenfranchisement could not be justified.\(^{143}\) First, he found that because felons, as citizens, have an interest in who is governing them, the franchise could not be denied based on the felons’ perceived disinterest in the electoral process.\(^{144}\) Second, Justice Marshall found that felon disenfranchisement is both overinclusive and underinclusive when enacted to prevent voter fraud.\(^{145}\) He found that disenfranchising individuals for crimes that were irrelevant to voter fraud could have no impact on reducing voter fraud.\(^{146}\) In addition, he found that disenfranchising only felons would be underinclusive because it would not include all individuals that would have a propensity to commit voter fraud.\(^{147}\)

\(^{141}\) *Id.* at 76-77 (internal citations omitted).

\(^{142}\) *Id.* at 74-76.

\(^{143}\) *Id.* at 78-80.

\(^{144}\) *Id.* at 78.

\(^{145}\) *Id.* at 79-80.

\(^{146}\) *Id.*

\(^{147}\) *Id.*
Justice Marshall then addressed the argument that denying felons the vote would preserve the “purity of the ballot box.”\textsuperscript{148} He rejected the argument that the voting patterns of felons would be subversive.\textsuperscript{149} Even if they were, Justice Marshall noted that the Court had recently affirmed the position that no one could be denied the franchise based on the way that individual was thought to be likely to vote.\textsuperscript{150} Justice Marshall therefore concluded that “modern equal protection jurisprudence” mandated that felon disenfranchisement be struck down as infringing on the “spirit of our system of government.”\textsuperscript{151}

D. Post-\textit{Richardson} Equal Protection challenges

After \textit{Richardson}, many courts considered the inapplicability of the Equal Protection Clause to felon disenfranchisement to be settled law. However, specific attacks on specific aspects of felon disenfranchisement under the Equal Protection Clause did not subside.

In \textit{Allen v. Ellisor},\textsuperscript{152} the United States Court of Appeals for the Fourth Circuit found that it did not violate the Equal Protection clause to pick and choose which crimes

\begin{flushleft}
\textsuperscript{148} \textit{Id.} at 81-82.
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} (citing Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969)).
\textsuperscript{151} \textit{Id.} at 85-86.
\textsuperscript{152} 664 F.2d 391 (4th Cir. 1981).
\end{flushleft}
would cause disenfranchisement upon conviction.\textsuperscript{153} The court held that Section Two of the Fourteenth Amendment immunized any system that allowed disenfranchisement for some felonies, but not for others.\textsuperscript{154} Such a holding would have caused a requirement of all-or-nothing disenfranchisement, a result that the court found was not warranted.\textsuperscript{155}

The Fifth Circuit in \textit{Shepherd v. Trevino}\textsuperscript{156} echoed the all-or-nothing reasoning in \textit{Allen}, finding that Texas’ re-enfranchisement process for felons did not violate the Equal Protection clause.\textsuperscript{157} The court applied rational basis review to find that the discretion in the Texas system of disenfranchising and re-enfranchising convicted felons bore a rational relationship to the legitimate state interest of “limiting the franchise to responsible voters.”\textsuperscript{158}

In \textit{Wesley v. Collins},\textsuperscript{159} the United States District Court for the Middle District of Tennessee affirmed \textit{Richardson}’s holding that the Equal Protection Clause is inapplicable to the explicit authorization of felon disenfranchisement in Section Two.\textsuperscript{160} In \textit{Wesley}, the court held that it did not violate the Equal Protection Clause to disenfranchise all

\textsuperscript{153} \textit{Id}. at 397-98 (stating that “§ 2 of the [Fourteenth] amendment immunizes any classification of disqualifying crimes, whether the classification is stated in terms of “felonies” generally, or of some felonies, or of certain specified crimes”).

\textsuperscript{154} \textit{Id}.

\textsuperscript{155} \textit{Id}.

\textsuperscript{156} 575 F.2d 1110 (5th Cir. 1978).

\textsuperscript{157} \textit{Id}. at 1114 (stating that the court did not “read Richardson to hold that the realm of state discretion in disenfranchising persons convicted of felonies is limited to the disenfranchisement of all felons or none”).

\textsuperscript{158} \textit{Id}. at 1115.

\textsuperscript{159} 605 F. Supp. 802 (M.D.Tenn. 1985).

\textsuperscript{160} \textit{Id}. at 806-07.
individuals convicted of any felony, even those felonies that did not correlate with protection of the purity of the ballot box. The court affirmed that the right of felons to vote was not fundamental, and that a state could constitutionally exclude “some or all” convicted felons from the franchise.

Not all equal protection claims during this period were unsuccessful. Some courts held that the Equal Protection Clause was still applicable to felon disenfranchisement when such provisions ran afoul of other areas of equal protection coverage. For example, in Hobson v. Pow, an Alabama federal district court held that the disenfranchisement of a male convicted of “assault and battery upon the wife” was unconstitutional when the state did not also disenfranchisement women who were convicted of assaulting their husbands. Although the court reaffirmed Richardson’s holding that a state could constitutionally disenfranchise felons, the court also applied sex-based heightened scrutiny review to find that Alabama had no rational justification in denying the vote to male spouse-beaters but not female spouse-beaters.

Several courts have also held that when a state disenfranchises a citizen “for other crimes,” it may only do so upon a felony conviction. In Tate v. Collins, a Tennessee federal district court judge held that the state of Tennessee could not disenfranchise

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161 Id.
162 Id.
164 Id. at 366-67.
165 Id.
166 496 F. Supp. 205 (W.D.Tenn. 1980).
individuals convicted of non-infamous crimes. Similarly, in *McLaughlin v. City of Canton*, the United States District Court for the Southern District of Mississippi faced the issue of whether the state could disenfranchise an individual who was convicted of writing bad checks, which was a misdemeanor. The court held that strict scrutiny was the appropriate standard of review to apply when a state disenfranchises an individual who is convicted of a misdemeanor. The court further determined that it violated the Equal Protection Clause to disenfranchise for a misdemeanor such as writing bad checks and not disenfranchise for other misdemeanors such as shoplifting.

While the courts entertained attacks on specific aspects of the states’ felon disenfranchisement provisions, the underlying issue of felon disenfranchisement appeared to be settled law. However, the Supreme Court eventually endorsed one method by which a felon disenfranchisement statute could be found unconstitutional.

E. Racially-Motivated Felon Disenfranchisement

In *Hunter v. Underwood*, the Supreme Court of the United States found Alabama’s felon disenfranchisement provision violated the Equal Protection Clause

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167 Id. at 207.


169 Id. at 973.

170 Id. at 975.

171 Id. at 976.


because it was enacted with the intent of specifically disenfranchising blacks.\textsuperscript{174} The Court held that while states could constitutionally disenfranchise felons, doing so with a racist intent would violate the Equal Protection Clause.\textsuperscript{175} Justice Rehnquist, writing for a unanimous court, discussed the history of Alabama’s 1901 Constitution and constitutional convention and found explicit and obvious evidence of racist intent behind the enactment of felon disenfranchisement provisions.\textsuperscript{176} The Court found that Alabama had selected crimes that resulted in disenfranchisement based on the perception that blacks committed a majority of those crimes, resulting in more blacks being disenfranchised than whites.\textsuperscript{177} Indeed, the Court found evidence that those provisions had their desired effect, and that this disparate impact continued until the time of the litigation.\textsuperscript{178} Therefore, the Supreme Court found that Alabama’s disenfranchisement of individuals convicted of misdemeanor “crimes involving moral turpitude” was unconstitutional because it was enacted with a racist intent, and the effects of that racism were still evident at the time of the suit.\textsuperscript{179}

Justice Rehnquist also briefly addressed Alabama’s argument that Section Two of the Fourteenth Amendment insulated all felon disenfranchisement provisions from review under the Equal Protection clause.\textsuperscript{180} The Court cryptically wrote:

\textsuperscript{174} Id. at 233.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 225-31.
\textsuperscript{177} Id. at 233.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id.
“Without again considering the implicit authorization of § 2 to deny the vote to citizens ‘for participation in rebellion, or other crime,’ we are confident that § 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation [of Alabama’s disenfranchisement provision] which obviously violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary.”

Some commentators have seen the decision in *Hunter* and *Richardson* to be wholly inconsistent in determining whether in fact the Equal Protection Clause actually and completely applies to felon disenfranchisement. However, it appears that while states must be wary of equal protection jurisprudence when disenfranchising felons, the Supreme Court has held that the underlying ability of whether the states may do so at all is not to be questioned.

However, in 1998, the United States Court of Appeals for the Fifth Circuit in *Cotton v. Fordice* revisited the issue of racial intent in the disenfranchisement provisions of the Mississippi state constitution. Like Alabama, Mississippi’s original disenfranchisement provisions were enacted out of a discriminatory intent to disenfranchise blacks. However, the court determined that despite these racist origins,

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181 *Id.*

182 *Hunter*, 471 U.S. at 233 (noting the “implicit authorization” of felon disenfranchisement in the Fourteenth Amendment).

183 157 F.3d 388 (5th Cir. 1998).

184 *Id.* at 389-90.

185 *Id.* at 390.
the Mississippi disenfranchisement provisions were constitutional because they had been later reenacted without such discriminatory intent.\textsuperscript{186} Indeed, the court found that each amendment to the constitution “superceded the previous provision and removed the discriminatory taint associated with the original version.”\textsuperscript{187} Therefore, while courts continued to acknowledge the Equal Protection Clause’s application to racially discriminatory disenfranchisement provisions, the courts in essence have created a simple loophole to maintain otherwise facially neutral provisions.

F. Voting Rights Act Challenges

Felons have also attempted to challenge felon disenfranchisement statutes by utilizing the Voting Rights Act amendments of 1982 (VRA).\textsuperscript{188} The VRA “protects the integrity of an individual’s vote by prohibiting a state from tampering with the voting potential of the group with whom he identifies” (so-called “vote dilution” claims) and also prevents the denial of the right to vote in a discriminatory manner (so-called “vote denial” claims).\textsuperscript{189}

To demonstrate a violation of the VRA, a plaintiff must show that “in the totality of circumstances,’ a particular state statute, policy, practice or standard ‘results’ in the denial of equal opportunity to participate in the process for selecting persons for public office or deciding public issues.”\textsuperscript{190} Felons have challenged their disenfranchisement

\begin{footnotesize}
\begin{enumerate}
\item[186] Id. at 390-91.
\item[187] Id. at 391.
\item[190] Id. at 809.
\end{enumerate}
\end{footnotesize}
based on both vote dilution and vote denial claims. However, felon plaintiffs have rarely been successful with either claim.

