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Sarah C. Grady

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COMMENTS

CIVIL DEATH IS DIFFERENT: AN EXAMINATION OF A POST-*GRAHAM* CHALLENGE TO FELON DISENFRANCHISEMENT UNDER THE EIGHTH AMENDMENT

Sarah C. Grady*

> "A man without a vote is a man without protection. He is virtually helpless." Out of such feelings of helplessness were revolutions born.[1]

Since the founding, the United States has struggled with the question of who should be permitted to vote. In their first days as political communities, some states required prospective voters to adhere to specified religions in order to qualify.[2] As conceptions of citizenship changed throughout history, various groups began to lobby for inclusion into the

* J.D., Northwestern University School of Law, 2012; B.A., University of Iowa, 2008. Many thanks to all who assisted me in completing this Comment. In particular, I would like to thank Joseph Margulies for his comments and suggestions, and Will Singer and Jessica Fricke for their assistance in edits.

[1] RANDALL B. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION 330 (2002) (quoting then-Senator Lyndon B. Johnson in a statement he gave to the press shortly after the approval of the Civil Rights Act of 1957).

[2] Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53, 57 n.36 (2006). Quakers, Catholics, and Jews were sometimes denied the franchise. *Id.* As late as 1777, Vermont enforced religious restrictions on the voting franchise. Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109, 120 n.37 (2004). However, this practice was largely abandoned with the adoption of the First Amendment and the Bill of Rights in 1791. *See id.* at 119–20; *see also* U.S. CONST. amend. I.

franchise.[3] Proponents of disenfranchisement schemes justified their exclusions on many bases, but most often relied on popular rhetoric suggesting the groups were second-class citizens, not worthy of the honor of the ballot box.[4] In the end, those fighting for suffrage carried the day, and the United States modified its laws to include them.[5] There is one group, however, which has still not attained nationwide suffrage: previously convicted felons.

This Comment argues for the abolition of the most extreme form of felon disenfranchisement in the United States—Virginia's lifetime disenfranchisement of all individuals convicted of any felony—through the framework of an Eighth Amendment challenge. Part I will discuss the history of this practice, including pre-American justifications for stripping various groups of the right to vote, and analyze the history of past challenges to such schemes. Part II will argue that, given prior case law and the nature of Virginia's provision, the Eighth Amendment is the best vehicle to challenge the constitutionality of felon disenfranchisement. Finally, Part III will apply the analysis articulated by the *Graham* Court and argue that the Eighth Amendment requires invalidation of Virginia's provision because it constitutes cruel and unusual punishment forbidden by the Constitution.

I. A HISTORY OF DISENFRANCHISEMENT

A. THE ORIGINS OF DISENFRANCHISEMENT

The phenomenon of disenfranchisement has a long history reaching back to ancient and medieval times. However, its current form in the United States is both overinclusive (in terms of the population upon whom disenfranchisement is imposed) and underinclusive (in terms of the range of sanctions imposed upon the affected population). Moreover, when the practice was originally brought to the United States from Europe,

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[3] *See* Schall, *supra* note 2, at 70 (discussing the role liberalism plays in the modern conception of voting as a right, important both inherently and as a protector of a panoply of other substantive rights).

[4] ROGERS M. SMITH, CIVIC IDEALS 3 (1997). There is one interesting exception: women. Although some of the anti-Suffragette rhetoric contained overtones of "women-as-second-class-citizens," the most popular argument against including women in the franchise centered on the notion that politics were dirty and corrupt, and women were too delicate to be exposed to the crooked business. *See id.*

[5] *See, e.g.*, U.S. CONST. amend. XV, § 1 (prohibiting exclusion from voting on the basis of race); U.S. CONST. amend. XIX, cl. 1 (granting women the right to vote); U.S. CONST. amend. XXIV, § 1 (prohibiting poll taxes in federal elections); U.S. CONST. amend. XXVI, § 1 (lowering the voting age to eighteen years).

permanent disenfranchisement was limited to a discrete range of crimes, all closely related to the exercise of the franchise itself. Ultimately, no legal tradition, domestic or foreign, imposed the broad disenfranchisement provisions that currently exist in Florida, Iowa, Kentucky, and Virginia today. Part I.A.1 will discuss the ancient history of disenfranchisement, while Part I.A.2 will discuss the implementation of disenfranchisement in early American history.

1. Ancient History

The disenfranchisement of felons long predates the birth of America and traces its roots to ancient Greece and Rome, where criminals were branded with the status of *atimia* or *infamia*, depriving them of all of their rights and privileges including the right to vote.[6] The Greeks and Romans dearly coveted these political rights, and losing them was equated with a loss of honor and one's position as a citizen in society.[7] As such, the threat of this loss was an effective way to deter criminal behavior.[8] Centuries later, European states adopted a similar condition called "outlawry," which deprived certain criminals of all legal protections.[9] These criminals were essentially expelled from the political community, losing even the right of legal protection from murder by other citizens.[10] The underlying crime was considered a war on the community, and outlawry was justified as a necessary response by the community to assert its control.[11]

In England, "outlawry" developed into the concept of "attainder" or "civil death."[12] All of the criminal's property was returned to the control of the king.[13] The "attainted criminal was said to be 'dead in law' because he

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[6] ENGIN F. ISIN, BEING POLITICAL 82 (2002); Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 492 (2004).

[7] Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 757 (2000).

[8] Mark E. Thompson, Comment, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 172 (2002).

[9] Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060 (2002).

[10] *Id.*

[11] *See* Thompson, *supra* note 8, at 172. This justification bears a resemblance to a modern defense of felon disenfranchisement laws—that felons have broken the social contract, and therefore do not possess the moral competence to participate in elections.

[12] Schall, *supra* note 2, at 54.

[13] *Id.*

could not perform any legal function—including, of course, voting."[14] Civil death, like *atimia* and *infamia*, served as a deterrent "because the stigma of the loss of civil rights in the small communities of those times increased the humiliation and isolation suffered by the offender and his family and served as a warning to the rest of the community."[15] It was used sparingly, however. As Blackstone explained, civil death was used only "when it is . . . clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society."[16]

2. Taking Disenfranchisement to America

English colonists brought the tradition of civil death with them to America.[17] As time passed and colonies began to adjust the old common law to meet their own needs, many of the deprivations that attached with civil death were discarded.[18] Disenfranchisement for criminal activity, however, remained firmly established in early American law. In the pre-Revolution colonies, even established citizens could lose their "freeman" status if they exhibited behavior characterized as "grossly scandalouse, or notoriously vitious."[19] While some colonies merely indicated that misbehavior would result in general loss of freedom, others more directly targeted voting.[20] In Connecticut, for example, a freeman who had been

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[14] Ewald, *supra* note 9, at 1060. Ewald notes that the English infliction of "civil death" was reserved for a small number of very serious crimes and had to be implemented by judicial pronouncement. *Id.* at 1060–61.

[15] Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004) (quoting Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 726–27 (1973)) (internal quotation marks omitted). Behrens notes that an imposition of civil death was an *alternative*, rather than an addition, to other forms of public punishment, such as hanging and mutilation. *Id.* at 236 n.30.

[16] 4 WILLIAM BLACKSTONE, COMMENTARIES *373.

[17] William Walton Liles, Commentary, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 617 (2007).

[18] For example, as the criminal code evolved in the early colonies, many of the civil prohibitions—e.g., inability to enter into contracts, inability to own property—were eliminated. *See id.*

[19] Cortlandt F. Bishop, *History of Elections in the American Colonies*, *in* 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 55 (Univ. Faculty of Political Sci. of Columbia Coll. ed., 1893).

[20] *Id.*

"scandalous" was disenfranchised until "good behaviour shall cause restoration of the privilege."[21] The Code of 1650 similarly dictated that:

> if any person within these Libberties haue beene or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to haue any voate in the Towne or Commonwealth, nor to serue in the Jury, vntill the Courte shall manifest theire satisfaction.[22]

Massachusetts explicitly announced that disenfranchisement was to be imposed for "fornication or any shamefull and vitious crime" or "any evill carriage agnt ye gouernments or churches."[23] Yet, while most of these laws conferred substantial discretion as to when suffrage could be regained, few envisioned permanent deprivation.[24] Those laws that did call for lifetime disenfranchisement generally only allowed it after a conviction for an offense closely related to the exercise of the franchise itself.[25]

The drafters of these early provisions and the governmental bodies in charge of their enforcement did not specify the purpose of the disenfranchisement penalties.[26] These laws might simply be viewed as the direct descendants of their English forefathers, unquestionably penal in nature and used to punish and deter criminal behavior.[27] On the other hand, the original unamended Constitution did not protect any voting rights,[28] except requiring an election for candidates to the House of Representatives[29] and allowing states to dictate the time, place, and manner for holding elections for congressional representatives.[30] These two clauses taken together suggest that access to the ballot box followed the theme of early American law: the Founding Fathers conferred to the states plenary

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[21] *Id.* (quoting ACTS AND LAWS OF HIS MAGESTIE'S COLONY OF CONNECTICUT IN NEW ENGLAND 40 (1702)) (internal quotation marks omitted).

