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THE PROBLEM OF HABITUAL OFFENDER LAWS IN STATES WITH FELONY DISENFRANCHISEMENT

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Habitual offender laws operate to increase the sentence of an individual if that person already has a felony conviction. At the same time, many people with felony convictions cannot vote or run for office due to felony disenfranchisement laws. Thus, habitual offender laws target a formally disenfranchised group—people with felony convictions. That creates an archetypal political process problem. As John Hart Ely argued, laws that target a formally disenfranchised group are tainted and deserve heightened constitutional scrutiny. When reviewing habitual offender laws under the Eighth Amendment, however, courts have applied the opposite of heightened scrutiny—they have applied an extreme form of deference for decades.

This phenomenon of deference despite disenfranchisement creates a cruel democratic purgatory. It is the institutional equivalent of disenfranchising people with pre-existing health conditions, passing a health insurance law that excludes them, and then declining to hear their constitutional challenges out of deference to the democratic process. Or disenfranchising women, criminalizing abortion, and shutting the courthouse door.

This Article describes this dysfunctional dynamic and offers a solution: if a court is reviewing a habitual offender law from a state with felony disenfranchisement, it should apply heightened scrutiny, not deference.

* Clinical Lecturer in Law, Yale Law School. I thank Barry Friedman and Maria Ponomarenko for always giving my drafts a careful read and constructive feedback. I am grateful to Kenji Yoshino for his mentorship as I began this project; I will never forget his ability to hear my ideas and offer them back in a more poetic form. Chesa Boudin offered critical insight as I developed this idea. The feedback of Grace Li, Yixuan Liu, Gabriel Lopez Low, Sarah Dowd, and Meredith Wheeler improved the Article immensely. I am especially thankful for the editors at the Journal of Criminal Law & Criminology who have treated this Article with great care and patience.

INTRODUCTION

Lee Carroll Brooker lived on a quiet road in Cottonwood, Alabama.[1] Behind his house was a wooded area, where he planted about three dozen marijuana plants.[2] At seventy-six-years old, and after a life that included combat tours in Lebanon and the Dominican Republic, Brooker found that marijuana was the best medicine for his anxiety and ailing body.[3] But before long, the police found the plants and arrested him.[4]

The county trial judge sentenced Brooker to life in prison without the possibility of parole in 2014.[5] As the judge lamented, he had no choice:

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[1] Kent Faulk, *Should a 76-year-old Serve Life for Marijuana? Supreme Court Considers Review of Alabama Man's Sentence*, ADVANCE LOC. (Apr. 15, 2016, 10:00 AM), https://www.al.com/news/birmingham/2016/04/us_supreme_court_to_consider_r.html [https://perma.cc/Q8NS-KS4U].

[2] *Ex parte* Brooker, 192 So. 3d 1, 2 (Ala. 2015).

[3] Joanna Walters, *Supreme Court Considers Taking Case of Man Given Life in Prison for Growing Pot*, GUARDIAN (Apr. 15, 2016), https://www.theguardian.com/society/2016/apr/15/lee-carroll-brooker-alabama-marijuana-sentence [https://perma.cc/45QM-V2DF].

[4] *Brooker*, 192 So. 3d at 2.

[5] *Id.*

because Brooker had a prior felony conviction, Alabama's "habitual offender"[6] law required such a sentence.[7] Brooker appealed the sentence and argued that it violated the Eighth Amendment's protection against cruel and unusual punishment.[8]

Brooker's appeal failed. The Eighth Amendment, as courts currently apply it, is extremely deferential to legislative decisions about sentence lengths. If the legislature decides a sentence length is appropriate, that decision is mostly unreviewable, and courts will not strike it down.[9] Thus, even though Brooker faced life in prison for marijuana charges, Alabama courts denied his Eighth Amendment claim and the United States Supreme Court declined to intervene.[10]

The judicial unwillingness to scrutinize sentencing laws rests on the premise that such laws are the result of a legitimate democratic process and therefore are entitled to deference. Part I of this Article explores the history of this premise and how courts have increasingly relied on it to deny Eighth Amendment claims in the last 50 years. According to the premise, if Brooker does not like his sentence, then he should raise that concern in the political arena, not the courts, and cast his vote accordingly.

The problem for Brooker, and the one that animates this Article, is that he cannot vote. Because of his prior felony and Alabama's felony

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[6] I very reluctantly use the term "habitual offender law," which I understand to be imprecise and political. What the term "habitual offender law" purports to describe is a law that elevates a penalty if someone has committed a prior crime. But doing something a few times does not constitute a habit. The use of the term "habitual" thus seems to be an exaggeration. Other terms often used suffer from similar problems. These are "career criminal," "repeat offender laws," "recidivist statutes," "repetitive offender laws," and "three strikes laws." I considered new terms altogether, but concluded that using them would cause undue confusion, so I adopt, with reservation, the term habitual offender law.

[7] ALA. CODE § 13A-5-9 (2015).

[8] Walters, *supra* note 3.

[9] *See infra* Part I.

[10] *Brooker*, 192 So. 3d at 2, *aff'd sub nom.* Brooker v. State, 219 So. 3d 695 (Ala. Crim. App. 2015), *cert. denied sub nom.* Brooker v. Alabama, 578 U.S. 922 (2016). Brooker remains in the custody of the Alabama Department of Corrections, but he was released on medical furlough in 2019, at the age of 81. *See Inmate Search*, ALA. DEP'T OF CORR., http://www.doc.state.al.us/InmateSearch (last visited Jan. 29, 2023) (search for Lee Brooker using the Alabama Institutional Serial number "00296774"); Kathyrn Casteel & Will Tucker, *Arbitrary & Excessive: Marijuana trafficking sentences in Alabama*, S. POVERTY L. CTR. (Mar. 28, 2020), https://www.splcenter.org/news/2020/03/28/arbitrary-excessive-marijuana-trafficking-sentences-alabama [https://perma.cc/PTQ8-L58Y].

disenfranchisement law, Brooker cannot vote now to respond to this harsh law, nor could he vote to prevent it, because he was disenfranchised in 1998 when Alabama elected the legislature that would go on to pass the habitual offender law.[11] For Brooker, there is no democratic process. And he is not alone. In 1998, the year that the habitual offender law passed, over 240,000 Alabamians were barred from voting because of prior felonies.[12] That means that Alabama excluded roughly seven percent of voting age individuals from the political process that produced the law.[13] And that is not a random subset of seven percent—it is seven percent of the population (people with felonies) that were likely to be affected by the new law (which penalizes multiple felonies).