In *Wesley v. Collins*, 191 a federal district court judge refused to find the requisite “nexus between discriminatory exclusion of blacks from the political process and disenfranchisement of felons.” 192 The court stated that because felons were not disenfranchised based on immutable characteristics (but rather based on their own choice to commit a felony), it would be illogical to suggest that disenfranchising felons “caused” blacks to be excluded from the polls. 193

In *Baker v. Pataki*, 194 one half of an equally divided *en banc* Second Circuit Court of Appeals found that the VRA could not be applied to felon disenfranchisement provisions because it was “not unmistakably clear” that Congress intended the VRA to apply to such provisions. 195 The court relied first on the widespread and historical use of felon disenfranchisement provisions - especially in light of their enactment for “compelling, nondiscriminatory reasons.” 196 Secondly, the court found that allowing a VRA disenfranchisement claim would raise a “serious constitutional question” because Section Two of the Fourteenth Amendment specifically authorized the disenfranchisement of felons. 197 Because the court was evenly


192 *Id.* at 812.

193 *Id.* at 813-14.

194 85 F.3d 919 (2d Cir. 1996).

195 *Id.* at 922.

196 *Id.* at 929.

197 *Id.*
divided, the lower court decision, holding that the VRA did not afford relief to
disenfranchised felons, was upheld.\textsuperscript{198}

At least one court has held that the VRA allows claims where a plaintiff can
demonstrate discriminatory uses of felon disenfranchisement. The court in \textit{Farrakhan v. Locke}\textsuperscript{199} held that if a plaintiff could prove that a felon disenfranchisement scheme
denied them the right to vote in a discriminatory manner, then that plaintiff could present
a valid VRA vote denial claim.\textsuperscript{200} While the court acknowledged that in isolation felon
disenfranchisement is constitutionally and statutorily sound, the Supreme Court’s
decision in \textit{Hunter} made clear “that Congress also has the power to protect against
discriminatory uses of felon disenfranchisement statutes through the VRA.”\textsuperscript{201}

Since the constitutionality of felon disenfranchisement appears well-grounded
after the \textit{Richardson} decision,\textsuperscript{202} some courts and commentators have suggested that the
proper method of attacking such provisions is through the legislative process.\textsuperscript{203}
Although some attempts have been successful,\textsuperscript{204} this paper proposes that felon

\textsuperscript{198} \textit{Id.} at 921.

\textsuperscript{199} 987 F. Supp. 1304 (E.D.Wa. 1997).

\textsuperscript{200} \textit{Id.} at 1312.

\textsuperscript{201} \textit{Id.} at 1310.

\textsuperscript{202} See \textit{Jones v. Edgar}, 3 F. Supp. 2d 979, 980 (C.D.Ill. 1998) (finding the \textit{Richardson} decision to be settled
law).

\textsuperscript{203} See, e.g., \textit{Richardson v. Ramirez}, 418 U.S. 24, 55 (1974) (stating that it now up to the people of
California to determine the laws in their state regarding felon disenfranchisement).

\textsuperscript{204} See, e.g., Margie Hyslop, \textit{Some Maryland Felons to get Vote}, \textit{WASH. TIMES}, April 7, 2002, at A01
detailing the passage of a bill that permanently bars second-time violent felons from voting, but allows
disenfranchisement statutes and constitutional provisions remain vulnerable under the Eighth Amendment’s prohibition on cruel and unusual punishment. As the next sections demonstrate, a modern case may build on the jurisprudence of the last few decades to successfully challenge felon disenfranchisement under the U.S. Constitution.

III. The Unconstitutionality of Felon Disenfranchisement under the Equal Protection Clause

This Section will examine a contemporary challenge to felon disenfranchisement provisions under the Equal Protection Clause. Although this paper recognizes that the Supreme Court foreclosed a successful equal protection challenge to felon disenfranchisement as a general practice, demonstrating that felon disenfranchisement cannot survive strict scrutiny analysis will lend support to a potential Eighth Amendment challenge, which will be discussed infra in Sections IV and V.

A. The Right to Vote and the Equal Protection Clause

By 1972, the Supreme Court had made it very clear that voting was a fundamental right that could only be abridged or restricted if such a restriction could meet strict scrutiny constitutional review under equal protection analysis. Throughout the 1960s...
and early 1970s, the Court time after time reaffirmed voting’s status as fundamental and found several state voting practices unconstitutional.

In *Reynolds v. Sims*, the Court held that “the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” The Court held that the right to vote, and therefore the right to have one’s vote counted as equally as another’s, was a fundamental right. The Court highlighted the importance of the right to vote to the health of a nation, stating that the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.” In addition, the Court reaffirmed its prior holding that voting is “preservative of all rights” and that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined.”

In *Carrington v. Rash*, the Court held that Texas could not constitutionally deny the right to vote to members of the Armed Forces who moved to Texas as part of their military orders. Texas had argued that allowing military personnel to vote could cause local elections to be easily manipulated by a base commander who could persuade or even order his subordinates to vote in a particular fashion, potentially against local

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208 *Id.* at 568.

209 *Id.* at 554-55.

210 *Id.* at 555.

211 *Id.* at 561-62.

212 380 U.S. 89 (1965).

213 *Id.* at 96-97.
interests.\textsuperscript{214} However, the Court dismissed this argument, holding instead that residents of a state, with the intention of making that state their home indefinitely, have a right to vote that is equal to the rights of any other qualified resident.\textsuperscript{215} In addition, the Court stated that Texas could not “fence out” a certain segment of the voting population out “of a fear of the political views of a particular group of bona fide residents.”\textsuperscript{216}

In *Harper v. Virginia Board of Elections*,\textsuperscript{217} the Court found Virginia’s $1.50 poll tax to be unconstitutional.\textsuperscript{218} Although the Court reaffirmed its holding that the states have the latitude to establish qualifications for voters, it also emphasized that those qualifications must pass strict scrutiny review under equal protection analysis.\textsuperscript{219} The Court held that the wealth of a voter could not be used as a prerequisite to voting since, like one’s race or creed, it is “not germane to one’s ability to participate intelligently in the electoral process.”\textsuperscript{220} The Court based its holding on the concept of an evolving Equal Protection Clause that was “not shackled to the political theory of a particular era.”\textsuperscript{221} The Court therefore held that although a poll tax may have once been acceptable

\textsuperscript{214} Id. at 93-94.

\textsuperscript{215} Id. at 94.

\textsuperscript{216} Id.

\textsuperscript{217} 383 U.S. 663 (1966).

\textsuperscript{218} Id. at 666.

\textsuperscript{219} Id. at 665.

\textsuperscript{220} Id. at 668.

\textsuperscript{221} Id. at 669.
under the Constitution, in light of the fundamental importance of voting, such a restriction could no longer be constitutionally tolerated.222

In *Kramer v. Union Free School District No. 15*,223 the Court held that a jurisdiction could not constitutionally limit the right to vote in special interest elections such as school board elections to only those individuals who owned or leased property or were parents (or had custody) of children enrolled in the local public schools.224 In doing so, the Court rejected the state’s argument that it had a legitimate interest in limiting the right to vote in school elections to property owners and parents because other individuals did not have the proper interest or knowledge in the election.225 While the Court did not explicitly foreclose the existence of a situation in which a state could constitutionally exclude “disinterested voters,” the Court held that such a situation would require strict scrutiny analysis.226 The Court then found that the limiting provision was too broad to pass constitutional muster since it excluded individuals, such as the petitioner, who were interested in and informed about the election but did not own property or have custody of children.227

222 *Id.* at 669-70.


224 *Id.* at 622.

225 *Id.* at 633. The Court also invalidated several other voting provisions whose justification was to ensure that “only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them.” *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *see also Cipriano v. City of Houma*, 395 U.S. 701 (1969) (invalidating a Louisiana statute limiting the right to vote to property taxpayers in elections called to approve the issuance of revenue bonds by a municipal utility).

226 *Kramer*, 395 U.S. at 632.

227 *Id.* at 632-33.
The Court further shaped its voting rights jurisprudence in *Dunn v. Blumstein*,\(^\text{228}\) in which the Court struck down Tennessee’s requirement that an individual reside in the state for at least one year before registering to vote.\(^\text{229}\) The Court held that such a restriction failed equal protection review because durational residence requirements were not necessary to further any legitimate interest offered by the state.\(^\text{230}\) Even though durational residence requirements may have once been necessary to prevent voter fraud, the Court determined that modern voting registration systems eliminated these concerns.\(^\text{231}\) However, although the Court recognized that durational residence requirements “completely bar” some residents from voting, the Court did not strike down all residence requirements.\(^\text{232}\) Instead, the Court held that a state may, at the most, refuse to register individuals who attempt to register less than thirty days before an election.\(^\text{233}\)

These cases demonstrate the fundamental nature of the right to vote and the increased scrutiny that courts must give to any denial, restriction or abridgement of such a right. However, such an abridgement may be constitutional if it both serves a compelling state interest and is narrowly tailored to effectuate that interest.\(^\text{234}\) As the

\(^{228}\) 405 U.S. 330 (1972).

\(^{229}\) *Id.* at 332.

\(^{230}\) *Id.* at 344-50.

\(^{231}\) *Id.* at 345-47.

\(^{232}\) *Id.* at 336.

\(^{233}\) *Id.* at 347 (stating that “[a]s long as the State permits registration up to 30 days before an election, a lengthy durational residence requirement does not increase the amount of time the State has in which to carry out an investigation into the sworn claim by the would-be voter that he is in fact a resident”).

\(^{234}\) *Id.* at 627, 632.
next Section demonstrates, felon disenfranchisement provisions neither serve a compelling state interest, nor are they sufficiently narrowly tailored to effectuate the proffered state interests.

B. Felon Disenfranchisement Provisions Serve No Compelling State Interest, Nor are They Narrowly Tailored to Effectuate a Proffered State Interest

Prior to Richardson v. Ramirez, the courts were split as to whether felon disenfranchisement provisions served a compelling state interest. However, those that determined that such laws did serve a compelling state interest did so under a variety of theories. In addition to examining the theories used by those courts, this Section will also discuss one justification for felon disenfranchisement seldom considered by the courts.

1. Fitness of the Voter

Most of the courts that have justified felon disenfranchisement laws have done so on the premise that individuals who have committed crimes have thus demonstrated that they are not qualified, either mentally or morally, to vote. Many of these cases

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236 Compare Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972) (finding felon disenfranchisement violates the Equal Protection Clause) with Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967) (holding that felon disenfranchisement does not violate equal protection because it is justified by the Lockian social contract and the “purity of the ballot box”).

237 See, e.g., Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967) (holding New York’s disenfranchisement provisions constitutional because it furthered the legitimate state interest of incapacitating antisocial voters).
analogize felons with “idiots and the insane,” who “lack the requisite judgment and discretion which fit them for [the right to vote].” However, many of these courts also recognize that felons, unlike idiots and the insane, are capable of rational and deliberate thought. Therefore, the unfitness of the felon may depend not on his or her ability to vote, but on the consequences of letting such a person vote.