[22] *Id.* (quoting 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 559 (J. Hammond Trumble ed., 1950)) (internal quotation marks omitted).

[23] *Id.* at 55–56 (quoting MASSACHUSETTS COLONIAL RECORDS, pt. II, 562, 110) (internal quotation marks omitted).

[24] Ewald, *supra* note 9, at 1062. While some smaller communities within the colonies, like Plymouth, imposed permanent disenfranchisement, few required it for the entire colony. Instead, colonies like Massachusetts and Connecticut left the decision of when to restore voting rights to the court. *Id.*

[25] *Id.* Ewald notes that in Rhode Island, lifetime disenfranchisement was only triggered once a person was convicted of bribing an election official or of possessing a false deed (since owning property was at the time a prerequisite to ballot access). *Id.*

[26] Thompson, *supra* note 8, at 173.

[27] *Id.*

[28] *See* John R. Cosgrove, *Four New Arguments Against the Constitutionality of Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 165 (2004).

[29] U.S. CONST. art. I, § 2, cl. 1.

[30] U.S. CONST. art. I, § 4, cl. 1.

authority over the franchise while explicitly limiting the powers given to the national government.[31]

Indeed, a quick survey of early American history sheds some light on what concept of suffrage the Framers had in mind. John Adams and James Madison supported granting the franchise to only white landowning males, worrying that universal white suffrage might allow "the rights of property or the claims of justice . . . [to] be overruled by a majority without property, or interested in measures of justice."[32] Even Thomas Jefferson and Daniel Webster, whose visions of suffrage were more expansive, called for the suffrage of men who in some way affirmatively contributed to the government through ownership of property, participation in the army, or by paying taxes.[33] These views of suffrage saw voting as a privilege rather than a right, and it is altogether possible that the Framers intended to leave the matter of voter qualifications entirely to the states. It is no surprise then, that eighteenth-century America extended the franchise to property-owning white males alone.[34]

As notions of political equality developed in the United States, however, access to the ballot box began to expand.[35] In the early nineteenth century, land ownership requirements fell away and were replaced by less onerous poll taxes.[36] In 1870, the Fifteenth Amendment was ratified, welcoming black men to the franchise.[37] In 1920, women were added to the voting rolls.[38] In 1964, the poll tax was abolished,[39] and in 1971, the United States allowed all citizens age eighteen and over to vote.[40]

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[31] *See* S. Brannon Latimer, *Can Felon Disenfranchisement Survive Under Modern Conceptions of Voting Rights?: Political Philosophy, State Interests, and Scholarly Scorn*, 59 SMU L. REV. 1841, 1842 (2006).

[32] James Madison, *Note to his Speech on the Right of Suffrage*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450, 450 (Max Farrand ed., rev. ed. 1966).

[33] Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* POLITICAL WRITINGS OF THOMAS JEFFERSON 210, 212 (Joyce Appleby & Terence Ball eds., 1999).

[34] Latimer, *supra* note 31, at 1842.

[35] *Id.* at 1842–43.

[36] *Id.* at 1842.

[37] U.S. CONST. amend. XV, § 1.

[38] U.S. CONST. amend. XIX, cl. 1.

[39] U.S. CONST. amend. XXIV, § 1.

[40] U.S. CONST. amend. XXVI, § 1. Interestingly, Pamela Karlan has argued that the extension of the voting franchise to new groups has been influenced by the United States' engagements in war. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346 (2003). According to Karlan, participation in a war effort, either by fighting directly or contributing at home, strengthens the affected group's claim to full participation in democratic government. *Id.*

Yet even as the voting rolls have become more diverse, there is one group whose claim to nationwide suffrage continues to be ignored: felons. Contrary to the general trend of expansion, felon disenfranchisement actually *gained* momentum in the early years of American history.[41] In 1840, only four of the existing twenty-four states had codified felon disenfranchisement schemes,[42] but by "the eve of the Civil War, some two dozen states had statutes barring felons from voting or had . . . [similar] provisions in their state constitutions."[43] This change increased its speed in the years immediately following the Civil War.[44] By 1870, twenty-eight of the thirty-eight states deprived citizens of the vote based on a felony conviction.[45] Many have noted that this increase is largely due to the fact that southern states used criminal disenfranchisement provisions to prohibit black men from access to the ballot, otherwise barred by the Fifteenth Amendment.[46]

In addition to the increase in the number of states that enacted disenfranchisement provisions during this time, the nature of those provisions also changed.[47] Rather than limiting the penalty to offenders who committed a discrete group of crimes relevant to the exercise of the franchise, states began to enact much broader provisions.[48] These provisions took a harsh tone, requiring an executive pardon to be returned to suffrage if they provided for a return at all.[49]

It was not until the 1950s that advocates began to challenge felon disenfranchisement schemes, as part of a wider agenda to change the focus of the American penal system from retribution to rehabilitation and

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[41] Manza & Uggen, *supra* note 6, at 492.

[42] *Id.*

[43] Liles, *supra* note 17, at 617 (quoting Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781 (2002)).

[44] Behrens, *supra* note 15, at 237.

[45] *Id.*

[46] *See, e.g.*, Ewald, *supra* note 9, at 1065 (noting that "several Southern states carefully re-wrote their criminal disenfranchisement provisions with the express intent of excluding blacks from the suffrage"); Latimer, *supra* note 31, at 1843 (explaining the various ways that "Southern Democrats erected . . . barriers to black suffrage" after the ratification of the Fifteenth Amendment); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 542 (1993) (recognizing that "scholars widely acknowledge the historically racist motives underlying criminal disenfranchisement").

[47] Behrens, *supra* note 15, at 237.

[48] *Id.*

[49] *Id.*

resocialization of offenders who successfully served out their sentences.[50] Advocates saw criminal disenfranchisement provisions as a collateral sentencing consequence that excluded offenders from society and increased their likelihood of recidivism.[51] Given that these provisions disenfranchised an expressly defined group—individuals who had committed some offense—advocates first alleged violations under the Fourteenth Amendment's guarantee that all people would receive "equal protection of the laws."[52]

B. FALLEN BRETHREN: PAST LEGAL CHALLENGES

In the 1960s, the Warren Court handed down a series of decisions establishing the right to vote as "fundamental . . . in a free and democratic society."[53] Access to the ballot box, the Court explained, "is a fundamental political right, because [it is] preservative of all rights."[54] The Court thus required that any restriction of that right "must meet close constitutional scrutiny."[55]

Citing these cases, former inmates brought actions challenging state disenfranchisement laws, arguing that the laws deprived them of the right to vote protected by the Equal Protection Clause of the Fourteenth Amendment.[56] Although these suits were initially successful,[57] courts were

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[50] Demleitner, *supra* note 7, at 766. The challenge came from a "broad alliance" of unusual groups, including the National Conference on Uniform State Laws, the American Law Institute, the National Probation and Parole Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the President's Commission on Law Enforcement and the Administration of Justice. *Id.*

[51] *Id.*; *see also* Latimer, *supra* note 31, at 1845–46.

[52] U.S. CONST. amend. XIV, § 1.

[53] Reynolds v. Sims, 377 U.S. 533, 561–62 (1964). Professor John Hart Ely has defended the Warren Court's one person, one vote standard against criticism by arguing that the Republican Form Clause (Section Four of Article IV), when read together with the Equal Protection Clause of the Fourteenth Amendment and other constitutional amendments further extending the franchise, supports the conclusion that all qualified citizens should play a role in elections. JOHN HART ELY, DEMOCRACY AND DISTRUST 121–23 (1980).

[54] *Reynolds*, 377 U.S. at 562 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[55] Dunn v. Blumstein, 405 U.S. 330, 336 (1972). The *Dunn* Court held that laws affecting the right to vote, like other laws implicating fundamental rights, must assert a compelling government interest and be "tailored to serve their legitimate objectives." *Id.* at 343. In approaching such an analysis, the Court stated that it gives no deference to state legislators when confronting a challenge to a citizen's ability to participate in the franchise. Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627–28 (1969).