As Part II explains, the interaction of felony disenfranchisement and habitual offender laws creates an acute political process problem. Habitual offender laws target a group—people with felonies—who can neither vote nor run for office. Habitual offender laws operate in all fifty states; felony disenfranchisement laws operate in forty-eight. As the least-controversial strain of political process theory teaches, laws that target formally disenfranchised groups deserve heightened judicial scrutiny. But instead, courts are applying no scrutiny at all out of deference to this defective democratic process. This approach, which I will call deference despite disenfranchisement, is deeply troubling.

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[11] Throughout this Article I adopt the term "felony disenfranchisement" over the more common term "felon disenfranchisement" as a means of avoiding the word "felon," which mercilessly defines a person by their criminal conviction. I also use felony disenfranchisement over possibly better alternatives, like "felony vote-stripping" and "civil death," simply because of its common usage.

[12] *See* JAMIE FELLNER & MARC MAUER, SENT'G PROJECT & HUM. RTS. WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 11–12 (1998), https://www.hrw.org/reports/pdfs/u/us/usvot98o.pdf [https://perma.cc/9RUN-DV9U].

[13] *See Total Population by Child and Adult Populations in the United States*, KIDSCOUNT DATA CENTER (Oct. 2022), https://datacenter.kidscount.org/data/tables/99-total-population-by-child-and-adult-populations#detailed/2/2/false/869,36,868,867,9/39,40,41/416,417 [https://perma.cc/G3CG-M4H5] (documenting 3,286,449 Alabamians aged 18 or over in 1998). The rate of disenfranchisement is even higher today, at 8.6%. *See* CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON & ROBERT STEWART, SENT'G PROJECT, LOCKED OUT 2022: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY 16 (Oct. 25, 2022), https://www.sentencingproject.org/app/uploads/2022/10/Locked-Out-2022-Estimates-of-People-Denied-Voting.pdf [https://perma.cc/7MCV-83FV].

Part III suggests a better way. Of course, states could end felony disenfranchisement. But this Article takes felony disenfranchisement laws as a given and asks how courts applying the Eighth Amendment should account for them when reviewing habitual offender laws.[14] The Article's proposal is that if a state has a felony disenfranchisement law, courts should not apply deference to that state's habitual offender law. If disenfranchisement, no deference.

This Article's particular claim is novel, but important and closely related work has been done. Erwin Chemerinsky, for example, has argued that political process theory supports increased Eighth Amendment scrutiny in prison law.[15] He does not extend his claim, however, to sentencing law broadly or to habitual offender laws specifically.[16] And he invokes political process theory on the ground that prisoners are a discrete and insular minority, whereas this Article does so on the more narrow ground that people with felonies are formally disenfranchised.[17]

In his book *The Age of Culpability*, Gideon Yaffe argues that "kids should be given a break" when it comes to criminal culpability "because they are disenfranchised, denied as much say over the law as adults, and so denied an equal role in authoring the law's demands."[18] He then extends this argument to incarcerated individuals, who also cannot vote.[19] The prescriptive upshot is that people who commit crimes while incarcerated should be treated more leniently.[20] The claim of this Article is consistent with Yaffe's, but brings particular attention to the Eighth Amendment and to habitual offender laws, and offers a prescription focused specifically on constitutional standards of review.

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[14] The Supreme Court has held that a state's decision to disenfranchise people with felonies does not violate the Equal Protection Clause. Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974) (relying on Section 2 of the Fourteenth Amendment and holding that it explicitly permits states to disenfranchise people with felonies).

[15] Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459–61 (1999).

[16] *Id.*

[17] *Id.*

[18] GIDEON YAFFE, THE AGE OF CULPABILITY 1 (2018).

[19] *Id.* at 196–98.

[20] *Id.* at 197.

Finally, Eric Berger has proposed a system for determining the appropriate level of deference in Eighth Amendment cases.[21] Courts, he argues, should condition deference on each law's "democratic pedigree," which is determined by multiple factors, including whether the law targets an unpopular minority.[22] The argument in this Article could be thought of as a specific application of his approach—one which focuses on habitual offender laws and formal disenfranchisement.[23] There is also a rich and critical literature on Eighth Amendment law. Thus far, however, that literature has undertheorized Eighth Amendment law's failure to account for felony disenfranchisement.[24]

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[21] Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 37–39 (2010) (discussing the tension between the Court's deference in a prison case (*Blaze*) and lack of deference in death penalty case (*Kennedy*) and arguing that "democratic pedigree" should be the inquiry that shapes deference decisions).

[22] *Id.*

[23] Some have argued that criminal sentencing deserves strict scrutiny under the Due Process Clause. *See* Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 867–68 (2019); Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 806 (1994); Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2129–48 (2020). Ben Geiger has argued that people with convictions should be treated as a suspect class under equal protection doctrine for purposes of their treatment after their release. *See* Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1226–29 (2006). This Article makes the distinct argument that scrutiny must be elevated when reviewing sentences under the Eighth Amendment.