As the court in *Kronlund v. Honstein* stated, a “state has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims.” This theory of protecting the “purity of the ballot box,” first espoused in the 1884 case, *Washington v. State*, is indeed premised on the fear that felons would undoubtedly corrupt the ballot box by only voting for fellow felons or those candidates that would be corrupt themselves, or would legalize the felon’s currently outlawed behaviors. This fear also drove the Second Circuit in *Green v. Board of Elections*:

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238 *Washington v. State*, 75 Ala. 582, 585 (1884).


240 *Id.*


242 *Id.* at 73.

243 75 Ala. 582 (1884).

244 *Id.* at 585.

245 380 F.2d 445 (2d Cir. 1967).
“A contention that the equal protection clause requires New York to allow convicted Mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.”\textsuperscript{246}

In a similar bout of hyperbole during the 1866 ratification debates in Congress for Section Two of the Fourteenth Amendment, Representative Eckley of Ohio stated:

“… But suppose the mass of the people of a State are pirates, counterfeiters, or other criminals, would gentlemen be willing to repeal the laws now in force in order to give them an opportunity to land their piratical crafts and come on shore to assist in the election of a President or members of Congress because they are numerous?”\textsuperscript{247}

The issue therefore becomes whether the state has a compelling interest in protecting the “purity of the ballot box” from felons who have demonstrated their “moral corruptness,” and therefore their inability to vote properly. As Justice Marshall found in his dissent in \textit{Richardson}, this interest fails to be compelling for several reasons,\textsuperscript{248} especially in light of the voting rights cases discussed \textit{supra}.\textsuperscript{249} The idea that a particular group of individuals may be denied the franchise simply because of the way they may

\textsuperscript{246} \textit{Id.} at 451-52.

\textsuperscript{247} \textit{Richardson v. Ramirez}, 418 U.S. 24, 46 (1974).

\textsuperscript{248} \textit{Id.} at 72-86 (Marshall, J., dissenting).

\textsuperscript{249} \textit{See supra} Section III(A).
vote has been summarily dismissed as a violation of equal protection analysis.\textsuperscript{250} Since the disenfranchisement of felons is not based on their functional ability to vote (as with idiots and the insane), it appears that it instead is based upon a fear of how the rationally (yet criminally) minded felon will vote. However, such a theory of felon disenfranchisement “fences out” the felon population simply based on how they may vote, directly in contravention of the constitutional principles espoused in \textit{Carrington v. Rash}.\textsuperscript{251}

Even if one accepts the premise that a state may “fence out” a certain population because of the way they vote, a close scrutiny of felons and voting reveals that fears of a felon voting bloc are unfounded. First, there are currently two American states that allow incarcerated felons to vote.\textsuperscript{252} Not only have these states never faced even the remote possibility of the election of candidates desiring explicitly to generally weaken the criminal laws, but these two states have low crime rates compared with other states that disenfranchise all ex-felons.\textsuperscript{253}

In addition, a suggestion that felons could vote as a bloc to effectuate changes contains several unfounded assumptions. First, one must assume that all felons are unremorseful and retain their desire to commit crimes. Although some ex-felons do retain their criminal lifestyle, research shows that most criminal defendants recognize that

\begin{flushleft}
\textsuperscript{250} \textit{See, e.g., Carrington v. Rash}, 380 U.S. 89, 94 (1965) (holding that Texas could not constitutionally deny the right to vote to members of the Armed Forces who moved to Texas as part of their military orders).  \\
\textsuperscript{251} \textit{Id.}  \\
\textsuperscript{252} These two states are Vermont and Maine.  \\
\textsuperscript{253} Itzkowitz, \textit{supra} note 4, at 734-35.
\end{flushleft}
the criminal laws they violated are a proper and necessary part of society that ought to be respected and followed.\footnote{254}{Ewald, supra note 2, at 1099-1102.}

Second, one must also assume that even if felons all voted as a bloc, they would be numerous enough to offset “law-abiding” voters. This assumption fails for several reasons. In no state does the population tainted with a felony conviction outnumber the voting population that does not have a felony conviction.\footnote{255}{For example, in a state such as Alabama in which all felons are disenfranchised, only 7.5% of the population has been disenfranchised as the result of a felony conviction. The Sentencing Project, Losing the Vote, Oct. 1998, (December 3, 2003) available at http://www.sentencingproject.org/pdfs/9080.pdf. According to the Sentencing Project, Alabama has the highest overall rate of felon disenfranchisement. Id.} Therefore, felon voters could never effectuate a change that did not find support amongst a significant number of “law-abiding voters.” In addition, it would be erroneous to suggest that felons, or any other group of voters for that matter, would all base their vote on a single issue, such as weakening the criminal laws.\footnote{256}{See, e.g., Ewald, supra note 2, at 1099-1102 (suggesting that it would be ridiculous to argue that all voting felons would vote as a single-issue bloc, and furthermore that it would be absurd to suggest that the theoretical single issue would be the general weakening of criminal laws).} Third, one must assume that a politician would actively and openly seek the felon vote.\footnote{257}{Id. at 1099.} Without a candidate to put the felons’ changes into place, felons would have no method of “corrupting the ballot box.”

Finally, as Justice Marshall remarked, “[t]he process of democracy is one of change.”\footnote{258}{Richardson v. Ramirez, 418 U.S. 24, 82 (1974) (Marshall, J., dissenting).} Refusing to allow ex-felons to vote frustrates this process by excluding a minority of individuals who have been convicted under the laws enacted by a majority of
the citizens. Freezing the felon out of voting ensures that a “temporal majority could use
[disenfranchisement] to preserve inviolate its view of the social order simply by
disenfranchising those with different views.”

Justice Marshall suggested in 1974 that the democratic process with regard to the legalization of marijuana had been subverted by the disenfranchisement of drug offenders. The import of that assertion has certainly been multiplied in the wake of the decades-long war on drugs.

Employing felon disenfranchisement as a method of “purifying the ballot box” therefore cannot be justified as a compelling state interest. The Supreme Court has held that a group of individuals may not be excluded from the franchise simply based on the perceived way those individuals may vote. In addition, there is no evidence that fears of a felon voting bloc are grounded in anything more than political hyperbole. Finally, because the ballot box exists as a reflection of society, the legitimacy of an election does not depend on an electorate’s “purity.” Because the substance of a person’s vote cannot be corrupt (unless it has been sold, discussed infra), upholding the “purity of the ballot box” cannot be a compelling state interest.

259 Id.

260 Id. at 82-83.

2. Prevention of Election Fraud

Some courts have justified felon disenfranchisement provisions on the premise that removing felons from the franchise prevents voter fraud. As Justice Marshall found in his dissent in *Richardson*, such a proposition is both overinclusive and underinclusive. If preventing voter fraud is the purpose of disenfranchisement provisions, then it defies that purpose to disenfranchise individuals convicted of felonies that are completely unrelated to election crimes. In addition, disenfranchising felons is underinclusive because a disenfranchised individual can still commit essentially every voter fraud crime except for the sale of votes. Justice Marshall also found such a justification lacking because of the “panoply of criminal offenses available to deter and punish electoral misconduct.” Therefore, although the prevention of election fraud may be a compelling state interest, the use of felon disenfranchisement does not pass strict scrutiny analysis because it is not narrowly tailored to accomplish that aim.

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262 *See, e.g., Otsuka v. Hite*, 64 Cal.2d 596, 603, 414 P.2d 412, 417 (1966) (holding that felon disenfranchisement generally serves a compelling interest because it incapacitates an ex-felon who might “‘defile the purity of the ballot box’ by selling or bartering his vote or otherwise engaging in election fraud”).


264 *Id.*

265 *Id.* at 81.

266 *Id.* at 79-80.
3. The Social Contract

In *Green v. Board of Elections*, the United States Court of Appeals for the Second Circuit stated that upholding the theoretical Lockian social contract could be a compelling state interest justifying the disenfranchisement of felons. The theory behind Locke’s social contract theory is that “[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly be thought to have abandoned the right to participate in further administering the compact.”

However, felon disenfranchisement cannot be justified by a breach of the social contract. Locke stated that breaches of the social contract should be “punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like.” Disenfranchisement of the ex-felon, on the other hand, violates this ideal of proportionality and rationality by severing the individual from the ability to further participate in shaping the contract. In addition, because felons are rarely aware that their criminal behavior will lead to their disenfranchisement, such a penalty fails to be a deterrent, and does not conform to the traditional notion of a contract, with two fully informed participants. The concept of proportionality inherent in the social contract is also lacking when crimes of widely

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267 380 F.2d 445 (2d Cir. 1967).
268 Id. at 451.
269 Id.
271 Id. at 129.
272 Id. at 131-32.
differing magnitude (such as theft compared with murder) are treated as a similar breach requiring the identical penalty of disenfranchisement.\textsuperscript{273}

Upholding the social contract also fails to be a compelling state interest because it insulates the tainted individual from participating in the contract, i.e. the political process. Even if we assume that the theoretical “social contract” exists, the breach of one contract should not preclude that same individual from the ability to enter into other contracts.

No court has relied solely on the “social contract” theory to hold that felon disenfranchisement survives strict scrutiny equal protection review.\textsuperscript{274} Relying on the “social contract” theory, alone or in conjunction with any other theory, to uphold felon disenfranchisement fails strict scrutiny review because such a contract is unconscionable.\textsuperscript{275} In addition, because the penalty for breach is disproportionate, arbitrary, and removes the penalized individual’s ability to further “contract” with society, reliance on the “social contract” theory cannot pass strict scrutiny review.

4. Punitive Theories

Few, if any, courts have explicitly stated that states may use felon disenfranchisement solely for punitive reasons. While early civilizations used felon disenfranchisement (and other disqualifications) as a punishment for crimes against society,\textsuperscript{276} modern American courts have moved to a theory of protecting “the purity of

\textsuperscript{273} Id. at 130-31.

\textsuperscript{274} See, e.g., Green v. Bd. of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967) (relying on both a Lockian social contract theory and an incapacitation theory to justify felon disenfranchisement).

\textsuperscript{275} Johnson-Parris, supra note 270, at 132-37.

\textsuperscript{276} See supra Section I(A) - I(C).
the ballot box” as the primary justification for felon disenfranchisement. Perhaps this refusal to identify felon disenfranchisement as a punishment lies mainly with the constitutional issues that would arise if it were consistently given that label. However, it is quite clear that, given its extensive history, felon disenfranchisement at least partly encompasses a punitive nature.

Felon disenfranchisement cannot be justified under any punitive theory, whether it be rehabilitation, deterrence, retribution, or incapacitation. First, lifelong disenfranchisement cannot serve as an effective rehabilitative measure because it completely eradicates any ability of the ex-offender to fully rejoin society, leaving that individual in a perpetual state of isolation from society. Any length of disenfranchisement severs an individual from the society that he or she may eventually rejoin. Stripping the ex-offender of the right to vote ostracizes the felon from the rest of society, causing feelings of humiliation and rejection that may lead to low self-esteem or even further crimes. In essence, removing a felon’s right to vote does nothing to move that felon closer to rejoining society as a fully functioning and participating citizen. Even Chief Justice Rehnquist, writing for the majority (as Justice Rehnquist) in

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277 See, e.g., Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D.Ga. 1971) (justifying felon disenfranchisement on the grounds that it removes from the electoral process both “those persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims” and individuals that “may have a greater tendency to commit election offenses”).