[56] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967); Fincher v. Scott, 352 F. Supp. 117, 118–19 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973); Stephens v. Yeomans, 327 F. Supp. 1182, 1184–85 (D.N.J. 1970).

generally reluctant to strike down felon disenfranchisement laws under the Fourteenth Amendment.[58] In *Green v. Board of Elections*, the Second Circuit dismissed the plaintiff's Eighth Amendment[59] and Fourteenth Amendment challenges, citing John Locke and stating that "[a] man who breaks the laws he has authorized his agent to make . . . could fairly have been thought to have abandoned the right to participate in further administering the compact."[60] The court found this social contract theory sufficient to satisfy a rational basis test, which the court ruled was the appropriate standard for the provision.[61] The court also cited Section Two of the Fourteenth Amendment,[62] concluding that Section One could not possibly outlaw an action explicitly permitted under Section Two.[63]

District courts outside of the Second Circuit embraced the *Green* decision and quickly dismissed other challenges to criminal disenfranchisement laws on the grounds that Section Two of the Fourteenth Amendment conferred constitutional permission for such laws.[64] Just two years after *Green*, a district court in Florida noted that "excluding felons

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[57] *Stephens*, 327 F. Supp. at 1188 (finding that the state interest in protecting the "purity of the electoral process" was not related to the "totally irrational and inconsistent classification" used to disenfranchise in New Jersey).

[58] *Green*, 380 F.2d at 452; *Fincher*, 352 F. Supp. at 119; Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971); Beacham v. Braterman, 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969).

[59] See *infra* Part III for a more detailed analysis of the *Green* court's holding that felon disenfranchisement laws do not violate the Eighth Amendment's ban on cruel and unusual punishment.

[60] *Green*, 380 F.2d at 451.

[61] *Id*. at 451–52.

[62] Section Two of the Fourteenth Amendment reads:

> 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. CONST. amend. XIV, § 2, *modified by* U.S. CONST. amend. XIX, cl. 1, *and* U.S. CONST. amend. XXVI, § 1 (emphasis added).

[63] *Green*, 380 F.2d at 452.

[64] Fincher v. Scott, 352 F. Supp. 117, 119 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973); Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971).

from the franchise has been so frequently recognized . . . that such expressions cannot be dismissed as unconsidered dicta."[65]

Lower courts' reluctance to strike down felon disenfranchisement provisions under the Equal Protection Clause greatly intensified after 1974, when the Supreme Court decided *Richardson v. Ramirez*.[66] Plaintiffs in *Richardson* challenged California's disenfranchisement law[67] on the grounds that it violated the equal protection guarantee of the Fourteenth Amendment.[68] Plaintiffs argued that then-recent case law recognized the right to vote as fundamental and required any state law denying or inhibiting the exercise of the franchise to be narrowly tailored to meet a compelling state interest.[69] The California Supreme Court found for the plaintiffs, ruling that the state's disenfranchisement provisions did not rationally serve its proffered interest in protecting against election fraud.[70]

The *Richardson* Court disagreed and reversed. Instead, the Court adopted the Second Circuit's approach, finding that Section Two of the Fourteenth Amendment provided an "affirmative sanction" of exclusion from the franchise; without this sanction, disenfranchisement would be vulnerable under the standard articulated by the earlier Warren Court in decisions such as *Dunn* and *Kramer*.[71] Instead of declaring any standard of scrutiny for disenfranchisement laws, the Court implied that ex-offenders could be deprived of access to the ballot box in any way for any reason.[72] Additionally, like the district court in *Beacham v. Braterman*,[73] the

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[65] Beacham v. Braterman, 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969).

[66] 418 U.S. 24 (1974).

[67] The California constitution at the time provided that "[l]aws shall be made to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes" and that "no person convicted of any infamous crime . . . shall ever exercise the privileges of an elector in this State." CAL. CONST. art. XX, § 11, art. II, § 1.

[68] *Richardson*, 418 U.S. at 33.

[69] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972) ("Statutes affecting constitutional rights must be drawn with precision, and must be tailored to serve their legitimate objectives." (internal citations omitted) (internal quotation marks omitted)); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) ("[I]f a challenged state statute grants the right to vote . . . to some otherwise qualified voters and denies it to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest."); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969) ("Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (internal quotation marks omitted)).

[70] *Richardson*, 418 U.S. at 80 (Marshall, J., dissenting).

[71] *Id.* at 54; *see* cases cited *supra* note 69.

[72] *See Richardson*, 418 U.S. at 54.

[73] 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969).

Supreme Court noted that it had already "strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision."[74]

Following *Richardson*, it seemed that the Supreme Court would not strike down any felon disenfranchisement scheme for any reason. However, in *Hunter v. Underwood*, Chief Justice Rehnquist—the author of the earlier *Richardson* decision—modified his position and ruled that a provision in the Alabama constitution disenfranchising those convicted of "crimes of moral turpitude" was unconstitutional.[75] The two *Hunter* plaintiffs had both been convicted of presenting a worthless check, a misdemeanor in the state.[76] The Court found that lawmakers had enacted the provision for the purpose of discriminating against African-Americans and further found that it did discriminate in effect, thereby violating the Equal Protection Clause.[77] The Court retreated from its implication in *Richardson* that no felon disenfranchisement law could ever be found to violate the Fourteenth Amendment.[78] *Hunter* declared that although depriving criminals *as a group* from access to the franchise is facially valid under the Equal Protection Clause, states may not discriminate against any protected class in the enactment or enforcement of such provisions.[79]

The Supreme Court's language in *Hunter* encouraged other plaintiffs to challenge various states' disenfranchisement laws under a theory of intentional racial discrimination in violation of the Equal Protection Clause and the Voting Rights Act.[80] Like many other claims of intentional racial discrimination, these all failed.[81]

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[74] *Richardson*, 418 U.S. at 53 (citing Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 79 (1959)). *But see* Cosgrove, *supra* note 28, at 170 (arguing that but for Section Two of the Fourteenth Amendment, felon disenfranchisement schemes would be invalid under the modern Fourteenth Amendment voting rights cases).

[75] 471 U.S. 222, 233 (1985).

[76] *Id.* at 224.

[77] *Id.* at 233.

[78] *See id.*

[79] *Id.* at 233.

[80] *See, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (finding that an amendment to a state constitution removed the "taint" from the original version adopted to intentionally discriminate against blacks); *see also* Johnson v. Governor of Fla., 405 F.3d 1214, 1223–24 (11th Cir. 2005) (en banc) (same); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (finding no discriminatory intent in the enactment of Tennessee's disenfranchisement statute).

[81] *See supra*, note 80. Although the Supreme Court has never addressed a challenge to felon disenfranchisement under the Voting Rights Act, all circuit courts that have addressed the question have denied the claim. Farrakhan v. Gregoire, 623 F.3d 990, 994 (9th Cir. 2010) (en banc); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009), *cert. denied*, 131 S. Ct.

II. FITTING A NEW FRAMEWORK: CHALLENGING FELON DISENFRANCHISEMENT UNDER THE EIGHTH AMENDMENT

Previous challenges alleging intentional discrimination under the Fourteenth Amendment and Voting Rights Act failed because, despite being presented with overwhelming evidence of racially disparate treatment, courts refused to find discriminatory animus by the state against the individual plaintiffs.[82] The plaintiffs mentioned above likewise failed to conceptualize disenfranchisement provisions as barbaric, and contrary to *Trop v. Dulles* and modern Eighth Amendment jurisprudence requiring punishments to adhere to "evolving standards of decency."[83] Instead, a more viable attack on felon disenfranchisement provisions could rely on the Eighth Amendment's prohibition of cruel and unusual punishments.[84]

There is an existing precedent for a movement to litigate under the Eighth Amendment when the courts have ruled the Fourteenth Amendment does not apply: the most famous source of Eighth Amendment jurisprudence, the death penalty.[85] Although civil rights groups in the 1950s and 1960s enjoyed moderate success in the courts when challenging

412 (2010); Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006) (en banc); *Johnson*, 405 F.3d at 1234 (11th Cir. 2005) (en banc); *see also Wesley*, 791 F.2d at 1261 (6th Cir. 1986) (holding that a history of racial discrimination cannot "condemn action that is not in itself unlawful" under the Voting Rights Act (internal quotations omitted)).