[24] A robust literature, for example, addresses the existence and contours of the right to a proportionate sentence. *See generally, e.g.*, Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (arguing that the Eighth Amendment was originally understood to prohibit certain methods of punishment for all crimes, but not to consider the relationship between a crime and its punishment); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011) (arguing that the Eighth Amendment was originally meant to prohibit excessive punishments, that proportionality is a retributive concept, not a utilitarian one, and that proportionality should primarily be enforced when a sentencing regime is an upward departure from prior practices); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995) (arguing that courts should adopt retributivism as the limiting principle of proportionality); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) (arguing that proportionality is an external constraint, not a feature of retributivism); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005) (arguing that proportionality is a principle not rooted in theories of

This Article has an intentionally narrow descriptive aim: to illuminate the interaction of felony disenfranchisement and habitual offender laws. What we have is a political majority formally removing democratic power from a group (people with felonies) and then allocating burdens to that group (extremely long sentences for people with felonies). Then, upon review,

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punishment, but in theories of limitation on punishment); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 575 (2005) (arguing that proportionality analysis should not be limited to retributive theory). A separate body of the literature analyzes the Court's (often inconsistent) willingness to apply proportionality. *See generally, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and The Case For Uniformity*, 107 MICH. L. REV. 1145, 1182 (2009) ("[T]he Court has resisted extending protections to noncapital cases because of a concern with judicial management."); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000) (arguing that the Court's willingness to police proportionality in the punitive damages context undermines the Court's claim that proportionality is too indefinite to apply in the criminal context). Work has also been done to find better criteria for applying the Eighth Amendment. *See generally, e.g.*, Julia Fong Sheketoff, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209 (2010) (arguing that state innovations on proportionality limitations to non-capital sentences provide the Supreme Court with a ready example of how to apply proportionality with proper concern to issues of subjectivity, inadministrability, and deference to states); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527 (2008) (offering new principles and factors to build out the existing proportionality test); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475 (2005) (proposing a theory of the Eighth Amendment organized around the notion of cruelty); Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1144, 1146 (2014) (arguing that the Cruel and Unusual Punishments Clause proscribes severe punishments disproportionately imposed upon minorities and proposing that the court apply heightened judicial scrutiny to those punishments that bear a disparate impact upon minorities.). Finally, there has been productive work assessing the Court's deference, and proposing better criteria for its application, including in this Journal. *See generally, e.g.*, James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551 (2004) (recounting the strong use of deference and arguing against it); Susan Raeker-Joran, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107 (2011) (describing the history of the Court's jurisprudence, with an eye to the Justices' willingness to engage in substantive judgments of their own, rather than deferring to legislative decisions); Aliza P. Cover, *Supermajoritarian Criminal Justic*e, 87 GEO. WASH. L. REV. 875, 881 (2019) (suggesting that to incorporate counter majoritarianism into Eighth Amendment law the Court could ask whether its independent judgment is corroborated by the strongly held moral viewpoints of a substantial *minority* of the community) (emphasis added).

courts defer to those decisions as untouchable results of the democratic process. The outcome is that people with felonies get no vote and no judicial review—just long, unreviewable sentences. The prescriptive aim of the Article is also narrow: to encourage the adoption of an Eighth Amendment doctrine that rejects deference despite disenfranchisement.

I. THE CURRENT, SACROSANCT STATUS OF HABITUAL OFFENDER LAWS

On its face, the Eighth Amendment—which prohibits "cruel and unusual punishments"—looks like a source of protection for people serving extremely long sentences. But the Supreme Court has rendered it mostly useless to them.[25] This Part tells the story of how that happened. What ideas, premises, or beliefs have guided the Court to hold that life in prison for a drug conviction is not cruel and unusual? If you read the body of Eighth Amendment sentencing cases, you start to see the word "deference" over and over. It becomes clear that the Court has not been guided by a consideration of the meaning of the words "cruel and unusual," nor by the historical context of the amendment, but rather by an abiding commitment to deference to legislative decision-making. Deference drives Eighth Amendment doctrine.

A. THE PATCHY EIGHTH AMENDMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[26] This Article focuses on the last part—the Cruel and Unusual Punishments Clause. That clause has produced distinct doctrines for evaluating challenges to prison conditions, methods of execution, and criminal sentences. This Article does not address the doctrines related to prison conditions and methods of execution. Instead, it covers how the Eighth

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[25] Two recent articles have helpfully described the Court's hollowing out of the Eighth Amendment right when it comes to challenging long sentences. *See* Matt Kellner, *Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure*, 132 YALE L.J.F. 75, 78 (2022) ("[T]he U.S. Supreme Court and state apex courts have largely abstained from meaningful substantive regulation of criminal sentences, at least outside of the death penalty."); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628, 1636–37 (2021) ("[T]he Supreme Court has rendered the Eighth Amendment a dead letter with respect to non-capital, non-juvenile life-without-parole sentences."). This Article makes the additional claim that the animating factor behind this hollowing out was a commitment to deference.

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

Amendment is applied to criminal sentences, and in particular to non-capital, or term-of-years sentences.[27]

Dating back to 1910, the Court has interpreted the concept of "cruel and unusual" punishment to include both punishment that is *inherently* cruel and unusual (like torture)[28] and punishment that *becomes* cruel and unusual by virtue of being disproportionate to the underlying crime (like fifteen years imprisonment for falsification of public documents).[29] This latter understanding of the phrase "cruel and unusual" is known as the Eighth Amendment's "proportionality principle."[30] The idea is that punishment should be proportionate to the crime, otherwise the punishment is cruel. Thus, the Court has held that "the concept of proportionality is central to the Eighth Amendment" and that "[e]mbodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[31] There was some controversy about whether the clause truly contains such a proportionality requirement, but other than a spirited argument by Justice Scalia in 1991, the Court has consistently held that the proportionality principle exists in the Eighth Amendment.[32]

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[27] For a more expansive history and account of the Eighth Amendment, see generally THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W. Berry III eds., 2020).