279 Itzkowitz, supra note 4, at 732.

280 Id.
Richardson, recognized that the concept of felon disenfranchisement was squarely at odds with the idea of rehabilitating felony offenders.\textsuperscript{281}  

Felon disenfranchisement also fails to be justified by the theory of deterrence. The theory of deterrence suggests that the potential of being disenfranchised upon a felony conviction will cause individuals to be less likely to commit crimes than if the penalty of felon disenfranchisement was not a potential outcome.\textsuperscript{282}  This theory fails for several reasons. First, for a deterrent to work effectively, the penalty must be well-known by society, and especially the potential offender. This is not the case with felon disenfranchisement. Many individuals are not aware that a felony conviction will result in the forfeiture of the right to vote.\textsuperscript{283}  In addition, due to the diversity of felon disenfranchisement provisions in the many states, ex-felons who move throughout the country may be especially unaware of the collateral consequences of a felony conviction in other states. An additional theory for why offenders may not be fully aware of the disenfranchisement consequences of a conviction may lie with the average age of offenders. Many young individuals tend not to fully appreciate (or utilize) their right to vote until they reach an older age. Therefore, because offenders are usually under the age of 30, those offenders were probably not deterred by the potential forfeiture of a right that they did not fully value.\textsuperscript{284}  

\textsuperscript{281} Richardson v. Ramirez, 418 U.S. 24, 55 (1974) (approving of the notion that “it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term”).

\textsuperscript{282} Itzkowitz, supra note 4, at 733.

\textsuperscript{283} Id. at 734-35.

\textsuperscript{284} Id. at 735.
Secondly, it is debatable whether even the threat of incarceration as a punishment serves as a deterrent to crime.\textsuperscript{285} Therefore, if the severe consequences of extended incarceration cannot serve as an effective deterrent, it can not logically be argued that a secondary consequence such as disenfranchisement can have the effect that the primary consequence does not.\textsuperscript{286} Moreover, statistical analysis of the states reveals quite the opposite: those states that impose no form of ex-felon disenfranchisement tend to have lower crime rates than those states with disenfranchisement provisions in geographically similar parts of the nation.\textsuperscript{287}

Retribution also fails as a justifiable punitive theory. Retribution is a form of revenge, exacted on the convicted offender by an injured state, society, or individual.\textsuperscript{288} Although retribution served as one of the original justifications for collateral consequences, both domestic and abroad,\textsuperscript{289} extending retributive disenfranchisement after a felon’s state supervision reduces a shaky punitive theory to unnecessary cruelty. Disenfranchising ex-offenders for a period after a felon’s incarceration defies the notion that a felon has “repaid his debt to society.” Extending disenfranchisement also enlarges retribution to a perpetual state of debt to society, and exacts an arbitrary revenge.

\textsuperscript{285} See \textit{id.} at 734 (stating that “throughout recorded history severe punishments have never reduced criminality to any marked degree”).

\textsuperscript{286} Id.

\textsuperscript{287} Id. \textit{See also} \textit{Uniform Crime Reports - Crime in the United States 2001,} (December 3, 2003) \textit{available at} http://www.fbigov/ucr/cius_01/xl/01tbl05.xls (demonstrating, for example, that although Connecticut has a more stringent disenfranchisement provision than Vermont, it has a higher overall crime rate).

\textsuperscript{288} Itzkowitz, \textit{supra} note 4, at 735.

\textsuperscript{289} See \textit{supra} Section I(A).
regardless of the severity of the felony. In addition, the concept of retribution, once regarded as an effective punitive theory, has been found incompatible with contemporary reliance on rehabilitation as a fundamental objective of punishment.290

Felon disenfranchisement also fails under the incapacitation theory. Under this theory, disenfranchisement is justified as a punishment because it removes the offender from the ability to cast a tainted vote.291 The failure of this “purity of the ballot box” theory to survive strict scrutiny is discussed supra in Section III(B)(1).

As Justice Marshall explored in his dissent in Richardson v. Ramirez,292 felon disenfranchisement fails equal protection review when the shield of Section Two of the Fourteenth Amendment is absent.293 Although the courts have not backed down from Section Two’s immunization of felon disenfranchisement from equal protection review,294 the evolving nature of the Eighth Amendment’s prohibition on cruel and unusual punishment may open the door for a renewed attack on felon disenfranchisement.

290 Itzkowitz, supra note 4, at 736 (stating that the punitive “theory of punishment runs counter to the modern emphasis on rehabilitation as the most humane and ultimately beneficial method of dealing with offenders and protecting society”).

291 See supra Section III(B)(1).


293 Id. at 85-86.

294 See Jones v. Edgar, 3 F. Supp. 2d 979, 980 (C.D.Ill. 1998) (finding that felon disenfranchisement is authorized by the U.S. Constitution).
IV. Overview of Eighth Amendment Jurisprudence

A. Early History of the Eighth Amendment

The Eighth Amendment of the U.S. Constitution, which prohibits the infliction of cruel and unusual punishment, has its origins in the bloody practices of King James II of England in the seventeenth century. A near identical prohibition on cruel and unusual punishment can be found in the English Bill of Rights of 1689, adopted shortly after the accession of William and Mary to the English throne. The prohibition in the English Bill of Rights is widely regarded as a reaction to the sanctioned state torture and murders that occurred as part of the “Bloody Assizes” during the later part of the reign of Charles II and the early years of the reign of James II. The English House of Commons, concerned with the arbitrary and cruel infliction of torture and murder upon political dissenters, eventually approved provisions that placed strict limitations on “excessive bail,” “excessive fines,” and “illegal and cruel punishments.”

Although these limitations found their way into many state constitutions after the American states achieved independence from England, the original U.S. Constitution did not include such a limitation. During the ratification of the U.S. Constitution, several

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295 The Eighth Amendment of the U.S. Constitution states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.


297 Id.

298 Id.; Furman v. Georgia, 408 U.S. 238, 253-54 (1972) (Brennan, J., concurring).

299 Ingraham, 430 U.S. at 665 n. 33.

300 Id. at 665-66. Indeed, the text of the Eighth Amendment is taken nearly verbatim from the Virginia Declaration of Rights of 1776. Id. at 664.
state delegations expressed concern that the Constitution placed no limitations on
criminal trials or punishments.\textsuperscript{301} Indeed, delegates such as Patrick Henry of Virginia
intimated that the absence of a limitation on criminal proceedings or punishments
amounted to no limitation on the power of a legislature or judge to prescribe torture or
cruel punishments.\textsuperscript{302} However, many delegates were content with leaving this practice
to the individual states, and as a result, no such limitations were placed in the original text
of the U.S. Constitution.

During the ratification before the First Congress, the proposed Eighth
Amendment’s prohibition of cruel and unusual punishment received little debate.\textsuperscript{303}
While many representatives expressed the need for a limitation on the government’s
power to punish, others expressed concern that such a limitation would outlaw some
punishment practices that were widely practiced at the time.\textsuperscript{304} Although hanging,
whippings and ear-cropping were common practices at the time of the ratification of the
Bill of Rights, the language of the Eighth Amendment was approved simply because to

\begin{itemize}
\item \textsuperscript{301} See \textit{id.} at 666 (detailing the objections of members of the Virginia and Massachusetts delegations).
\item \textsuperscript{302} \textit{id.} Patrick Henry, after invoking the language of the Virginia Declaration of Rights, stated before the
ratification debates of the original Constitution: “Are you not, therefore, now calling on those gentlemen
who are to compose Congress, to prescribe trials and define punishments without this control? Will they
find sentiments there similar to [the Virginia] bill of rights? You let them loose; you do more -- you depart
from the genius of your country….” \textit{id.}
\item \textsuperscript{303} \textit{Furman v. Georgia}, 408 U.S. 238, 258-59 (1972) (Brennan, J., concurring).
\item \textsuperscript{304} \textit{id.} at 262. Representative Livermore expressed concern that a prohibition on cruel punishments would
be detrimental to the ability of the state to establish order, finding that such punishments were the only
effective means of achieving that goal. \textit{id.}
\end{itemize}
fail to include a limitation on punishment would appear to grant “unfettered power to prescribe punishments for crime.”\textsuperscript{305}

**B. Modern Application of the Eighth Amendment**

From its adoption, the American courts have struggled with the proper standard and application of the Eighth Amendment’s ban on cruel and unusual punishments. Although the modern Court has fashioned some guidelines for determining an Eighth Amendment violation, its decisions in this area continue to lack complete clarity. This subsection discusses the Court’s application of the Eighth Amendment, including the type of punishments prohibited by the amendment, its application only to criminal punishments, and the evolving nature and scope of the amendment.

1. Types of Punishment Prohibited by the Eighth Amendment

The Supreme Court has primarily relied on historical evidence to define the modern application of the Eighth Amendment’s prohibition on cruel and unusual punishment. As was the case at the time of the amendment’s adoption, the Court has struggled in determining what kinds of punishments are prohibited by the Eighth Amendment.\textsuperscript{306} Although the Eighth Amendment and its English counterpart were concerned mainly with the torture and murder that occurred as part of the Stuart purges in the seventeenth century, the Court has used language from the ratification debates to find

\textsuperscript{305} Id. at 263.

\textsuperscript{306} See, e.g., Trop v. Dulles, 356 U.S. 86 (1958) (finding that the Eighth Amendment does not only prohibit physically brutal punishments).
that the Eighth Amendment covers other types of punishments as well.\(^{307}\) Justice Brennan, in his concurring opinion in *Furman v. Georgia*,\(^ {308}\) found that the Framers were not “exclusively concerned with prohibiting tortuous punishments.”\(^ {309}\) The Justice instead found that the Framers were concerned that the absence of a prohibition would grant unlimited power to Congress to create whatever punishments it deemed proper.\(^ {310}\) While torture was certainly forefront in the Framers’ minds, the range of punishments imagined did not end with physical torture.\(^ {311}\)

Throughout its limited Eighth Amendment jurisprudence, the Court has recognized that the amendment prohibits three types of punishments. First, the amendment “limits the kinds of punishment that can be imposed on those convicted of crimes.”\(^ {312}\) In *Trop v. Dulles*,\(^ {313}\) the Court held that the expatriation of a soldier convicted of war-time desertion constituted cruel and unusual punishment.\(^ {314}\) The Court held that even though expatriation does not constitute physical torture, the fundamental question under Eighth Amendment jurisprudence is whether a particular punishment is


\(^{308}\) 408 U.S. 238 (1972).

\(^{309}\) Id. at 260.

\(^{310}\) Id. at 258-269.

\(^{311}\) Id. at 263 (stating that the Framers certainly “intended to ban tortuous punishments, but the available evidence does not support the further conclusion that only tortuous punishments were to be outlawed” (emphasis in original)).