[82] In *Johnson*, the plaintiffs produced a wealth of evidence regarding the history of disenfranchisement in Florida. Brief of Plaintiffs–Appellants at 5–16, Johnson v. Governor of Fla., 2004 WL 5467042 (11th Cir. 2005) (en banc) (No. 02-14469C). Their evidence and arguments traced the presence of discrimination from 1868, when Florida's first disenfranchisement provision was adopted to "discriminate[] against the newly freed slaves and severely dilute[] their votes," *id.* at 8, to the present use of the clemency process in the state to exacerbate racial disparities, *id.* at 13 ("In 2000, African Americans were 43.3% of the 9,750 applicants for restoration without a hearing, but only 29.2% of those determined eligible and only 25.3% of those whose civil rights were ultimately restored."). At the trial level, plaintiffs introduced the testimony of numerous experts, virtually all of whom testified about the racial effects of Florida's disenfranchisement provision. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants Clemency Board Members' Motion to Exclude Plaintiffs' Witnesses and Evidence Identified Out-Of-Time at 1–3, Johnson v. Bush, 2002 WL 32495085 (S.D. Fla. 2002) (No. 00-3542-CIV). Incredibly, the plaintiff in *Cotton* litigated his claim pro se from prison. Appellants, Pro Se, Brief at 1, Cotton v. Fordice, 1997 WL 33485007 (5th Cir. 1998) (No. 97-60275). Despite his incarceration, he nevertheless presented the circuit court with a detailed history of racism in Mississippi and its connection to the state's disenfranchisement provision. *Id.* at 27–32. Indeed, the plaintiff's evidence was so strong that both the defendant and the court conceded that Mississippi's disenfranchisement provision was enacted for the purpose of discriminating against African-Americans. Cotton v. Fordice, 157 F.3d at 391.

[83] 356 U.S. 86, 101 (1958).

[84] U.S. CONST. amend. VIII.

[85] STUART BANNER, THE DEATH PENALTY 247 (2003).

blatantly discriminatory laws under the Fourteenth Amendment,[86] they were altogether unsuccessful at challenging the death penalty under the Equal Protection Clause.[87] Then, in a dissent from the denial of certiorari in *Rudolph v. Alabama*,[88] Justice Arthur Goldberg proposed that the death penalty might violate the "evolving standards of decency" prohibited under the Eighth Amendment.[89]

Reacting to Goldberg's dissent, the NAACP Legal Defense Fund (LDF) abandoned its Fourteenth Amendment approach and co-opted the Eighth Amendment challenge.[90] After winning a series of cases with narrow holdings,[91] LDF's broader argument carried the day in *Furman v. Georgia*, where the Supreme Court held Georgia's death penalty unconstitutional under the Eighth Amendment.[92] LDF's argument—that the rareness of the death penalty made the selection of eligible defendants "arbitrary"—allowed some Justices in the majority to voice their concerns about the discrimination present in the application of the death penalty, even when those concerns were not based on intentional discrimination as required for invalidation under the Equal Protection Clause.[93]

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[86] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 20 (1953) (holding that restrictive covenants segregating neighborhoods by race violated the Equal Protection Clause); McLaurin v. Okla. State Regents, 339 U.S. 637, 642 (1950) (finding a state law that provided different graduate education for students based on race invalid under the Fourteenth Amendment).

[87] Rudolph v. State, 152 So. 2d 662, 666 (Ala. 1963) (refusing to take judicial notice of the discrimination present in the imposition of death sentences between black and white defendants); State *ex rel.* Johnson v. Mayo, 69 So. 2d 307, 308 (Fla. 1954) (ruling that statistics showing a disparity in imposing the death sentence between black and white defendants did not prove acts of discrimination); Williams v. State, 335 S.W.2d 224, 225–26 (Tex. 1960) (upholding the defendant's sentence of death despite statistical evidence showing the disparity in death sentences); Hampton v. Commonwealth, 58 S.E.2d 288, 298 (Va. 1950) (finding "not a scintilla of evidence" to support defendants' claim of discrimination).

[88] 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of cert.).

[89] *Id.* at 890 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[90] BANNER, *supra* note 85, at 252.

[91] *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 521–22 (1968) (ruling that a state cannot exclude jurors for expressing general objections to the death penalty); United States v. Jackson, 390 U.S. 570, 585 (1968) (striking down the capital punishment clause of the Federal Kidnapping Act as unconstitutional).

[92] 408 U.S. 238, 239 (1972) (per curiam). *Furman* was a 5-4 decision and all 9 justices on the Court wrote separate opinions. *Id.*

[93] BANNER, *supra* note 85, at 269. For example, Justice Douglas wrote in his concurrence that "[i]n several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty." *Furman*, 408 U.S. at 251 (Douglas, J., concurring).

Indeed, the core value embodied by the Eighth Amendment makes it a more appropriate avenue for a constitutional challenge to felon disenfranchisement. From the beginning of modern Eighth Amendment jurisprudence, the Court has said that the ban on cruel and unusual punishment has a prospective scope and "may acquire meaning as public opinion becomes enlightened by a humane justice."[94] In *Trop v. Dulles*, the seminal Eighth Amendment case, the Court announced that the Amendment "must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society."[95] The *Trop* Court envisioned the Eighth Amendment as evolutionary, where a form of punishment once unquestioned might be viewed by future generations as outside the limits of civilized standards and constitutionally impermissible.[96] By contrast, the Equal Protection Clause generally requires a plaintiff to show that the state intended to engage in invidious discrimination when it first acted in the field.[97] Once a court has ruled that the law's creation was not tainted with a racially discriminatory purpose, stare decisis demands that the ruling be respected unless it is proven unworkable.[98]

Because of the prospective nature of the *Trop* decision,[99] courts can feel freer to modify past rulings to adjust to current popular practices and opinions.[100] Moreover, these modifications largely push judicial decisions one way: "as moral sentiments become more refined—as the frame of reference for humanity and compassion expands—the range of constitutionally permissible punishment diminishes."[101] The Supreme

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[94] Weems v. United States, 217 U.S. 349, 378 (1910) (internal citations omitted).

[95] 356 U.S. 86, 101 (1958) (emphasis added).

[96] *Id.* at 100.

[97] Washington v. Davis, 426 U.S. 229, 239–40 (1976). The Fifth and Eleventh Circuits further require that a plaintiff must show not only that the state's original legislative action was motivated by impermissible discrimination, but also that any amendment to or modification of that law was similarly adopted with discriminatory intent. Johnson v. Governor of Fla., 405 F.3d 1214, 1224 (11th Cir. 2005) (en banc); Cotton v. Fordice, 157 F.3d 388, 392 (5th Cir. 1998).

[98] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (plurality opinion).

[99] *Trop*, 356 U.S. at 101.

[100] *See* William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1384 (2005).

[101] *Id.* (internal quotations marks omitted). The notable exception to this one-way street of Eighth Amendment interpretation is the death penalty (once again). In *Furman v. Georgia*, the Court invalidated Georgia's death penalty law, ruling that its "imposition . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." 408 U.S. 238, 239–40 (1972). Four years later, however, the Court in *Gregg v. Georgia* upheld Troy Gregg's sentence of death for a murder conviction. 428 U.S. 153, 158, 207 (1976).

Court, recognizing the potential arbitrariness that might result from such a free-wheeling mandate, has attempted to rein in this power by looking for "objective evidence of contemporary values," as evidenced by "legislation enacted by the country's legislatures."[102] However, the Court simultaneously reserves the right to exercise its own judgment on what practices are cruel and unusual.[103]

Past case law demonstrates that the Supreme Court is perhaps more willing to modify its earlier rulings in the context of Eighth Amendment litigation than any other constitutional challenge. In *Atkins v. Virginia*,[104] the Court ruled that imposing the death penalty on mentally retarded criminals was cruel and unusual, directly overruling *Penry v. Lynaugh*, a case it decided just thirteen years earlier.[105] Similarly, the Court announced in *Roper v. Simmons*[106] that juveniles could no longer be constitutionally sentenced to death, reversing *Stanford v. Kentucky*,[107] decided by the Court sixteen years earlier.[108] Thus, when it comes to Eighth Amendment jurisprudence, the Court seems more willing to consider changing conditions and social attitudes, notwithstanding its own past statements regarding the legitimacy of a form of punishment, and question the punishment anew.

It may seem surprising, then, that more scholars have not argued that the Eighth Amendment is the proper channel for a challenge to felon disenfranchisement schemes.[109] However, given the quite recent

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[102] Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)) (internal quotation marks omitted).

[103] Coker v. Georgia, 433 U.S. 584, 597 (1977). This "independent judgment," though continually invoked by the Court, has never been used to strike down a form of punishment that did not meet the evolving standards comparison, using legislative action or popular opinion as evidence. Heffernan, *supra* note 100, at 1380–81.

[104] *Atkins*, 536 U.S. 304.

[105] *Penry*, 492 U.S. at 322, 335 (holding that failure to instruct the jury that it could consider mitigating evidence of defendant's mental retardation was cruel and unusual, but that sentencing a mentally retarded man to death, per se, was not), *overruled by Atkins*, 536 U.S. at 314–15 (finding that "[m]uch has changed since [*Penry*]," including the fact that states post-*Penry* overwhelmingly provided additional protections for mentally retarded defendants facing the death penalty).

[106] 543 U.S. 551 (2005).

[107] 492 U.S. 361, 371–72 (1989) (ruling that because a majority of the states with capital punishment regimes allow defendants sixteen or older to face a possible sentence of death, the practice was not unusual and did not violate the Eighth Amendment).