[28] *See* O'Neil v. Vermont, 144 U.S. 323, 339 (1892) ("[Cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering.").

[29] Weems v. United States, 217 U.S. 349, 385 (1910) (White, J., dissenting) ("[T]he court interprets the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature of the crime.").

[30] *E.g.*, Blake J. Delaney, Comment, *A Cruel and Unusual Application of the Proportionality Principle in Eighth Amendment Analysis*, 56 FLA. L. REV. 459, 461 (2004).

[31] Graham v. Florida, 560 U.S. 48, 59 (2010).

[32] In *Harmelin v. Michigan*, Justice Scalia argued on originalist grounds that "the Eighth Amendment contains no proportionality guarantee." 501 U.S. 957, 965 (1991) (Scalia, J., concurring). That opinion was not controlling, and since then the Court has held that "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 U.S. at 59 (2010). What the future holds for the proportionality principle is up for debate. Any effort to resuscitate Justice Scalia's originalist argument will have to contend with subsequent scholarship refuting his historical claims. *See e.g.*, Michael J. Zydney Mannheimer, Harmelin*'s Faulty Originalism*, 14 NEV. L.J. 522, 525–535 (2014) (providing a point-by-point refutation of Scalia's analysis in *Harmelin*, 501 U.S. 957).

The Court uses the proportionality principle to assess the constitutionality of sentences. There is a huge gap, however, in how the principle operates in theory and in practice. In theory, if a convicted individual asserts that her sentence is disproportionate to her crime, doctrine instructs a court to treat this claim as follows: first, determine whether there is a gross disproportionality between the crime and the sentence, and if there is, compare the sentence to other sentences in the jurisdiction and also to sentences outside of the jurisdiction.[33] If these tools indicate that the sentence is unconstitutionally disproportionate to the crime, courts will remand the case to the sentencing judge for a new sentencing and invalidate any portion of the sentencing statute that required such a sentence.[34]

In practice, the proportionality doctrine almost always leads to a denial of the Eighth Amendment claim, without even considering the steps just described. The Court has found no gross disproportionality, for example, in a sentence of twenty-five years to life for the theft of a golf club,[35] a sentence of two consecutive terms of twenty-five years to life for the theft of five videotapes worth $85.70,[36] and a sentence of life without parole for cocaine possession.[37] In these cases, the Court did not even move past the first step of the analysis. While formally the doctrine requires multiple steps of analysis, the doctrine functionally offers nothing more than a denial of disproportionality claims.

The exception to this practice of blanket denial is that the Court has carved out a number of "categorical exemptions"—*i.e.*, categories of people or crimes for which the death penalty or life without parole is unconstitutional. For example, the Court has held that the death penalty is unconstitutional for people who are intellectually disabled,[38] for people who committed the crime of conviction before they turned eighteen,[39] and for all individuals convicted of non-homicide crimes.[40] The Court has also held that life without parole is unconstitutional for people who committed non-

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[33] *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring).

[34] For an example of this, see Solem v. Helm, 463 U.S. 277, 303 (1983).

[35] Ewing v. California, 538 U.S. 11, 28–31 (2003).

[36] Lockyer v. Andrade, 538 U.S. 63, 77 (2003).

[37] *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

[38] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[39] Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

[40] Kennedy v. Louisiana, 554 U.S. 407, 413, 438 (2008).

homicide crimes before they turned eighteen[41] and also that mandatory life without parole is unconstitutional for all people whose crime, including murder, was committed before they turned eighteen.[42] The doctrine for categorical exemption cases is a two-prong test. The Court first looks to the states to determine whether the practice is inconsistent with evolving standards of decency and then makes its own judgment about the proportionality of the crime to the punishment.[43]

Taking into view both the general practice of denial and these narrow exceptions, the application of the proportionality principle is best understood as patchy. Some people are covered; most are not. If you fit within a narrow set of categories (crime committed under eighteen, intellectually disabled, or convicted of a non-homicide crime), and your sentence is either the death penalty or life without parole, the proportionality principle *may* have teeth. The Court will at least consider the claim. For everyone else, like Lee Carroll Brooker, the proportionality principle is a mirage. But no one can credibly claim that life without parole is proportionate to drug possession, so why do courts deny these claims?

B. THE FORCE OF DEFERENCE

Now that it is clear how useless the Court has rendered the Eighth Amendment for most sentences, we must ask why it has done so. We might expect that the Court has defined "cruel and unusual" narrowly or that historical research suggests that certain sentences would not be cruel and unusual at the time of the founding. But that is not at all what has happened. Instead, an abiding commitment to deference has guided the Court to its current Eighth Amendment austerity.[44]

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[41] Graham v. Florida, 560 U.S. 48, 82 (2010).

[42] Miller v. Alabama, 567 U.S. 460, 470, 489 (2012).

[43] *Graham*, 560 U.S. at 60–61.

[44] Judicial deference is a judge's substitution of someone else's judgment for her own. Some justifications for deference are authority-based while others are epistemic-based. Still others relate to a fear of too much litigation. For a helpful treatment of the various forms of deference, see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1078–85 (2008). I have decided not to hew my argument to each justification of deference, nor even to address each one, because in my view the political process problems undermine all justifications for deference. Nonetheless, Part III.C responds to the epistemic-based justification for deference.

The through-line of deference in Eighth Amendment cases dates back a hundred years. The first trace is found in *Weems v. United States*, where the Court found an Eighth Amendment violation when a resident of the Philippine Islands (then a U.S. territory), who falsified a public document, was sentenced to twelve to fifteen years of imprisonment in *cadena temporal* and stripped of parental, marital, property, and voting rights for life.[45] The majority held that the sentence was unconstitutionally disproportionate. Writing for the dissent, and previewing a major Eighth Amendment argument in the century to come, Justice White argued that the Eighth Amendment must not prohibit Weems' sentence, because if it did, "nothing [would] be left of the independent legislative power to punish and define crime."[46] What is significant is Justice White's assertion that the problem with the majority's holding was not its interpretation of the Cruel and Unusual Punishments Clause, but rather its consequential infringement on legislative prerogative. It is not an argument about text or history, but one about deference to the legislature.