\(^{314}\) Id. at 91-92.
degrading to the dignity of man. Indeed, the Court found that expatriation was “a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.” Therefore, while the Eighth Amendment’s primary concern is degrading physical pain and suffering, the parameters of the prohibition extend further to any punishment that excessively degrades one’s status and dignity.

Secondly, the Eighth Amendment “proscribes punishment grossly disproportionate to the severity of the crime.” In Weems v. United States, the Court found that a provision of the Philippine criminal code was unconstitutional because it punished the crime of falsifying an official document with the sanction of 15 years of Cadena (painful labor). The Court examined the history of the Eighth Amendment and found that it contained a proportionality principle. The Court then examined punishments for similar crimes in other jurisdictions and found that the sanction in the case at hand was more than a permissible exercise of judicial discretion but instead a manifestation of unrestrained punishment power. However, the modern Court has

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315 Id. at 99-100.
316 Id. at 101.
317 Id. at 99-100.
319 217 U.S. 349 (1910).
320 Id. at 380-82.
321 Id.
322 Id.
limited the amendment’s prohibition to only punishments that are “grossly disproportionate” to the crime.\textsuperscript{323}

Finally, the Eighth Amendment “imposes substantive limits on what can be made criminal and punished as such.”\textsuperscript{324} Although the Court applies this limitation sparingly, the Court in \textit{Robinson v. California}\textsuperscript{325} found a California law unconstitutional that made it a crime to be addicted to narcotics.\textsuperscript{326} However, it is clear that the primary concern of the prohibition on cruel and unusual punishments is the limitation on the types of punishments that may be imposed on a valid criminal conviction.\textsuperscript{327}

2. Application of Eighth Amendment Solely to Criminal Punishments

The Supreme Court has also found that the prohibition of cruel and unusual punishments extends only to criminal punishment.\textsuperscript{328} In \textit{Trop v. Dulles},\textsuperscript{329} the Court first grappled with the issue of whether expatriation was a punishment under the meaning of the Eighth Amendment. The Court stated that if expatriation was not a punishment but was instead a “non-penal” sanction, the limitations of the Eighth Amendment could not

\textsuperscript{323} \textit{See Ewing v. California}, 123 S.Ct. 1179, 1187 (2003) (stating that the Eighth Amendment “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime”).


\textsuperscript{325} 370 U.S. 660 (1962).

\textsuperscript{326} \textit{Id}. at 666-67.

\textsuperscript{327} \textit{Ingraham}, 430 U.S. at 667.

\textsuperscript{328} \textit{Id}. at 667-68.

\textsuperscript{329} 356 U.S. 86 (1958).
apply. In creating a standard for determining what constitutes a punishment, the Court dismissed the importance of a legislative classification of a particular statute as non-penal, suggesting that “even a clear legislative classification of a statute as ‘non-penal’ would not alter the fundamental nature of a plainly penal statute.” Instead, the Court determined that the purpose of the law could be determinative. If the purpose was to impose a disability to punish (or deter) a wrongdoer, then the Court would consider such a statute penal. However, the Court stated that a statute would be considered non-penal if its purpose was merely to impose a disability that served some other legitimate governmental purpose. In *Trop*, the Court held that the purpose of expatriation was to punish the deserter, and rejected the government’s argument that the expatriation statute was part of a non-penal regulatory provision authorized by Congress’s war power. The Court instead held that because the statute prescribed a consequence that would be imposed on one who violated the statute, such a provision was penal.

Much has been made in the felon disenfranchisement cases of the dicta in *Trop* that suggests that disenfranchisement of a bank robber would not be penal in nature because it is a valid exercise of the government’s power to “designate a reasonable

330 Id. at 94-98.
331 Id. at 95.
332 Id. at 96.
333 Id.
334 Id.
335 Id. at 97.
336 Id.
ground of eligibility for voting.\textsuperscript{337} However, as discussed \textit{infra} in Section V(A), this reasoning fails to be persuasive in light of its status as dicta, the evolving nature of the right to vote (not yet recognized at the time of \textit{Trop}),\textsuperscript{338} and the failure of felon disenfranchisement to serve a legitimate governmental purpose.

3. \textbf{“Evolving Standards of Decency”}

Finally, the Supreme Court has determined that the Eighth Amendment is not constrained by the historical use and approval of certain punishments.\textsuperscript{339} At the time of the ratification of the Bill of Rights, several punishments were common in America that have since been prohibited as cruel and unusual.\textsuperscript{340} Therefore, the courts have been reluctant to establish concrete standards for determining what is prohibited by the Eighth Amendment. Indeed, the Court in \textit{Weems} found difficulty in crafting a static and rigid definition of “cruel and unusual,” instead opting for a flexible and evolving standard for determining the limitation.\textsuperscript{341} The Court recognized that although the Eighth Amendment had its origins and concerns in the specific horrors employed by the Stuarts, the amendment’s limitations “must be capable of wider application than the mischief which

\textsuperscript{337} \textit{Id.} at 96-97.

\textsuperscript{338} \textit{See infra} Section V(A).

\textsuperscript{339} \textit{See}, \textit{e.g.}, \textit{Weems v. U.S.}, 217 U.S. 349, 373-74 (1910) (stating that the Eighth Amendment should not prohibit “what may have been but [also] what may be”).

\textsuperscript{340} \textit{See}, \textit{e.g.}, \textit{Furman v. Georgia}, 408 U.S. 238 (1972) (finding the practice of capital punishment, as applied, to violate the Eighth Amendment).

\textsuperscript{341} \textit{Weems}, 217 U.S. at 373-74.
gave it birth.”[342] The Court then examined the history of the amendment and the meaning given it by constitutional scholars, eventually determining that the Eighth Amendment’s prohibitions are “progressive” in nature and therefore “not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”[343]

Similarly, in *Trop v. Dulles*,[344] the Court struggled with the proper scope of the Eighth Amendment.[345] The Court refused to confine the limitations of the amendment to physical punishment, finding that such a restricted view would implicitly sanitize any punishment in light of the constitutionality of the ultimate penalty, capital punishment.[346] The Court instead recognized that the nature of the Eighth Amendment was flexible and changed with the attitudes of the civilized world.[347] In a standard that still governs Eighth Amendment jurisprudence, the *Trop* Court found that a punishment would be deemed unconstitutional if it was inconsistent with “the evolving standards of decency that mark the progress of a maturing society.”[348]

The courts have used this standard to find several punishments unconstitutional that were at an earlier time expressly found constitutional. In the most recent example,

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[342] Id. at 373.
[343] Id. at 378.
[345] Id. at 99-100.
[346] Id. at 99.
[347] Id. at 100-01.
[348] Id. at 101.
the Supreme Court in *Atkins v. Virginia*\textsuperscript{349} overruled its decision in *Penry v. Lynaugh*\textsuperscript{350} and ruled that the execution of mentally retarded individuals violated the Eighth Amendment.\textsuperscript{351} Although the Court decided *Penry* just thirteen years prior, the *Atkins* Court based its decision on the public opinion and outcry, the negative response of medical organizations and legal commentators, and the legislative reactions in states around the country.\textsuperscript{352} However, Justice Stevens, writing for the Court, did not articulate a concrete standard that could definitively guide future decisions.

C. An Evolving Standard for Defining Cruel and Unusual Punishment

Because of the wide scope of the type of punishments covered by the Eighth Amendment, there is no one articulated standard for determining whether a particular punishment violates the Eighth Amendment. However, an examination of the Supreme Court’s jurisprudence reveals several factors that have been used to find a violation of the Eighth Amendment.

The earlier Eighth Amendment cases express no concrete standards for determining whether a violation exists. For example, in *Weems*, the Court based its holding on the notion that 15 years of painful labor was a manifestation of the “unrestrained power” to punish prohibited under the “spirit of constitutional limitations formed to establish justice.”\textsuperscript{353} The Court also relied on the contemporary opinions of

\textsuperscript{349} 536 U.S. 304 (2002).

\textsuperscript{350} 492 U.S. 302 (1989).

\textsuperscript{351} *Atkins*, 536 U.S. at 321.

\textsuperscript{352} *Id.* at 317.

“learned commentators” and the evolving nature of public opinion to find that the punishment in issue could not constitutionally stand.\textsuperscript{354}

In \textit{Trop}, the Court announced its ambiguous yet instructive “evolving standards of decency” standard.\textsuperscript{355} In applying this standard, the \textit{Trop} Court examined the severity of the punishment, the destructive nature of the punishment, and the contemporary (including international) attitudes toward the punishment to determine that expatriation was no longer a constitutionally (and publicly) acceptable punishment.\textsuperscript{356}

Several members of the Court elaborated on the \textit{Trop} standard in their separate concurring opinions in \textit{Furman v. Georgia},\textsuperscript{357} in which the Court per curiam held that capital punishment, as applied, was unconstitutional under the Eighth Amendment.\textsuperscript{358} Highlighting the fractured perspectives on the application of the Eighth Amendment, each concurring Justice relied on separate factors and standards to find capital punishment unconstitutional. For example, in his concurrence, Justice Douglas relied mostly on the arbitrary nature of capital punishment to find the practice unconstitutional.\textsuperscript{359}

However, in another concurrence, Justice Brennan highlighted four distinct factors that could collectively demonstrate that a particular punishment violated the

\textsuperscript{354} Id. at 378.


\textsuperscript{356} Id. at 99-103.

\textsuperscript{357} 408 U.S. 238 (1972)

\textsuperscript{358} Id. at 239.

\textsuperscript{359} Id. at 245 (Douglas, J., concurring).
Eighth Amendment. First, Justice Brennan stated that “a punishment must not be so severe as to be degrading to the dignity of human beings.” This factor focused on the severity of the punishment, relying on the holdings in *Trop* and *Weems* that a fundamental inquiry in Eighth Amendment jurisprudence was the extent of a punishment’s impact on the “dignity of man.” Secondly, Justice Brennan echoed Justice Douglas’s finding that the Eighth Amendment was triggered by an arbitrary application of a severe punishment. Justice Brennan suggested that the concern was not only with the arbitrary application of severe punishments for serious crimes, but the arbitrariness of the crimes for which a uniform punishment would be mandated.

Justice Brennan’s third factor inquired whether a severe punishment had been rejected by contemporary society. Finding this to be a clear indication that a punishment did not “comport with human dignity,” Justice Brennan stated that a proper inquiry under this principle would include both the contemporary practice in other jurisdictions in addition to the historical usage of the punishment in question.