[108] *Roper*, 543 U.S. at 566 (finding a significant decrease in states allowing juveniles to be sentenced to death, although noting that this decrease was not as substantial as in *Atkins*).

[109] *See, e.g.*, Cosgrove, *supra* note 28 (arguing that the language of Section Two of the Fourteenth Amendment applies only to male offenders and that the Nineteenth Amendment repealed this Section); Liles, *supra* note 17 (discussing the future of such challenges under

developments foreclosing the Voting Rights Act as a viable method to challenging these laws,[110] and given the fact that until 2010, the Court's main Eighth Amendment jurisprudence focused largely on the death penalty,[111] a viable challenge construing felon disenfranchisement as cruel and unusual under the Eighth Amendment has seemed unlikely until now. In *Rummel v. Estelle*, the Court went so far as to say that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[112]

Then, in May 2010, the Supreme Court decided *Graham v. Florida*[113] and reconstrued the "death is different" jurisprudence into a more expansive

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the Fourteenth Amendment and the Voting Rights Act); Shapiro, *supra* note 46 (arguing that such challenges should be made under the Voting Rights Act). *But see* Thompson, *supra* note 8, at 199–201 (advocating that felon disenfranchisement is cruel and unusual under Justice Brennan's four principles espoused in *Furman v. Georgia*); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 136–43 (2005) (exploring the possibility of an Eighth Amendment challenge to felon disenfranchisement).

[110] Indeed, until October 7, 2010, the Ninth Circuit maintained that the Voting Rights Act *did* preclude Washington's felon disenfranchisement law, creating a circuit split on the issue. Farrakhan v. Gregoire, 623 F.3d 990, 990–91 (9th Cir. 2010).

[111] Considering all the Eighth Amendment challenges to defendants' criminal sentences, it seems that since *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court has been much more sympathetic to attacks on the death penalty. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (finding it unconstitutional to sentence a defendant to death for the crime of rape of a child that did not result in death); Panetti v. Quarterman, 551 U.S. 930, 934–35 (2007) (ruling that criminals may not be executed if they are incapable of understanding the reason for their imminent execution); *Roper*, 543 U.S. at 578 (holding that juveniles may not be sentenced to death); Atkins v. Virginia, 536 U.S. 304, 306–07 (2002) (stating that mentally retarded defendants may not be sentenced to death); Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding it unconstitutional to sentence a defendant to death for aiding and abetting a felony wherein a murder is committed by others without any intent on the part of the defendant); Coker v. Georgia, 433 U.S. 584, 599 (1977) (ruling that a sentence of death for the rape of an adult woman was cruel and unusual).

By contrast, Eighth Amendment challenges to other criminal sentences as disproportionate to the crime largely fail. *See, e.g.*, Ewing v. California, 538 U.S. 11, 30–31 (2003) (holding that California's three strikes law was not cruel and unusual); Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991) (finding that although a sentence to life without parole for a first-time offender may be cruel, it is not unusual and therefore does not violate the Eighth Amendment); Rummel v. Estelle, 445 U.S. 263, 283–84 (1980) (ruling that a mandatory life sentence following a defendant's third felony conviction, this time for obtaining $120.75 by false pretenses, was not cruel and unusual). The sole exception to this peculiar history is *Solem v. Helm*, where the Court ruled that a sentence of life without parole for the crime of writing a check from a fake account did constitute cruel and unusual punishment. 463 U.S. 277, 303 (1983).

[112] *Rummel*, 445 U.S. at 272.

[113] 130 S. Ct. 2011 (2010).

view of the Eighth Amendment.[114] The Court ruled that juvenile offenders who have been convicted of non-homicidal crimes may not be sentenced to life without the possibility of parole. For the first time in the Court's history, it created a categorical exclusion under the Eighth Amendment that did not involve the penalty of death.[115] The Court reinvigorated *Trop*'s "precept[s] of justice" and "evolving standards of decency" language, applying it outside of the capital punishment context.[116]

Most notably, the *Graham* Court recharacterized the distinction between a "gross proportionality" analysis and a categorical exclusion analysis.[117] Previously, most courts had applied the gross proportionality analysis to all sentences not implicating the death penalty.[118] This analysis "does not require strict proportionality between crime and sentence" and "forbids only extreme sentences that are grossly disproportionate to the crime."[119] The gross proportionality analysis is heavily fact-centered, taking into account all of the circumstances of the case at hand and inquiring whether the *exact* punishment imposed is excessive.[120] Challenges in cases analyzed under the "gross proportionality" requirement are widely unsuccessful and, even when the offender does prevail, so fact-specific that they rarely apply outside of the instant case.[121] In fact, there have been just three instances where the Supreme Court has found the punishment in question cruel and unusual under a gross proportionality analysis, and none since 1983.[122]

The *Graham* Court, however, construed the challenged punishment as part of a larger categorical challenge and subjected it to a much more

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[114] *See generally Graham*, 130 S. Ct. 2011. Commentators have credited the origin of the "death is different" phrase to Justice Stewart, who wrote in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring), that "[t]he penalty of death differs from all other forms of criminal punishment . . . ." *See, e.g.*, Daniel Ross Harris, Note, *Capital Sentencing After* Walton v. Arizona*: A Retreat from the "Death Is Different" Doctrine*, 40 AM. U. L. REV. 1389, 1390 n.7 (1991); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 364 n.79 (1999).

[115] *Graham*, 130 S. Ct. at 2023.

[116] *Id.* at 2021.

[117] *Id.* at 2022.

[118] *See* Robert Smith & G. Ben Cohen, Commentary, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSION 86, 87 (2010).

[119] Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (internal quotation omitted).

[120] *See* Smith & Cohen, *supra* note 118, at 87.

[121] Rummel v. Estelle, 445 U.S. 263, 272 (1980).

[122] Solem v. Helm, 463 U.S. 277 (1983); Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349 (1910).

searching analysis.[123] Under the modified categorical exclusion analysis, the Court asked whether the general punishment in question (life without the possibility of parole) was permissibly imposed on the offenders in question (juveniles convicted of non-homicidal crimes).[124] Having framed the issue, the Court employed the standards used in previous death penalty cases.

Smith and Cohen observe that, whether or not this move by the Court was wise, the characterization "appears poised to stay."[125] Thus, the next portion of this Comment follows the steps of analysis articulated by the *Graham* Court and shows how one state's felon disenfranchisement scheme might successfully be challenged by arguing that it imposes cruel and unusual punishment, prohibited by the Eighth Amendment.

III. A LIFE SENTENCE: CHALLENGING VIRGINIA'S DISENFRANCHISEMENT PROVISION AS CRUEL AND UNUSUAL

Generally speaking, when courts confront Eighth Amendment challenges to a state practice or law, they typically take most seriously challenges to the most draconian or extreme form of that practice. In the context of the juvenile justice system, advocates first worked to exempt juveniles from the death penalty[126] before challenging their sentences of life without the possibility of parole for non-homicidal crimes.[127] As Smith and Cohen note, it was the convergence of reasoning in *Roper*[128] and *Kennedy v. Louisiana*[129] that allowed the Court in *Graham* to find a constitutional violation.[130] In other words, but for *Roper*, there would be no *Graham*.[131]

In the context of disenfranchisement, attacking the practice wholesale will likely result in immediate dismissal from most courts.[132] Instead, a

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[123] Graham v. Florida, 130 S. Ct. 2011, 2023 (2010). Justices Thomas and Scalia noted the Court's innovation and departure from the "death is different" distinction, declaring it "especially mystifying when one considers how long it has resisted crossing that divide." *Id.* at 2046 (Thomas, J., dissenting).

[124] *Id.* at 2039 (Roberts, C.J., concurring in the judgment).

[125] Smith & Cohen, *supra* note 118, at 89.

[126] Roper v. Simmons, 543 U.S. 551 (2005).

[127] *Graham*, 130 S. Ct. 2011.

[128] *Roper*, 543 U.S. 551.

[129] 554 U.S. 407 (2008).

[130] Smith & Cohen, *supra* note 118, at 91–92.

[131] *Id.*

[132] There are several reasons, both practical and legal, why a court would not take such a challenge seriously. In its broadest form, forty-eight states deprive *some* felons of the right to vote for *some* period of time. *See infra* Part III.C. Most courts that have addressed an Eighth Amendment challenge to felon disenfranchisement wholesale have given it short

serious challenge to felon disenfranchisement laws will begin with the most draconian forms of those laws, found in just four states—Iowa,[133] Florida,[134] Kentucky,[135] and Virginia.[136] For reasons explained in Part B, this Comment's analysis of the *Graham* test will focus on the sweeping disenfranchisement provision found in the Virginia constitution.