Justice White's concern about deference to the legislature first appeared in a majority Eighth Amendment sentencing opinion in 1980 in *Rummel v. Estelle*, a case about a habitual offender law.[47] William Rummel, a Texas native, was convicted of obtaining $80 worth of goods with a fraudulent credit card in 1964, passing a forged check worth $28.36 in 1969, and—the straw that got him sentenced to life in prison—stealing $120.75 in 1975.[48] Justice Rehnquist, writing for the 5-4 majority, upheld the sentence and argued that drawing lines around sentence lengths is a "process that is pre-

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[45] Weems v. United States, 217 U.S. 349, 364 (1910). *Cadena temporal* is a punishment whereby one is forced to do "painful labor" while being "always" chained by the ankles and the wrists. *Id.*

[46] *Id.* at 388 (White, J., dissenting).

[47] Rummel v. Estelle, 445 U.S. 263, 274–75 (1980). By the time of *Rummel*, the Eighth Amendment had been incorporated against the states. *See* Robinson v. California, 370 U.S. 661, 667 (1962). The Court's reluctance to invalidate a state law in *Rummel* can only be understood in the context of the previous 50 years, during which time the contest between the Constitution and legislative prerogative lived an active life. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling *Lochner's* core principle that the Court had authority to strike a state labor law as a violation of the freedom of contract); Roe v. Wade, 410 U.S. 113, 166 (1973) (striking a state abortion law as a violation of the right to privacy); Furman v. Georgia, 408 U.S. 238, 239 (1972) (striking a state death penalty law as a violation of the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 207 (1976) (holding that states can use the death penalty without necessarily violating the Constitution).

[48] *Rummel*, 445 U.S. at 265–66.

eminently the province of the legislature" and "that Texas is entitled to make its own judgment as to where such lines lie."[49] He concluded that the Court should be "reluctan[t] to review legislatively mandated terms of imprisonment."[50] Once again, note that the Court's reasoning is animated not by text nor by history, but by the principle of deference.

The Court doubled down on deference two years later in *Hutto v. Davis*, another case about a habitual offender law.[51] Here, Roger Davis challenged his forty-year sentence for possession and distribution of marijuana.[52] In a per curiam opinion, the Court upheld Davis' sentence, reasoning that, "*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment.'"[53] This assertion is remarkable because the Court is defining the proposition of an earlier Eighth Amendment case as being about deference. Thus, even in the Court's own language, the doctrine really is all about deference. And it shows. The Court in *Davis* used deference in a new and more extreme way. While the deference in *Rummel* amounted to a merits analysis with a thumb on the scale for upholding the sentence, the deference in *Davis* amounted to disposition without consideration of the merits. As Justice Brennan described in his dissent, the Court in *Davis* used "the general principle of deference" to "justify the complete abdication of [the Court's] responsibility to enforce the Eighth Amendment."[54]

These cases illustrate the prevailing path of Eighth Amendment sentencing law, but there was a blip in 1985. In *Solem v. Helm*, the Court surprisingly struck down a sentence and a habitual offender law very similar to the sentences and laws upheld just a few years earlier in *Davis* and *Rummel*.[55] But even in this case, deference dominated the analysis. Jerry

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[49] *Id.* at 275, 284.

[50] *Id.* at 274.

[51] Hutto v. Davis, 454 U.S. 370, 374 (1982).

[52] *Id.*

[53] *Id.*

[54] *Id.* at 383 (Brennan, J., dissenting).

[55] Solem v. Helm, 463 U.S. 277 (1983). The change was caused by Justice Blackmun, who voted with the majority to uphold the sentences in *Rummel* and *Davis*, but then joined the dissenters of those cases to form a majority to strike the sentence in *Solem*. Though not centrally important, the shift is illuminating. My hypothesis is that Justice O'Connor's recent arrival on the Court, and her heavy-handed deference to states, led Justice Blackmun to see himself as a defender of a strong conception of *Marbury*. This tension was building right at the time of Justice Blackmun's *Davis-Solem* switch. *See* CHARLES M. LAMB & STEPHEN C.

Helm was sentenced to life without parole for issuing a no-account check for one hundred dollars on top of his prior convictions for seven non-violent felonies.[56] In vacating the sentence, Justice Powell's majority opinion acknowledged the value of deference, but discounted its governing force. "Reviewing courts," he wrote, "should grant substantial deference to the broad authority that legislatures necessarily possess . . . [b]ut no penalty is *per se* constitutional."[57] Justice Burger, in dissent, disagreed: "the length of a sentence of imprisonment is a matter of legislative discretion."[58]

Since *Solem*, no individual term-of-years sentence has been vacated as cruel and unusual. And, for its part, the Court has only increased its reliance on the idea of deference. In *Harmelin*, the 1991 case that upheld a sentence of life without parole for cocaine possession, the controlling opinion echoed *Solem*'s concession that courts should "grant substantial deference to the broad authority that legislatures necessarily possess."[59] In *Ewing*, the 2003 case that upheld a sentence of 25 years to life sentence for theft of a golf club, the Court noted that even though the habitual offender law made Ewing's sentence "a long one[,] . . . it reflect[ed] a rational legislative judgment, entitled to deference . . . ."[60] And lest there be any doubt about what animates this corner of Eighth Amendment law, the Court wrote in *Ewing*'s companion case, *Lockyer*, that deference to legislatures is the "governing legal principle."[61]

So, we now know that the Court treats most sentences as per se constitutional and that the Court does so not because of the text or history of the Eighth Amendment, but because it believes that legislative decision-making about sentencing law is entitled to deference. The next Part identifies one difficulty with this belief.