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360 *Id.* at 271-281.
361 *Id.* at 271.
363 *Furman*, 408 U.S. at 274.
364 *Id.* at 274-78.
365 *Id.* at 277.
366 *Id.* at 277-79.
Brennan stressed that the inquiry under this principle should be as objective as possible.367

Finally, Justice Brennan stated that a constitutional punishment could not be “excessive.”368 Justice Brennan defined an excessive punishment as an unnecessary or pointless punishment unsupported by a legitimate penological objective.369 Justice Brennan included within this factor any punishment that was disproportionate to the crime.370 While a blatant violation of any of these factors, however unlikely, could cause a punishment to be unconstitutional, Justice Brennan stressed that these factors should be considered cumulatively to assess the question of whether a punishment could stand.371

Justice Marshall, in his Furman concurrence, also highlighted four factors that could lead to the conclusion that a punishment was inconsistent with the “evolving standards” of contemporary society.372 First, Justice Marshall stated that a punishment would be impermissible if it involved immense physical pain and suffering; in other words, torture.373 Secondly, Justice Marshall stated that an “unusual,” or formerly unused, punishment would be constitutionally suspect.374 Third, Justice Marshall echoed

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367 Id. at 278-79. Justice Stevens echoed this principle in Atkins v. Virginia, 536 U.S. 304, 312 (2002) (stating that “[p]roportionality review under those evolving standards should be informed by ‘objective factors to the maximum possible extent’” (citations omitted)).

368 Furman, 408 U.S. at 279.

369 Id.

370 Id. at 280.

371 Id. at 281.

372 Id. at 330-34 (Marshall, J., concurring).

373 Id. at 330.

374 Id. at 331.
Justice Brennan’s assertion that a punishment would be unconstitutional if it served no valid governmental purpose. Finally, Justice Marshall stated that negative public attitudes toward a particular punishment could doom a punishment to constitutional failure.

Although there is no single standard for determining whether an Eighth Amendment violation exists, an examination of the preceding factors may provide valuable guidance in crafting a comprehensive standard. Indeed, as part of demonstrating the constitutional infirmities of felon disenfranchisement infra in Section V(B), this paper formulates an Eighth Amendment standard that is based loosely on Justice Brennan’s four factors, yet encompasses all of the factors and principles discussed in this Section.

V. Felon Disenfranchisement Violates the Eighth Amendment’s Prohibition of Cruel and Unusual Punishment

To determine whether felon disenfranchisement violates the Eighth Amendment, a plaintiff must first demonstrate that disenfranchisement for a felony conviction constitutes punishment as defined by the courts. Once that task is complete, the plaintiff must then demonstrate that disenfranchisement is a punishment that is inconsistent with “the evolving standards of decency that mark the progress of a maturing society.”

375 Id.
376 Id. at 332.
378 Id. at 101.
A. Felon Disenfranchisement as Punishment

As demonstrated in Trop and Ingraham, the threshold matter under the Eighth Amendment is whether the practice under scrutiny is a criminal punishment.\(^{379}\) Felon disenfranchisement satisfies this threshold inquiry.

The Court in Ingraham held that the first threshold matter under Eighth Amendment scrutiny is whether the questioned practice is the result of a criminal proceeding or judgment.\(^{380}\) In the case of felon disenfranchisement, this element is easily satisfied. The sanction of disenfranchisement is triggered directly by a criminal conviction for a felony. Because the criminal conviction is the underlying event that results in the loss of the right to vote, felon disenfranchisement satisfies this first threshold matter.

The second inquiry in determining whether felon disenfranchisement is indeed a punishment requires a deeper analysis, especially in light of the factors and dicta found in Trop v. Dulles.\(^{381}\) In Trop, the Court held that a statute would be considered non-penal if its purpose was to impose a disability that served some other legitimate governmental objective.\(^{382}\) In addition to establishing disenfranchisement as a penal measure, a proponent of classifying felon disenfranchisement as punishment must address the fact that the Trop Court explicitly referred to felon disenfranchisement as a valid non-penal

\(^{379}\) Id. at 94-95; Ingraham v. Wright, 430 U.S. 651, 667-68 (1977).

\(^{380}\) Ingraham, 430 U.S. at 664-68.

\(^{381}\) Trop, 356 U.S. at 94-97.

\(^{382}\) Id. at 96.
exercise of the legitimate governmental objective of “designat[ing] a reasonable ground of eligibility for voting.”  

There are several factors that lead to the conclusion that, even in light of the *Trop* dicta, felon disenfranchisement should be categorized as punishment. First, the categorization of felon disenfranchisement in *Trop* was in fact simply dicta, and did not directly address an issue that was before the Court. Secondly, *Trop* was decided before voting was elevated to the status of fundamental right. Therefore, the *Trop* Court could not acknowledge that the revocation of the fundamental right of voting as a result of a criminal conviction carries a great deal more significance than the revocation of a mere privilege. The *Trop* Court therefore failed to consider the elevated scrutiny attached to the denial of the right to vote in illustrating a valid non-penal statute.

Finally, the *Trop* Court found that the denial of the ability to vote upon a felony conviction fulfilled the legitimate governmental objective of establishing qualifications for voting. However, the *Trop* Court merely accepts, without any documented legal or factual support, the assertion that the disenfranchisement of felons is an acceptable and effective method of furthering that governmental objective. Despite the reliance of

383 *Id.* at 96-97.

384 See supra Section III(A).

385 See Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (holding that because voting is a fundamental right, and not merely a privilege, the state may only abridge or limit that right under severely limited circumstances).

386 *Trop*, 356 U.S. at 96-97.
subsequent lower courts on this unsupported assertion.\footnote{See, e.g., Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967) (holding that felon disenfranchisement fulfills the constitutionally valid objective of establishing qualifications for voting).} Felon disenfranchisement fails to be an effective method of furthering anything besides the punishment of felons and ex-felons.\footnote{See supra Section III(B).} As the preceding Sections demonstrate, felon disenfranchisement cannot withstand equal protection analysis because the practice cannot be supported by any legitimate governmental objective.\footnote{Id.} Therefore, the Trop Court’s use of felon disenfranchisement as an effective fulfillment of the governmental objective of establishing voting qualifications cannot be supported in light of the finding that felon disenfranchisement fails to be an effective and narrowly tailored method of fulfilling that objective.

Indeed, the purpose of taking the away the right to vote is simply to punish the convicted felon. As the preceding Sections demonstrate, disenfranchisement does not “purify” the ballot box, nor does it prevent election fraud or properly uphold the Lockian social contract.\footnote{Id.} Instead, felon disenfranchisement, like other retributive punishments such as imprisonment, seeks to provide a penalty that punishes the status of the convicted felon.\footnote{See Trop v. Dulles, 356 U.S. 86, 97 (1958) (finding that “[t]he purpose of taking away citizenship from a convicted deserter is simply to punish him”).} Because disenfranchisement has no valid governmental purpose, and exists solely as a retributive punishment, the practice of denying the vote to ex-felons can properly be categorized as a punishment under Eighth Amendment jurisprudence.
B. The Disenfranchisement of Ex-Felons is Cruel and Unusual Punishment

As the preceding Section demonstrates, identifying a standard for determining Eighth Amendment violations has been a difficult task.\footnote{92} Therefore, this paper seeks to first define a comprehensive standard that may be applied to felon disenfranchisement, based on the historical factors highlighted in the prior Section. This paper will then examine these factors, both singularly and cumulatively, to determine whether the practice of felon disenfranchisement survives constitutional review under the Eighth Amendment.

This paper will identify and rely on four factors, based loosely on Justice Brennan’s concurrence in \textit{Furman},\footnote{93} in determining whether the disenfranchisement of felons beyond their supervision by the state violates the Eighth Amendment’s prohibition of cruel and unusual punishment. First, this paper will determine whether disenfranchisement, as a punishment, strips ex-felons of human dignity, self-worth, and the ability to participate in the laws that govern them.\footnote{94} Secondly, this paper will determine whether disenfranchisement constitutes a static punishment that is arbitrarily imposed regardless of the severity and type of offense.\footnote{95} Third, this paper will

\footnote{92} See supra Section IV.


\footnote{94} This factor combines elements found in Justice Brennan’s concurrence in \textit{Furman}, 408 U.S. at 271, Justice Marshall’s concurrence in \textit{Furman}, 408 U.S. at 330-31, and the Court’s opinion in \textit{Trop}, 356 U.S. at 96-98.

\footnote{95} This factor combines elements found in Justice Brennan’s concurrence in \textit{Furman}, 408 U.S. at 274, and Justice Douglas’s concurrence in \textit{Furman}, 408 U.S. at 249.
determine whether disenfranchisement has been rejected by contemporary society as an inappropriate sanction for ex-felons.\textsuperscript{396} Finally, this paper will examine whether felon disenfranchisement is a disproportionate sanction that serves no valid penological objective.\textsuperscript{397}

1. Disenfranchisement Strips Ex-Felons of Human Dignity, Self-Worth, and the Ability to Participate in the Laws that Govern Them

Throughout history, governments have used collateral consequences to ostracize offenders as unworthy members of society.\textsuperscript{398} Felon disenfranchisement continues this practice. The denial of the right to vote, as evidenced by the Voting Rights cases,\textsuperscript{399} is a punishment that unconstitutionally strips ex-felons of human dignity, self-worth, and the ability to participate in the laws that govern them.

First, the disenfranchisement of ex-felons, like expatriation in \textit{Trop}, barbarically diminishes an ex-felon’s status in society even after his supervision by the state is over.\textsuperscript{400} Disenfranchisement does not merely strip the ex-felon of an ordinary right, but

\begin{itemize}
  \item \textsuperscript{396} This factor combines elements found in Justice Brennan’s concurrence in \textit{Furman}, 408 U.S. at 277-78, the Court’s opinion in \textit{Trop}, 356 U.S. at 99-104, the Court’s opinion in \textit{Weems v. U.S.}, 217 U.S. 349, 378-79 (1910), and the Court’s opinion in \textit{Atkins v. Virginia}, 536 U.S. 304, 313-17 (2002).
  \item \textsuperscript{397} This factor combines elements found in Justice Brennan’s concurrence in \textit{Furman}, 408 U.S. at 279-80, Justice Marshall’s concurrence in \textit{Furman}, 408 U.S. at 332-33, and the Court’s opinion in \textit{Atkins}, 536 U.S. at 317-18.
  \item \textsuperscript{398} \textit{See supra} Section I.
  \item \textsuperscript{399} \textit{See supra} Section III(A).
  \item \textsuperscript{400} \textit{Trop}, 356 U.S. at 99-102.
\end{itemize}
extinguishes the right that is preservative of all other rights.\textsuperscript{401} As in \textit{Trop},
disenfranchisement “destroys for the individual the political existence that was centuries
in the development.”\textsuperscript{402} The disenfranchised ex-felon finds himself in the undignified
position of being at the mercy of his fellow citizens to make the laws that will affect him
and his family. The disenfranchised ex-felon becomes a political outcast, unwanted as a
voice in the governance of his family, community and nation.

The disenfranchisement of ex-felons, near universally regarded as abhorrent to the
concept of rehabilitative and productive justice,\textsuperscript{403} compounds the isolation that an ex-
felon feels from the community that he rejoins. This isolation further silences the ex-
felon’s voice and identity, feelings that may lead to recidivism.