A. EIGHTH AMENDMENT CATEGORICAL EXCLUSION ANALYSIS

Before a court will analyze a state or federal law for Eighth Amendment violations, petitioners must clear a threshold hurdle: they must establish that the law in question is indeed punishment and not merely a regulation.[137] If the court finds a law to be merely a regulation of the field, this ends the Eighth Amendment inquiry, as its focus is *punishments*.[138]

If a petitioner successfully persuades a court that the disenfranchisement provision is indeed punitive, he or she must satisfy every step of the categorical exclusion analysis. Under the categorical exclusion analysis articulated by the *Graham* Court, a court considering any challenge to a category of punishment must first consider the "objective indicia of society's standards."[139] In so doing, it will conduct a survey of state legislation and sentencing practices to determine whether a "national consensus against the sentencing practice at issue" exists.[140]

Next, a court must make its own independent judicial determination as to whether the punishment is prohibited under the Eighth Amendment, using the provision's "text, history, meaning, and purpose."[141] In the context of felon disenfranchisement, the court should: (a) consider the offender's characteristics to determine whether the particular class of offenders in question has some common characteristic rendering those offenders less deserving of punishment than offenders at large, and (b)

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shrift, disposing of the claim quickly. *See, e.g.*, Theiss v. State Admin. Bd. of Election Laws of Md., 387 F. Supp. 1038, 1041–42 (D. Md. 1974); Fincher v. Scott, 352 F. Supp. 117, 119 (M.D.N.C. 1972); Kronlund v. Honstein, 327 F. Supp. 71, 74 (N.D. Ga. 1971).

[133] IOWA CONST. art. II, § 5.

[134] FLA. CONST. art. VI, § 4.

[135] KY. CONST. § 145.

[136] VA. CONST. art. II, § 1. *See* Erika Wood, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 3 (2d ed. 2009); *see also* Wendy R. Weiser & Lawrence Norden, BRENNAN CTR. FOR JUSTICE, VOTING LAW CHANGES IN 2012, at 34–36 (2011).

[137] *See, e.g.*, Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167–69 (1963).

[138] Smith v. Doe, 538 U.S. 84, 93–94 (2003).

[139] Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) (quoting Roper v. Simmons, 543 U.S. 551, 563 (2005)).

[140] *Id.* at 2023.

[141] *Id.* at 2022 (quoting Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)).

analyze the nature of the offense to determine whether it is less deserving of punishment than other offenses punished in the same way.[142] The court should also consider the nature of the punishment, to see how it compares against other possible punishments and the penological justification for it, to determine whether any legitimate justification exists.[143] As to the last factor, if the court finds *no* legitimate penal objective, the sentence in question "is by its nature disproportionate to the offense" and must be invalidated under the Eighth Amendment.[144]

Finally, the court may look to how the practices of the punishment within the United States compare to the practices within other countries around the world.[145] Although the *Graham* Court did look to international sentencing practices to support its finding,[146] an international comparison can only lend support and should not itself be considered dispositive on the issue of whether a punishment is cruel and unusual.[147]

B. LIFETIME FELONY DISENFRANCHISEMENT IS PUNITIVE AND NOT REGULATORY

As a threshold issue, a party bringing a claim against felon disenfranchisement must establish that the law in question is punitive in order to invoke the protections of the Eighth Amendment.[148]

In *Trop v. Dulles*, the Court mentioned in passing that unlike the revocation of citizenship, where the effects are so drastic that it can only be punitive in nature, revocation of access to the voting franchise might

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[142] *Id.* at 2026–27.

[143] *Id.* at 2026–28.

[144] *Id.* at 2028.

[145] *Id.* at 2033–34.

[146] *Id.*

[147] The debate over the appropriate role that international law should play in American constitutional jurisprudence is far outside the bounds of this Comment. Suffice it to say that Justice Thomas notes his bitter disagreement with the majority's choice to employ comparisons with foreign jurisdictions, "confining to a footnote" his belief that "such factors are irrelevant to the meaning of our Constitution or the Court's discernment of any longstanding tradition in *this* nation." *Id.* at 2053 (Thomas, J., dissenting).

[148] In *Smith v. Doe*, the Court explained how it distinguished between regulatory and punitive schemes:

> If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the state's] intention to deem it civil. Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

538 U.S. 84, 92 (2003).

legitimately "designate a reasonable ground of eligibility for voting," and could thus be sustained as a "nonpenal exercise of the power to regulate the franchise."[149] Although this statement was dicta and posed as a simple hypothetical,[150] the Court gave it more force in *Lassiter v. Northampton County Board of Elections*, when it stated that "[r]esidence requirements, age, [and] previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."[151] These statements, taken together, have been enough to convince some courts that felon disenfranchisement is regulatory, not punitive, and therefore not subject to the dictates of the Eighth Amendment.[152]

However, given subsequent developments in conceptions of the right to vote, Professor Pamela Karlan argues that these prior decisions were based on an outdated understanding that states had plenary power to regulate the franchise, including regulating by disqualifying those who were "practically hostile" to established moral values.[153] The Court repudiated the "hostility to moral values" view in *Carrington v. Rash*, striking down laws that denied the right to vote to "persons advocating a certain practice."[154]

But arguing the inapplicability of the statements in *Trop* and *Lassiter* in the face of *Carrington* will at best create a blank slate as to the regulatory or punitive function of felon disenfranchisement laws. Further proof that the disenfranchisement provision is punitive must still be given. To that end, the Reconstruction Act of 1870[155] provides forceful evidence that Virginia's constitutional provision disenfranchising felons must be punitive.

The Reconstruction Act of 1870 was one of four acts passed to readmit the eleven ex-Confederate states into the Union.[156] The Act requires:

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[149] 356 U.S. 86, 96–97 (1959).

[150] Wilkins, *supra* note 109, at 102 ("[T]he Court invoked a hypothetical statute from a hypothetical jurisdiction, then assumed (without examining the history of the hypothetical statute or of disenfranchisement practices in the hypothetical jurisdiction) that the hypothetical statute's purpose was to regulate the franchise.").

[151] 360 U.S. 45, 51 (1959).

[152] Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967); Beacham v. Braterman, 300 F. Supp. 182, 184 (S.D. Fla. 1969), *aff'd*, 396 U.S. 12 (1969).

[153] Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate of Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150–51 (2004).

[154] 380 U.S. 89, 94 (1965).

[155] Act of Jan. 26, 1870, ch. 10, 16 Stat. 62.

[156] Act of Feb. 27, 1870, ch. 19, 16 Stat. 67 (readmitting Mississippi); 16 Stat. 62 (readmitting Virginia); Act of June 25, 1868, ch. 70, 15 Stat. 73 (readmitting North Carolina,

> That the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions: First, That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law*, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State.[157]

The Virginia Constitution, including the felon disenfranchisement provision, was subsequently ratified in 1870.[158] Therefore, the Act required that any disenfranchisement provision enacted in Virginia *must* be for the purpose of punishment,[159] or else Virginia would, in effect, be violating the terms upon which it was readmitted into the Union.

Invoking the Reconstruction Act as dispositive proof that Virginia's lifetime felon disenfranchisement provision is punitive forces the state into a sort of catch-22. If the state argues that its constitutional provision is merely regulatory, then the Act functions as an alteration made by Congress to a state's federal election laws, as permitted by Article I, Section Four of the Constitution.[160] If the state instead avoids this argument and does not

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South Carolina, Louisiana, Georgia, Alabama, and Florida); Act of June 22, 1868, ch. 69, 15 Stat. 72 (readmitting Arkansas).

Florida's Reconstruction Act, with language nearly identical to the one applicable to Virginia, may allow for a similar challenge to be brought against the state of Florida. 15 Stat. 73. However, Florida only recently began imposing lifetime disenfranchisement for all convicted felons. David Ruppe, *Florida Changes Controversial Voting Policy*, ABC NEWS, Mar. 26, 2007, http://abcnews.go.com/US/story?id=93730&page=1&singlePage=true#.T0RQbXKXSs4. While the state constitution authorizes the state's sweeping disenfranchisement provision, *see* FLA. CONST. art. VI, § 4, the state had previously provided for automatic restoration of some individuals previously convicted of felonies. *See* Ari Berman, *The GOP War on Voting*, ROLLING STONE, Sept. 15, 2011, at 49. In March 2011, however, after just thirty minutes of public debate, Republican Governor Rick Scott overturned that streamlined process. *Id.* (noting that the change instantly disenfranchised 97,491 individuals and precluded another 1.1 million individuals from being allowed to vote after completing their sentences). Given the infancy of the state's disenfranchisement provision, as well as the special attention given to the issue in Florida (the state's application of its disenfranchisement provision became a controversial issue during the 2000 Presidential election), this Comment will not address how such an alternative challenge might succeed.

[157] 16 Stat. 62 (emphasis added).

[158] VA. CONST. art. II, § 1.