HALPERN, THE BURGER COURT 73–74 (Charles M. Lamb & Stephen C. Halpern eds., 1991); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 147 (2005) (describing the O'Connor-Blackmun tension in the decision of *FERC v. Mississippi*, 456 U.S. 742 (1982)).

[56] *Solem*, 463 U.S. at 296–97.

[57] *Id.* at 290.

[58] *Id.* at 310 (Burger, J., dissenting).

[59] Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 290).

[60] Ewing v. California, 538 U.S. 11, 30 (2003).

[61] Lockyer v. Andrade, 538 U.S. 63, 76 (2003).

II. THE UNFLATTERING LIGHT OF POLITICAL PROCESS THEORY

Felony disenfranchisement laws have been around since the time of the founding, but they proliferated after the Civil War. States enacted broad felony disenfranchisement laws with the explicit purpose of excluding Black voters.[62] Paired with new substantive criminal law that targeted Black Americans, felony disenfranchisement laws proved disturbingly successful at keeping many Black people from voting.[63] To this day, felony disenfranchisement laws, which operate in forty-eight states, strip Black Americans of the right to vote at a rate of three and a half times the rate for the rest of the population.[64]

The history, purpose, and present effect of felony disenfranchisement laws is enough to warrant their abolition. But this Article focuses on a narrower question: how do they implicate the propriety of habitual offender laws? More specifically, how do they inform the proper standard for reviewing habitual offender laws under the Eighth Amendment? This Part argues that felony disenfranchisement laws undermine the legitimacy of habitual offender laws and necessitate a higher standard of review.

A. THE EFFECT OF FORMAL DISENFRANCHISEMENT ON CONSTITUTIONAL REVIEW

Political process theory is controversial as a whole, but there has been broad support for its limited insight that laws targeting formally disenfranchised groups do not deserve deference. This Article relies only on that insight, and this Section explains why it should be uncontroversial to do so.

When political process theory surfaced in *United States v. Carolene Products*, it was broad and undertheorized.[65] The Court suggested that going forward, it might apply different levels of scrutiny to laws depending on

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[62] *See* ERIN KELLY, BRENNAN CTR., RACISM AND FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1–3 (May 9, 2017), https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history [https://perma.cc/AK35-PHMU].

[63] *Id.*

[64] *See* UGGEN, LARSON, SHANNON & STEWART, *supra* note 13, at 3; *see generally* DEP'T OF J., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION (June 2022), https://www.justice.gov/d9/fieldable-panel-panes/basic-panes/attachments/2022/05/19/voting_with_a_criminal_conviction.pdf [https://perma.cc/YRW8-UBSE].

[65] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

whether the targeted group could participate in the political process. For example, the Court first suggested that it might apply a "more exacting judicial scrutiny" to any "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[66] As examples of such legislation, the Court described laws that restrict the right to vote, the right to disseminate information, and the right to organize.[67] The Court then suggested that it also might apply "a more searching judicial inquiry" to laws that burden "discrete and insular minorities" (such as religious, national, or racial minorities) on the theory that in such situations the "political processes ordinarily to be relied upon" to protect such groups cannot be trusted.[68]

To put it metaphorically, the approach offered by *Carolene Products* resembles a seesaw, with judicial review on one end and access to political participation on the other. As access to political participation is lowered, judicial scrutiny elevates. Full access to political participation, by contrast, enables the Court to decrease scrutiny. In either direction, there is a responsive, inverse relationship between access to political participation and judicial review.

In *Democracy and Distrust*, John Hart Ely elaborated on *Carolene Products* and recast the two scenarios that require heightened judicial scrutiny. On his account, the two scenarios are, first, when the targeted group is formally excluded, and, second, when the targeted group is not formally excluded but nevertheless is a perpetual loser in the political process due to prejudice.[69] These are generally described as the two "prongs" of Ely's theory, the first being the "access prong" and the second being the "prejudice prong."[70] The thrust of Ely's theory is that by applying heightened scrutiny to laws that target these groups, courts would appropriately review the political process, and reinforce representation, rather than making controversial substantive value judgments about rights themselves.

Critics have assailed Ely's prejudice prong, but few quibble with his access prong. The leading critique of the prejudice prong is that in order to

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] JOHN HART ELY, DEMOCRACY AND DISTRUST 103 (1980).

[70] *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 748 (1991) ("[T]he access, but not the prejudice, prong of political process theory has emerged relatively unscathed from the barbs of Ely's critics.").

determine what counts as a perpetual loser due to "prejudice," courts would be required to make substantive value judgments, leaving courts with the same predicament that Ely claims to resolve.[71] But this critique applies with less force to the access prong, which focuses on the more easily identifiable formal disenfranchisement. Courts need no value system to determine who is entitled to vote and who is not—that answer can be found in statutes and regulations. That makes it relatively straightforward under the access prong to determine which groups would receive heightened scrutiny and which would not.

For this reason, as Michael Klarman writes, "[O]nly the prejudice prong of political process theory . . . has been shown to be unworkable."[72] Bruce Ackerman, another of Ely's critics, specifically notes that his critique "applies exclusively to the paradigm case I have just described [relating to prejudice against a group], and *not* to the cruder case in which [groups] are excluded from the voting booth."[73] Robert Bork concedes that the access prong "poses no special challenge to constitutional theory."[74] As Aaron Tang summed it up more recently: "The access prong is relatively uncontroversial and remains in force today."[75]

The point is, no matter how one feels about *Carolene Products* or political process theory generally, there is nothing theoretically shaky about the principle that government action targeting formally disenfranchised groups is constitutionally suspect. The principle can also be seen in action

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[71] *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1094 (1981) ("Ely's theory still requires the court to make unprivileged value choices. Ely asserts that a legislature may not disadvantage people merely because it dislikes them. This sounds like fundamental rights talk."); Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 737–38 (1985) ("Recall that *Carolene*'s promise is a form of argument that allows a court to say that it is purifying the democratic process rather than imposing its own substantive values upon the political branches. And yet it is just this process orientation that is at risk when a *Carolene* court undertakes to identify the prejudices that entitle a group to special protection from the vagaries of pluralist politics. One person's 'prejudice' is, notoriously, another's 'principle.' How, then, do we identify a group for *Carolene* protection without performing the substantive analysis of constitutional values that *Carolene* hopes to avoid?").