Disenfranchisement is also cruel and unusual punishment because it completely
extinguishes an ex-felon’s ability to participate in the political process.\textsuperscript{404} The denial of
the fundamental right to vote, like expatriation in \textit{Trop}, “is offensive to cardinal
principles for which the Constitution stands.”\textsuperscript{405} Although the ex-felon retains his
citizenship, disenfranchisement diminishes his status to that of a second-class citizen,

\begin{footnotes}
\item[401] See \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886) (stating that voting “is regarded as a fundamental political
right, because [it is] preservative of all rights”)
\item[402] \textit{Trop}, 356 U.S. at 101.
\item[403] See \textit{Richardson v. Ramirez}, 418 U.S. 24 (1974) (recognizing that felon disenfranchisement may be
inconsistent with the concept of rehabilitation of offenders).
\item[404] See \textit{Dunn v. Blumstein}, 405 U.S. 330, 336 (1972) (finding that durational residence requirements
violated equal protection review partly because they completely barred individuals from exercising the
franchise).
\item[405] \textit{Trop}, 356 U.S. at 102.
\end{footnotes}
whose voice is not trusted (nor wanted) near the ballot box. Denying an ex-felon the right to participate in the crafting of laws that directly affects him is a punishment that cannot stand in light of the recognition of voting as a fundamental right.

2. Disenfranchisement is a Static Punishment that is Arbitrarily Imposed Regardless of the Severity and Type of the Offense

   The disenfranchisement of ex-felons also fails constitutional scrutiny because of the arbitrary nature of the practice. Although disenfranchisement is imposed automatically by a state statute or constitutional provision (unlike the capital punishment found unconstitutional in *Furman*[^406]), the categories of offenses that result in disenfranchisement, along with the varied practice among the states, demonstrate that felon disenfranchisement is imposed in a constitutionally arbitrary matter.

   First, disenfranchisement may be imposed for any felony, regardless of the severity of the crime or the relation of the crime to the election process. States are free (absent an impermissible motive) to select which felonies will result in disenfranchisement and which will not[^407]. These disenfranchisement provisions therefore often apply to a complete range of felonies, from larceny crimes to murder. In addition, although some courts have justified felon disenfranchisement provisions as necessary to

[^406]: *Furman*, 408 U.S. at 249 (Douglas, J., concurring) (holding that the unbridled discretion of juries to impose capital punishment resulted in an unconstitutionally arbitrary practice).

[^407]: *See Allen v. Ellisor*, 664 F.2d 391, 397-98 (4th Cir. 1981) (en banc) (holding that Section Two of the Fourteenth Amendment “immunizes any classification of disqualifying crimes, whether the classification is stated in terms of ‘felonies’ generally, or of some felonies, or of certain specified crimes”).
prevent election fraud,\textsuperscript{408} most states that disenfranchise ex-felons have provisions that apply to much more than crimes that are related to election fraud.\textsuperscript{409}

Furthermore, the fact that some states have lifelong felon disenfranchisement provisions results in the absurd and arbitrary situation in which a state may punish an ex-felon for a crime that he or she committed and served a sentence for in another state. For example, while an ex-felon may vote as a citizen of West Virginia for the office of the presidency of the United States, if that same ex-felon becomes a citizen of neighboring Virginia, he may no longer vote for president.\textsuperscript{410} Denying a citizen of the right to vote in a state that had absolutely no relation to the felony committed by that citizen is an arbitrary yet realistic consequence of disenfranchisement provisions that extend beyond the felon’s supervision by the state. The disenfranchisement of ex-felons therefore is a practice that runs afoul of the Eighth Amendment’s scrutiny of arbitrary punishments.

3. Disenfranchisement has been Rejected by Contemporary Society as an Inappropriate Sanction for Ex-Felons

The Supreme Court has consistently held that the rejection of a certain type of punishment by contemporary society would play a significant role in determining whether that punishment was inconsistent with “the evolving standards of decency that

\textsuperscript{408} See, e.g., \textit{Kronlund v. Honstein}, 327 F. Supp. 71, 73 (N.D.Ga. 1971) (holding that “[a] State may also legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses”).

\textsuperscript{409} See supra Section I(G)(2) (describing current state felon disenfranchisement practice).

\textsuperscript{410} \textit{Compare} W. VA. CODE \textsection 3-1-3 (2003) (allowing an ex-felon to vote after his parole supervision ends) with VA. CODE ANN. \textsection 24.2-101 (2003) (disenfranchising an ex-felon for life).
mark the progress of a maturing society” and thus unconstitutional under the Eighth Amendment. A review of the history of felon disenfranchisement, juxtaposed with its modern use and attitudes toward the practice, demonstrates that contemporary society has rejected the disenfranchisement of ex-felons who have completed their supervision by the state.

a. The Contemporary Use of Felon Disenfranchisement has been Rejected by the Majority of the American States

The Court has indicated that, in an Eighth Amendment determination, it will place significant weight in the treatment of a particular punishment in the state legislatures. For example, the Court used contemporary attitudes toward the execution of mentally retarded individuals to find that practice unconstitutional in *Atkins v. Virginia*. Although the Court held the practice constitutional only 13 years earlier, the Court found the advocacy of legal commentators, public opinion, and the practice of state legislatures to be indicative of society’s views as a whole. With regards to the practice by the state legislatures, the Court stated:

“It is not so much the number of these States that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the


412 *Id.* at 315-16.


414 *Id.* at 313-17.
large number of States prohibiting the execution of mentally retarded persons … provides powerful evidence that today our society views mentally retarded individuals as categorically less culpable than the average criminal.\textsuperscript{415}

As with the execution of mentally retarded persons, the disenfranchisement of ex-felons has gradually yet consistently been rejected as an inappropriate sanction ever since the founding of this nation. As Section I(D) illustrates, the new American Constitution represented a shift away from the harsh collateral consequences of criminal convictions that were prevalent in England.\textsuperscript{416} Although the Constitution did not forbid felon disenfranchisement, the rejection of concepts such as bills of attainder or corruption of the blood demonstrates a still-continuing shift away from the punishment of an individual after he has “paid his debt to society.”\textsuperscript{417}

The states’ attitudes toward felon disenfranchisement have also consistently moved toward the idea that felons should not be subject to punishments after their supervision by the state is complete. At the turn of the century, most states had a statute or constitutional provision mandating the disenfranchisement of ex-felons.\textsuperscript{418} In addition, at the beginning of the 1960s, most states had some form of disenfranchisement for ex-

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{415} Id. at 315-16.
\item\textsuperscript{416} See supra Section I(D).
\item\textsuperscript{417} Id.
\item\textsuperscript{418} See Summary of Changes to State Felon Disenfranchisement Law 1865-2003, supra note 41 (stating that “[a]t the end of the [nineteenth] century, 38 of the 45 states disenfranchised convicted felons for some amount of time, with 33 states disenfranchising ex-felons”).
\end{itemize}
\end{footnotesize}
felons. However, as the Warren Court ushered in the recognition of voting as a fundamental right, many states began to relax their restrictive felon disenfranchisement provisions.

This consistent trend toward allowing ex-felons to vote can easily be seen by comparing composites of felon disenfranchisement for the early 1970s, early 1990s, and for the year 2003. In 1973, nearly half of the states disenfranchised felons for the rest of their lives. In 1993, only fourteen states disenfranchised felons either for life or for some finite period beyond the completion of their sentence. Moreover, in 2003 only thirteen states extend disenfranchisement for some period after state supervision, with only six states disenfranchising felons for life upon a first-time felony conviction.

The move toward allowing ex-felons to vote is strengthened by the fact, recognized in Atkins, that such a trend runs counter to the usual reluctance to repeal provisions aimed at punishing wrongdoers. This assertion may be reinforced by the fact that most members of the public believe that ex-felons should be allowed to vote, and that burdening felons beyond their supervision may be the product of unnecessary cruelty.

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419 *See id.* (stating that “44 of the 50 states disenfranchised at some level by 1959”).

420 *See supra* Section III(A).

421 *See supra* Section I(F).

422 *See supra* Section I(G)(1).

423 *See supra* Section I(G)(2).


425 *See supra* Section I(H).
As these trends indicate, the majority of the state legislatures have rejected the disenfranchisement of ex-felons as outmoded, unnecessary, or against public policy. Therefore, the Supreme Court should find that the practice of disenfranchising ex-felons is not consistent with “the evolving standards of decency that mark the progress of a maturing society.”

b. Most Legal Scholars Agree that Felon Disenfranchisement is an Outmoded and Unnecessary Practice

An objective review of contemporary attitudes does not end with a survey of the state legislatures. As the Court held in Weems v. U.S.,\(^\text{426}\) the courts should take the cumulative opinions of legal commentators into account when deciding whether a punishment violates the Eighth Amendment.\(^\text{427}\) In the case of felon disenfranchisement, a survey of scholarly journals and other materials demonstrates that the overwhelming majority of legal commentators who write on the subject oppose disenfranchisement as a punishment and advocate major reforms, if not the complete abolition, of the practice.\(^\text{428}\) An opponent of reform may argue that because disenfranchisement is currently a constitutional practice, there would be little interest or motivation in presenting a scholarly paper defending the practice. However, among scholarly materials, an article or note providing even a cursory justification for felon disenfranchisement is extremely

\(^{426}\) 217 U.S. 349 (1910).

\(^{427}\) Id. at 375-78.

\(^{428}\) A LEXIS search of articles and notes revealed 22 scholarly papers whose main topic was the disenfranchisement of felons. All 22 of these articles and notes advocated the liberalization or abolition of felon disenfranchisement provisions.
rare. Even the Supreme Court declined to provide a philosophical or theoretical justification for felon disenfranchisement in *Richardson*, instead relying on the implicit authorization of Section Two of the Fourteenth Amendment to find the practice constitutional.  

(c. Felon Disenfranchisement is Not Supported by a Majority of the American Public)

In addition to surveying established legal scholars, courts may look to the prevailing public opinion to determine whether a particular practice is inconsistent with the “evolving standards of decency” that trigger Eighth Amendment scrutiny. As demonstrated in Section I(H), a vast majority of the public disapproves of the practice of disenfranchising felons after their supervision ends. Although individual respondents did not give specific reasons for their answers, it may be postulated that the public expresses this view because it feels that punishment that extends beyond an individual’s supervision by the state amounts to an unnecessary and cruel burden to the felon’s rehabilitation.

(d. Disenfranchisement of Ex-Felons is Inconsistent with International Practice)

The Supreme Court has also indicated that it will look to international trends to supplement domestic information in determining whether a particular practice is

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430 *See Weems*, 217 U.S. at 378 (stating that the meaning and scope of the Eighth Amendment evolves with public opinion).