[159] *See* 16 Stat. 62. The Act also requires that Virginia limit its disenfranchisement scheme to those crimes that were at the time "felonies at common law." *Id.* This presents a strong alternative argument, but as it has no bearing on an Eighth Amendment claim, I will not address it here.

[160] U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof,

challenge petitioner's contention that the disenfranchisement provision is punitive, then no invocation of the Act is necessary and the analysis can move on to the next phase.

One pre-Voting Rights Act case in Virginia casts doubt on the validity of the Reconstruction Act and is worth rebutting here. In *Butler v. Thompson*, a black woman brought suit in federal court seeking an order to compel Virginia to register her as a voter despite her failure to pay the state's poll tax.[161] The court rejected her claim, questioning whether the state's failure to comply with certain conditions was justiciable in the courts and whether the Act was even valid at all.[162] The court suggested that the Supreme Court's ruling in *Texas v. White*, that the Confederate States were never legally outside the Union, obviated any need for readmission.[163] Finally, the court stated that the Act *must* not unduly restrict the election laws of Virginia in order to have any force, since "the constitutional duty of guaranteeing each state a republican form of government gives Congress no power in admitting a state to impose a restriction which would operate to deprive that state of equality with other states."[164]

In contrast, numerous federal courts have applied the Reconstruction Act of 1870 without mention of any genuine validity issues.[165] The Supreme Court itself, in *Richardson v. Ramirez*, cited the Reconstruction Acts favorably.[166] Second, the argument that Congress may not treat states unequally appears to have been answered when the Supreme Court, in *Bartlett v. Strickland*, upheld the constitutionality of Section Five of the Voting Rights Act, which requires federal approval for redistricting decisions in nine specified states.[167]

Thus, it appears that the Reconstruction Act of 1870 is valid and does have force. As such, its mandate that Virginia may only disenfranchise felons for a punitive purpose should be respected by a court, and section one of article II in the Virginia constitution should be construed as punitive.

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but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[161] Butler v. Thompson, 97 F. Supp. 17, 20–21 (E.D. Va. 1951).

[162] *Id.* at 19.

[163] *Id.* at 20 (citing Texas v. White, 74 U.S. 700, 721 (1868)).

[164] *Id*. at 21 (citing Coyle v. Smith, 221 U.S. 559, 570 (1911)).

[165] *E.g.*, Harvey v. Brewer, 605 F.3d 1067, 1076 (9th Cir. 2010) (holding that Section Two of the Fourteenth Amendment was not limited to felonies at common law when it was ratified because where Congress wished to place such a limitation, it did so explicitly); Coronado v. Napolitano, No. CV 07-1089-PHX-SMM, 2008 WL 191987, at *8 (D. Ariz. Jan. 22, 2008) (same).

[166] 418 U.S. 24, 49–51 (1974).

[167] 556 U.S. 1 (2009).

C. OBJECTIVE INDICIA DEMONSTRATE A NATIONAL CONSENSUS AGAINST IMPOSING INDISCRIMINATE LIFETIME FELONY DISENFRANCHISEMENT

Once a law is construed as punitive, the court may properly subject it to an Eighth Amendment analysis. The Court, in *Graham v. Florida*, articulated that any categorical exclusion analysis must begin by establishing a "national consensus" through "objective evidence of . . . the legislation enacted by the country's legislatures."[168] In the context of felon disenfranchisement, only four states—Iowa, Florida, Kentucky,[169] and Virginia[170]—now exclude individuals convicted at *any* time of *any* felony from the franchise for life.[171] Although forty-eight states deprive some felons of the right to vote for some period of time, no other states provide the combination of permanency and breadth present in these four states' constitutional provisions.[172] Thirty-seven states and the District of Columbia currently allow felons to be re-enfranchised at least upon completion of their sentences; two states, Maine and Vermont, currently allow felons to vote even while they are incarcerated.[173] The remaining seven states[174] impose lifetime disenfranchisement upon conviction of specifically enumerated felonies or upon conviction of a felony for the second time.[175]

However, as the *Graham* Court recognized, "[t]here are measures of consensus other than legislation," such as actual sentencing practices.[176] Here, too, Virginia stands out as one of the most extreme examples of felon

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[168] 130 S. Ct. 2011, 2022–23 (2010).

[169] KY. CONST. § 145.

[170] VA. CONST. art. II, § 1.

[171] Wood, *supra* note 136, at 3.

[172] *Id.*

[173] Of these thirty-seven states, five states (California, Colorado, Connecticut, New York, and South Dakota) allow felons on probation to vote, and thirteen states (Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah) and the District of Columbia allow those on probation *or* parole to vote. *Id.*

[174] The remaining seven states are Alabama, Arizona, Delaware, Mississippi, Nevada, Tennessee, and Wyoming. *Id.*

[175] BRENNAN CTR. FOR JUSTICE, CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES 2–3, *available at* http://www.brennancenter.org/page/-/d/download_file_48642.pdf. See *infra* note 186 for a discussion of states that have recently abolished disenfranchisement schemes identical to those found in Kentucky and Virginia.

[176] Graham v. Florida, 130 S. Ct. 2011, 2022–23 (2010) (quoting Kennedy v. Louisiana, 554 U.S. 407, 421–22 (2008)).

disenfranchisement.[177] Virginia's provision currently deprives 377,847 residents, or 6.8% of its population, from access to the ballot box.[178] In comparison, the only states with figures that exceed or approximate Virginia's are Texas (which currently disenfranchises 522,887 individuals) and Florida (which currently disenfranchises 1,179,687 individuals).[179] While the raw number of disenfranchised individuals is greater in Texas than in Virginia, the Texas figure represents only 3.3% of the state's population.[180] Furthermore, Texas deprives its felons of access only while they are completing their sentences, and thus, most of those who currently cannot vote will regain suffrage at some point in the future.[181]

Finally, the Court in *Atkins v. Virginia*[182] and *Roper v. Simmons*[183] noted that another important factor in an Eighth Amendment analysis regarding the presence of a "national consensus" is the history and substance of recent state action regarding the punishment in question.[184] Just as the Court in those decisions recognized the consistency of the direction of change in the state legislatures, here, too, there has been a largely one-way movement of states addressing their felon disenfranchisement provisions.[185] In just a thirteen-year period from 1997 to 2010, twenty-three states reformed their felon disenfranchisement laws in various ways to make the franchise more accessible to ex-felons.[186] As the *Atkins* Court observed, "[g]iven the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting . . . [the punishment in question] provides powerful evidence that today our society['s] views" have changed.[187] Moreover, there is direct evidence that

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[177] SENTENCING PROJECT, INTERACTIVE MAP, http://www.sentencingproject.org/map/map.cfm#map (last visited Feb. 11, 2012).

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] 536 U.S. 304, 314 (2002).

[183] 543 U.S. 551, 566 (2005).

[184] *Atkins*, 536 U.S. at 315–16.

[185] NICOLE D. PORTER, SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2010, at 4–5 (2010), *available at* http://www.sentencingproject.org/doc/publications/publications/vr_ExpandingtheVoteFinalAddendum.pdf.

[186] *Id.* For example, nine states either abandoned or modified lifetime disenfranchisement laws, including Alabama, Delaware, Florida, Iowa, Maryland, Nebraska, and New Mexico. *Id.* Eight more simplified their restoration processes for qualified people seeking to have their voting rights restored. *Id.* at 1.

[187] *Atkins*, 536 U.S. at 315–16.

the population at large disapproves of lifetime disenfranchisement. According to a poll conducted by the Center for Survey Research and Analysis in 2001, only 18 percent of respondents supported permanent disenfranchisement of felons.[188]

All of this evidence indicates that in the context of a challenge to Virginia's lifetime disenfranchisement provision, a national consensus has emerged against the imposition of this punishment.

D. LIFETIME DISENFRANCHISEMENT OF ALL FELONS HAS NO LEGITIMATE PUNITIVE JUSTIFICATIONS

However, the *Graham* Court stressed that a national consensus would not itself determine the standards of what constitutes cruel and unusual punishment, stating that "the task of interpreting the Eighth Amendment remains [the judiciary's] responsibility."[189] Under this analysis, the Court will examine the nature of the offender, the offense, and the punishment all separately and comparatively.[190] Because felons as a general group do not evoke the kind of sympathy that other groups like juveniles or the mentally handicapped do, and because the set of felonies in Virginia encompasses everything from possession of a certain amount of marijuana[191] to premeditated murder, it is unlikely that presenting the general group as somehow having less culpability would succeed.[192]

However, the court will also consider separately whether the punishment serves legitimate penal goals.[193] In the context of a claim against Virginia's disenfranchisement provision, petitioners will have to show that the state's law does not serve any of the four traditional legitimate penological aims: rehabilitation, incapacitation, deterrence, and retribution.[194]

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[188] *See also* PETER D. HART RESEARCH ASSOCIATES, INC., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 14 (2002), *available at* http://www.soros.org/sites/default/files/Hart-Poll.pdf (finding that 68% of respondents "strongly favor" or "somewhat favor" reenfranchising people with felony convictions after they are released from prison).