[72] Klarman, *supra* note 70, at 773.

[73] Ackerman, *supra* note 71, at 717.

[74] ROBERT H. BORK, THE TEMPTING OF AMERICA 197 (1990); *see also* Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131, 133 (1981) (critiquing the prejudice prong while "skipping over" the access prong).

[75] Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1438 (2017).

throughout case law.[76] *McCulloch v. Maryland* is as good a place to start as any.[77] The state of Maryland imposed a tax on the federal bank and the Court observed that such a tax imposed costs on out-of-staters with no voting power in Maryland.[78] Thus, the tax burdened a politically excluded group—out-of-staters—and the Court relied on this fact, along with the Supremacy Clause, in deeming the tax unconstitutional.[79] Less than a decade later, Maryland imposed a fee on businesses that imported from other states. This posed a similar problem: the fee penalized out-of-state businesses who had no voting power in Maryland, and the Supreme Court invalidated this law as well.[80]

Then, in the same term that the Court decided *Carolene Products*, it applied the principle once again in *South Carolina State Highway Department v. Barnwell Brothers* and more fully expressed the principle's logic: "Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted . . . ."[81] In other words, when the burden of legislation falls on a group that cannot vote, the political process is not properly restrained, thus necessitating meaningful judicial review. Following the development of this doctrine in these cases, the principle lived on. After *Carolene Products*, as Louis Lusky writes, the Court "almost immediately embraced the proposition

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[76] By contrast, the prejudice prong of political process has seen more resistance. *See generally id.* (documenting the ways in which the Court has rejected the prejudice prong).

[77] McCulloch v. Maryland, 17 U.S. 316, 316–19 (1819).

[78] *Id.* at 431, 435–36.

[79] *Id.* at 431 ("Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose, that the people of any one state should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused.").

[80] Brown v. Maryland, 25 U.S. 419, 440 (1827) ("Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others.").

[81] S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938).

tendered by Paragraph 2[, the access prong],” even while the Court hesitated to embrace the prejudice prong.[82]

Other cases demonstrate the Court embracing the seesaw conception of judicial review by decreasing scrutiny where there is adequate process. Indeed, the Court often cites an alleged sufficiency in process—albeit not necessarily electoral process—to justify decreased judicial scrutiny. In *McCleskey v. Kemp*, for example, the Court cited the safeguards of the jury process as a basis for upholding racially motivated death sentences and noted that “constitutional guarantees are met when ‘the mode [] itself has been surrounded with safeguards to make it as fair as possible.’”[83] The Court took a similar approach in *Hudson v. Michigan*, which narrowed the scope of the exclusionary rule as a remedy for Fourth Amendment “knock and announce” violations.[84] Part of the Court’s rationale was that internal police processes and citizen review boards provide a measure of procedural accountability, rendering the deterrence provided by the exclusionary rule redundant.[85] Here again, the Court used procedural protections to cover its retreat from substantive rights enforcement. Put differently, the Court justified deference by citing to process.

The inverse relationship between process and deference is also evident in corporate law. There, courts apply a multi-part test to determine what type of deference is due to a corporate decision based on the adequacy of a board’s decision-making process. Roughly, courts first look to whether members of the board may have had conflicts of interest, and if so, whether they took appropriate measures to shield the decision from those conflicts.[86] Then, based on the court’s assessment of the legitimacy of the process, it reviews the substance of the decision under either the business judgment rule, the enhanced scrutiny standard, or the entire fairness standard, which is the most scrutinizing.[87] Thus, rather than blindly applying deference as the Court does in the Eighth Amendment context, Delaware courts actually take account of

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[82] *E.g.*, Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103–04 (1982).

[83] McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (quotations and citations omitted).

[84] Hudson v. Michigan, 547 U.S. 586, 599 (2006).

[85] *Id*.

[86] *See, e.g.*, Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 DEL. J. CORP. L. 967, 972–75 (2011).

[87] *Id.*

the underlying decision-making process and apply deference or scrutiny accordingly.[88]

These examples illustrate that the insight of the access prong is not only well-supported as a matter of theory but is also visible in practice throughout American law. As the next Section argues, Eighth Amendment law is in tension with this insight because it applies no scrutiny whatsoever to habitual offender laws, even though these laws target a disenfranchised group.

B. APPLYING POLITICAL PROCESS THEORY TO HABITUAL OFFENDER LAWS

If government action that targets a "disenfranchised group" is constitutionally suspect, what counts as a disenfranchised group? Is it enough for part of the group to be disenfranchised, or must the group be entirely disenfranchised? And is it enough to just be disenfranchised, or does the disenfranchisement have to also affect legislative outcomes? This Section considers two approaches to answering these questions—one formal and one functional—but concludes that no matter how we answer them, people with felonies certainly count as a "disenfranchised group" in most states, and thus habitual offender laws, which target that group,are constitutionally suspect.

The formal approach would define a disenfranchised group as any group, a portion of which is disenfranchised based on membership in that group. If we adopt this definition, then people with felony convictions constitute a disenfranchised group in forty-eight states.[89] The portion of people with felonies who are disenfranchised varies from state to state, based on each state's particular disenfranchisement statute. Some states disenfranchise people with felony convictions only while they are in prison,[90] while other states disenfranchise people with felony convictions both when

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[88] Antitrust law is another example where courts focus on process rather than outcomes. Ely made this analogy between the process theory he advocated and antitrust law: "The approach to constitutional adjudication recommended here is akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results it intervenes only when the 'market,' in our case the political market, is systematically malfunctioning." ELY, *supra* note 69, at 102–03.