431 *See supra* Section I(H).
inconsistent with “evolving standards of decency.” 432 As Section I(J) indicates, the disenfranchisement of ex-felons is a nearly universally rejected practice. 433 Indeed, a significant number of nations from all areas of the world allow incarcerated felons to vote. 434 However, the American states that disenfranchise felons beyond state supervision find themselves in the company of only seven other nations. 435 In a nation that prides itself on being the model of democracy, these states not only are in the extreme minority internationally but represent an embarrassment to the principles that make our democracy work.

e. Felon Disenfranchisement Can Be Found Unconstitutional Despite its Implicit Authorization in Section Two of the Fourteenth Amendment

Although the Supreme Court refused to apply equal protection scrutiny to felon disenfranchisement because it is implicitly authorized in the Fourteenth Amendment, 436 that authorization does not doom an Eighth Amendment challenge. The fundamental principle of the Eighth Amendment is its evolving nature. 437 Indeed, not only did the Framers recognize this fact, but the Supreme Court has relied on this principle several times to find punishments unconstitutional that were previously thought to be


433 See supra Section I(J).

434 Id.

435 Id.


437 See Weems v. U.S., 217 U.S. 349, 378 (1910) (stating that the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice”).
constitutional.\textsuperscript{438} For example, the Court in \textit{Atkins} found the execution of mentally retarded offenders unconstitutional, despite finding the same practice constitutional only 13 years earlier.\textsuperscript{439}

While the execution of mentally retarded offenders is not specifically authorized in the Constitution, even an explicit constitutional authorization cannot be deemed an absolute bar to a finding that such a practice violates the Eighth Amendment. First, the Eighth Amendment’s evolving nature would be undermined if the lawmakers of a particular time period could insulate a punishment from review simply by placing it within the confines of the U.S. Constitution. Second, Section Two’s “authorization” of felon disenfranchisement is not an explicit authorization but merely the recognition of an exception to a policy that was acceptable at the time.\textsuperscript{440} Thus, the mention of disenfranchisement as a sanction for crimes committed was simply peripheral to the section’s purpose, and represented nothing more than a reflection of the prevailing views of that time period nearly 150 years ago.\textsuperscript{441}

In addition, Section Two, although enacted after the Eighth Amendment, is embodied in a completely separate and distinct amendment. The Court in \textit{Richardson} made much of the fact that the Equal Protection Clause and the implicit authorization of

\begin{thebibliography}{9}
\bibitem{438} \textit{See Atkins v. Virginia}, 536 U.S. 304, 312 (2002) (listing practices found unconstitutional that were once deemed constitutional).
\bibitem{439} \textit{Id.} at 316 (overruling \textit{Penry v. Lynaugh}, 492 U.S. 302 (1989)).
\bibitem{440} \textit{See Richardson}, 418 U.S. at 75-76 (Marshall, J., dissenting).
\bibitem{441} \textit{Id.}
\end{thebibliography}
felon disenfranchisement were both in the same amendment. The Court reasoned that a practice authorized in a later section of an amendment could not be invalidated by a prior section of the same amendment, since the same lawmakers enacted both sections during the same time period. However, it cannot be argued that the Framers of the Fourteenth Amendment had any intent to override the Eighth Amendment’s ban on cruel and unusual punishments because of its lack of relation to Section Two.

It would be inconsistent with the purpose of the Eighth Amendment to allow lawmakers of a particular time period to freeze a particular practice from Eighth Amendment review. However, some have argued that because felon disenfranchisement is authorized in Section Two of the Fourteenth Amendment, the only way to end this practice would be to amend the Constitution to prohibit the practice of felon disenfranchisement. Indeed, these individuals may point to the fact that both age and gender limitations on voting are authorized in Section Two, and that these limitations were ended only through constitutional amendment.

However, this argument ignores both the evolving nature of the Eighth Amendment and the heightened scrutiny subsequently given to limitations on voting. First, the practices of limiting voting based on age and gender affected either

442 Id. at 55 (stating that Section Two “is as much part of the Amendment as any of the other sections, and how it became part of the Amendment is less important than what it says and what it means”).

443 Id. at 43-44.

444 See U.S. CONST. amend XIX (prohibiting voting limitations based on sex); U.S. CONST. amend XXVI (prohibiting voting limitations based on age, except for individuals under eighteen).

445 See supra Section IV(C).

446 See supra Section III(A).
immutable characteristics or attributes that are not the result of an individual’s actions. Felon disenfranchisement, on the other hand, affects individuals that have been convicted of a crime. Therefore, the practices of limiting voting on age and gender grounds cannot be challenged under the Eighth Amendment’s ban on cruel and unusual punishments since disenfranchisement on these bases is not the result of a criminal punishment.\textsuperscript{447}

While it is plausible that a particular regulatory or civil practice could be permanently etched into the U.S. Constitution (such as prohibition), the ambiguous and evolving nature of the Eighth Amendment prevents the insulation of a particular punishment through its codification in a constitutional amendment simply because it is popular and effective at the time of its adoption as part a constitutional amendment.\textsuperscript{448} Indeed, the fact that capital punishment is implicitly authorized in the Constitution was no bar to the finding by the Supreme Court that capital punishment, as applied, violated the Eighth Amendment.\textsuperscript{449} Similarly, the fact that durational residence requirements were considered constitutional during the ratification debates of the Fourteenth Amendment did not prevent the Supreme Court from invalidating these requirements as unconstitutional under the Fourteenth Amendment.\textsuperscript{450}

\textsuperscript{447} See Ingraham \textit{v. Wright}, 430 U.S. 651, 665-66 (1977 (finding that the Eighth Amendment only applies to criminal punishments).

\textsuperscript{448} Furman \textit{v. Georgia}, 408 U.S. 238, 239 (1972).

\textsuperscript{449} See id. (finding capital punishment, as applied, to be unconstitutional despite the implicit authorization in such constitutional provisions as the ability to deny a citizen’s life only after due process).

\textsuperscript{450} See Richardson \textit{v. Ramirez}, 418 U.S. 24, 76 (1974) (Marshall, J., dissenting) (stating that “one form of disenfranchisement - one-year durational requirements - specifically authorized by the Reconstruction Act, one of the contemporaneous enactments upon which the Court relies to show the intendment of the framers
Secondly, the constitutional amendment removing the limitation on gender in voting was adopted more than forty years before the Supreme Court recognized voting as a fundamental right under the Equal Protection Clause of the U.S. Constitution.\textsuperscript{451} It is plausible that had the states not approved the Nineteenth Amendment (prohibiting discrimination in voting based on sex), a provision limiting the franchise to males would have been struck down under equal protection analysis as part of the Court’s Voting Rights Cases. In addition, it was only after Congress’s attempt to lower the voting age was found unconstitutional that the states began the process of adopting the Twenty-Sixth Amendment (lowering the voting age to eighteen).\textsuperscript{452} Indeed, the states responded quickly, completing the ratification process only three months after the Supreme Court refused to find Congress’s efforts constitutional.\textsuperscript{453}

An Eighth Amendment challenge to felon disenfranchisement is therefore not constrained by the implicit authorization found in Section Two of the Fourteenth Amendment. The framers of the amendment crafted its language so that its meaning would evolve with the attitudes of the American people.\textsuperscript{454} The very nature of the

\begin{flushleft}
\textsuperscript{451} The Nineteenth Amendment, prohibiting gender discrimination in voting, was adopted in 1920. \textit{U.S. CONST. amend. XIX.} The Voting Rights Cases, discussed \textit{supra} Section III(A), were not decided until the 1960s.


\textsuperscript{453} \textit{BRAVERMAN ET AL., supra} note 452, at App. -16.

\end{flushleft}
amendment’s prohibitions indicate that exceptions cannot be etched into the Constitution simply because a punishment is widely accepted during a given time period. Section Two’s mention of disenfranchisement for “other crime” is therefore merely incidental to the amendment’s encompassing language, and cannot be interpreted as insulating the practice of felon disenfranchisement from Eighth Amendment review.

4. Disenfranchisement is a Disproportionate Sanction that Serves No Valid Penological Objective

The disenfranchisement of ex-felons is a practice that is both disproportionate to the offense and serves no valid penological objective. By disenfranchising felons beyond their supervision by the state, those states extend a felon’s punishment further than is necessary or justified under any penological theory.\textsuperscript{455} Disenfranchising for life provides the felon with no opportunity to be rehabilitated, and directly affects the felon’s ability to reintegrate into society. In addition, the lifelong disenfranchisement of a felon cannot be justified after state supervision ends because such a punishment is disproportionate to the offense committed.

As demonstrated in Section III(B), felon disenfranchisement serves no valid purpose.\textsuperscript{456} Felon disenfranchisement fails as a method of either “purifying the ballot box,” upholding the Lockian “social contract,” or preventing election fraud.\textsuperscript{457} Most importantly, felon disenfranchisement fails as a punitive measure.\textsuperscript{458} Although some

\textsuperscript{455} See supra Section III(B).
\textsuperscript{456} Id.
\textsuperscript{457} Id.
\textsuperscript{458} See supra Section III(B)(4).
courts have held that a practice “that has little or no penological value may offend constitutional values upon a lower showing of harm,”\textsuperscript{459} that standard may not be necessary. The denial of the ex-felon’s vote provides no benefit to society, and is exacted with a terrible impact on the ex-felon’s dignity, self-worth and ability to participate in the political process. The disenfranchisement of ex-felons thus cannot be justified under proportionality principles or under any valid penological theory.

5. Taken Cumulatively, Felon Disenfranchisement Violates this Four-Prong Standard

The disenfranchisement of ex-felons is a punishment that is degrading, arbitrary, outmoded, and unnecessary. As the discussion of each element demonstrates, felon disenfranchisement is both inherently and in practice an affront to the constitutional principles that support the Eighth Amendment. Although the courts appear to place more significance on the contemporary attitudes of the states and the public, the disenfranchisement of ex-felons pervasively violates each of the four principles outlined in this Section. Therefore, these factors, taken cumulatively, provide the line of reasoning necessary for a court to determine that the disenfranchisement of ex-felons violates the Eighth Amendment’s prohibition on cruel and unusual punishments.

VI. Conclusion

Felon disenfranchisement survives today as an antiquated form of the brutal criminal disqualifications handed down upon the citizens of early Western Civilization. Although the Supreme Court has insulated the practice of felon disenfranchisement from

equal protection review, the Eighth Amendment may provide the mechanism for finally putting an end to this degrading practice. For years, as states have gradually relaxed their felon disenfranchisement provisions, public opinion and international practices have followed suit as the world realizes the barbaric nature of denying felons access to the political processes that directly affect them. However, unheeded by the findings that felon disenfranchisement is unnecessary and purposeless, states continue the practice as a feigned attempt to establish control over the purity of their ballot boxes. Felon disenfranchisement is instead an affront to the American model of democracy. More importantly, the disenfranchisement of ex-felons is an affront to the principles of the Eighth Amendment, and therefore cannot constitutionally stand.


See Brief for Appellant, Hunter v. Underwood, 471 U.S. 222 (1985) (arguing that the state of Alabama has a compelling interest in protecting the purity of its ballot box).