[189] Graham v. Florida, 130 S. Ct. 2011, 2026 (2010).

[190] *Id.*

[191] VA. CODE ANN. §§ 18.2-9 to -11 (2009).

[192] In *Graham*, petitioners were able to present a group of sympathetic plaintiffs (juveniles) being subjected to the second-worst punishment available (life in prison without the possibility of parole) for a group of crimes that specifically excluded the worst (non-homicide offenses). *Graham*, 130 S. Ct. at 2026–28.

[193] *Id.* at 2026.

[194] *Id.* at 2028–30 (noting that "[a] sentence lacking any penological justification is by its nature disproportionate to the offense" and therefore unconstitutional).

It is clear that any *lifetime* felon disenfranchisement cannot serve legitimate rehabilitative ends. Similar to the sentence in *Graham*, a sentence of lifetime removal from suffrage "forswears altogether the rehabilitative ideal."[195] The Court in *Graham* suggested that a decision that characterizes a group irredeemable and deprives them of the option of redemption would be met with suspicion.[196]

Nor can lifetime disenfranchisement be justified under a theory of incapacitation. Overall, it is unlikely that anyone would seriously argue that depriving a felon of the right to vote somehow will prevent her from committing some future criminal offense unrelated to voting.[197] Yet, the real effect of this penological justification draws on the moral desire to protect the purity of the ballot box.[198] Even in the context of voting, this justification carries no weight.[199] As Karlan discusses, the actual occurrence of voting fraud is low and rarely determinative in an election.[200] Moreover, when analyzing how many of those convicted of voting fraud have previously been convicted of a felony, the number dwindles to nearly zero.[201] Due to the technological advances in the way citizens vote, it is likely that election fraud may no longer pose a serious danger.[202] Furthermore, even if election fraud is a sufficient danger to warrant disenfranchisement, Virginia's provision disenfranchising *all* felons regardless of the crime reaches much further than necessary to prevent any fraud.[203] Indeed, the disconnect becomes apparent when comparing an individual convicted of possessing a large amount of marijuana, who is disenfranchised for life, with an individual convicted of a fraud-related crime, who will not lose his vote if the fraud was a misdemeanor.

Like the argument for incapacitation, the argument for lifetime disenfranchisement under a deterrence theory generally falls flat.[204] Realistically, it is unlikely that a would-be criminal, undeterred by the threat of long-term incarceration, limited freedom afterward on parole, and

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[195] *Id.* at 2030.

[196] *See id.*; *see also* Smith & Cohen, *supra* note 118, at 93.

[197] *See* Karlan, *supra* note 153, at 1167.

[198] *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box*," 102 HARV. L. REV. 1300, 1314 (1989).

[199] Karlan, *supra* note 153, at 1167.

[200] *Id.* at 1169.

[201] *Id.* at 1167.

[202] Thompson, *supra* note 8, at 190.

[203] *Id.*

[204] Karlan, *supra* note 153, at 1166.

the imposition of fines, would choose to abstain from crime based solely on the prospect that he would lose his ability to vote.[205]

Thus, the only justification for lifetime disenfranchisement is under a retributive theory.[206] However, the *Graham* Court is careful to note that while retribution is a legitimate reason to punish, "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[207] As Professor Karlan has observed, "[a] categorical disenfranchisement of all ex-offenders convicted of a felony lumps together crimes of vastly different gravity," and thus offenders without a high degree of blameworthy conduct, such as mere possession of cocaine,[208] are given the same punishment with the same justification as offenders with the highest degree of blameworthy conduct, such as those convicted of murder.[209] Although no precise degree of proportionality is required under an Eighth Amendment analysis, it is likely that a court will find that the complete lack of any proportionality renders Virginia's disenfranchisement provision invalid under a retributive penological justification.

E. WHEN COMPARED AGAINST INTERNATIONAL PRACTICES, VIRGINIA'S LIFETIME DISENFRANCHISEMENT PROVISION FOR ALL FELONIES APPEARS EVEN MORE CRUEL AND UNUSUAL

The Court in *Graham* looked to the international community to evaluate the cruelty and unusualness of Florida's sentencing practice.[210] The Court insisted, however, that "[t]he judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment," but merely relevant in assessing how far-reaching the consensus is against the challenged punishment.[211]

In the present case, the United States and Belgium are the only two countries among Western industrial nations to deny felons access to the

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[205] *Id.* Moreover, there is some evidence that suggests that disenfranchisement, when considered with other collateral consequences to conviction, actually *increases* the chances that a previously convicted individual will reoffend. *See* Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 820 (2010) (arguing that obstacles to reentry, imposed because of the conviction, "decreas[e] the utility of non-offending" and explain the low deterrence effect of even long-term incarceration).

[206] Karlan, *supra* note 153, at 1166.

[207] Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) (citations omitted).

[208] VA. CODE ANN. § 18.2-255.2 (2009).

[209] Karlan, *supra* note 153, at 1167.

[210] *Graham*, 130 S. Ct. at 2033.

[211] *Id.*

franchise for life.[212] Furthermore, the United States is the *only* country that permits disenfranchisement based on a category as broad as "all felonies."[213] In the mid-1960s, most of Europe questioned the practice of disenfranchisement altogether, and several countries enacted reforms to allow felons greater access to the ballot.[214] This movement has accelerated in recent years, as various courts have removed many limitations on the access to the ballot.[215] As the Sentencing Project noted in its 2007 report, *Barriers to Democracy*, "The United States' policy of criminal disenfranchisement is extreme by every metric, and there is compelling need for reform."[216]

The Court stated in *Graham*:

> the laws and practices of other nations and international agreements [are] relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.[217]

In the present context, we see how out of step Virginia is when compared with the rest of the world.

IV. CONCLUSION

Although previous case law implicitly foreclosed all challenges to felon disenfranchisement laws, there is a silver lining to be found in the "evolving standards" guaranteed by the Eighth Amendment. This guarantee carried the day in *Graham v. Florida*, and consequently, the Court reinvigorated the view of the Eighth Amendment as a rising bar. Furthermore, the Court in *Graham* rearticulated the previous "death is different" jurisprudence, expanding its scope under the Eighth Amendment. In so doing, the Court opened the door for a lifetime felon disenfranchisement claim under a more exacting scrutiny than would have been available before *Graham*.

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[212] Wilkins, *supra* note 109, at 90.

[213] SENTENCING PROJECT ET AL., BARRIERS TO DEMOCRACY I (2007), *available at* http://www.sentencingproject.org/doc/publications/fd_PETITION_TO_IACHR_final_formatted.pdf.

[214] Demleitner, *supra* note 7, at 758–59.

[215] ALEC EWALD & BRANDON ROTTINGHAUS, CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 110–11 (2009) (noting that the Supreme Court of Canada struck down its prisoner-disenfranchisement provision in 2002 and the European Court of Human Rights declared universal suffrage for all, including felons, as "the basic principle").

[216] SENTENCING PROJECT ET AL., *supra* note 213, at V.

[217] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

In the context of Virginia's permanent disenfranchisement of all felons, petitioners may have success launching an attack on Virginia's law in the wake of *Graham*. Given the Reconstruction Act of 1870, the state would have a difficult time arguing that its disenfranchisement provision is regulatory, not punitive. Surviving this threshold issue will allow a petitioner to point to the recent reform amongst the majority of the states to include more ex-offenders on their voting rolls. Moreover, strong arguments support the position that permanent disenfranchisement for all felonies (certainly a wide range of crimes given the complexities of the modern penal code) cannot rationally serve any legitimate penological goal.

In assessing whether the provision runs afoul of the Eighth Amendment's guarantee of protection from "cruel and unusual punishments," a court may wish to consider international opinions on permanent disenfranchisement of felons. Because the international community has largely condemned disenfranchisement, this inquiry will only serve to bolster this claim.

If a petitioner can successfully challenge one of the two harshest felon disenfranchisement provisions in court, the long march toward true universal suffrage may begin. With an estimated 5.3 million men and women in the United States currently unable to speak with their ballot because of a past conviction,[218] we must extend the franchise to *all* citizens including those convicted of a felony before we can realize true political equality. As the Supreme Court noted in *Gray v. Sanders*, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[219]

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[218] SENTENCING PROJECT, VOTING RIGHTS, http://www.sentencingproject.org/template/page.cfm?id=133 (last visited February 11, 2012).

[219] 372 U.S. 368, 381 (1963).