[89] The only states that do not disenfranchise people with felonies are Maine and Vermont. UGGEN, LARSON, SHANNON & STEWART, *supra* note 13, at 3.

[90] These states are California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington. *Id.*

they are in prison, and when they are on parole or probation.[91] The harshest states disenfranchise people with felony convictions forever, absent certain actions such as a pardon.[92] But under this formal approach, the portion of people disenfranchised is not definitive. The key fact is that a targeted group's political power is formally diminished through disenfranchisement, and that fact applies to full disenfranchisement and to partial disenfranchisement alike. In either case, the legislature has decided to strip power from and target the same group. Felony disenfranchisement laws and habitual offender laws combine to disempower and punish people based on the single fact of their felony convictions. That one-two punch is what generates constitutional suspicion.

The alternative definition of a disenfranchised group would be more functional. One might ask, does the political exclusion of people with felonies have any meaningful impact on elections, the legislative process, or substantive criminal legal policy? If not, then the interests of people with felony convictions are not disadvantaged in the political process, and perhaps, therefore, heightened scrutiny would not be necessary. If we entertain these questions, we might define a disenfranchised group as any group that can prove that their disenfranchisement affected a legislative or policy outcome.

This functional definition of a disenfranchised group is enticing but misguided. The harm of disenfranchisement is something that we can safely presume; it need not be proven. There is hardly a more accepted premise in democratic government than that voting affects outcomes, and therefore that excluding groups from voting also affects outcomes. The functional approach would unjustifiably challenge this premise and would put the burden on an excluded population to show that their exclusion is not harmless. The point of the access prong is that it is safe to assume that "when regulation is of such a character that its burden falls principally upon those without the state [or, without the vote], legislative action is not likely to be subjected to those political restraints which are normally exerted . . . ."[93]

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[91] These states are Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *Id.*

[92] These states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

[93] S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938).

As an exercise, though, we can explore the functional question: Does felony disenfranchisement affect legislative outcomes, and in particular, does it make habitual offender laws more likely? One study by Christopher Uggen and Jeff Manza suggests that felony disenfranchisement has a partisan effect on electoral outcomes. According to the study, absent felony disenfranchisement laws, the 2000 presidential election would have likely gone the other way.[94] So too would have as many as seven U.S. Senate elections between 1978 and 2000.[95] Even more fundamentally, the study concluded that had felony disenfranchisement laws not existed, the majority party in the Senate would have been switched in the 1994, 1996, and 1998 elections.[96] Thus, "the Democratic Party would have gained parity in 1984 and held majority control of the U.S. Senate from 1986 to [2002]."[97] This change, according to the study, "might have enabled the Clinton administration to gain approval for a much higher proportion of its federal judicial nominees, and key Senate committees would have shifted from Republican to Democratic control."[98] These changes would certainly have affected criminal punishment.

The results of this study are not shocking when we consider the high rates of disenfranchisement as compared to narrow electoral margins. The Sentencing Project estimates that 4.6 million individuals are disenfranchised due to a felony conviction.[99] That amounts to two percent of the national voting age population.[100] The rates of disenfranchisement are even higher in

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[94] Christopher Uggen & Jeff Manza, *Democratic Contradiction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 792, 794 (2002).

[95] *Id.* One of these elections was that of Mitch McConnell. Consider the description of that race provided by Uggen and Manza:

In the Kentucky election of 1984, the Republican candidate (Mitch McConnell) narrowly defeated the Democratic nominee by 5,269 votes. Because Kentucky disenfranchises ex-felons as well as current inmates, parolees, and felony probationers, the total number disenfranchised was over 75,000 in 1984. Because 1984 was a presidential election year, turnout was relatively high, and our voting preference model indicates that almost 70 percent of the felon voters would have selected the Democratic candidate. Thus, almost 11,000 Democratic votes were likely lost to disenfranchisement in this election, more than twice the 5,269-vote Republican plurality.

Id. at 789.

[96] *Id.* at 788.

[97] *Id.* at 794.

[98] *Id.*

[99] UGGEN, LARSON, SHANNON & STEWART, *supra* note 13, at 2.

[100] *Id.*

particular states, which is what matters in the main when considering the effect on state-issued habitual offender laws. Six states have felony disenfranchisement rates at or over five percent. These are: Mississippi (10.7%), Tennessee (9.3%), Alabama (8.6%), Florida (7.5%), Virginia (5.0%), and Arizona (5.1%).[101] It is not a stretch to imagine that such high rates of disenfranchisement do affect narrowly decided elections. In the 2022 gubernatorial election in Arizona, for example, Katie Hobbs beat Kari Lake by roughly 17,000 votes.[102] Meanwhile, over 100,000 Arizonans were barred from voting due to felony disenfranchisement.[103]

Uggen and Manza's estimates of partisan effects, however, are somewhat contextualized by a more recent study of disenfranchisement in Florida.[104] Michael Morse assessed the partisan consequences of Florida's successful 2018 ballot initiative, known as Amendment 4, which sought to end lifetime felony disenfranchisement.[105] Morse tracked the voting behavior of the individuals who navigated the complexities of the fine and fee requirements and succeeded in having their rights restored. He concluded that they were less likely to vote for Democratic candidates, and less likely to vote at all, than expected.[106] His findings complicate the "blue wave" theory of felony re-enfranchisement.[107] Even so, Morse's study does not undermine the possibility that a narrow election could be decided by re-enfranchisement. Nor does it call into question the notion that, to the extent there would be any partisan advantage to ending felony disenfranchisement, that that advantage would go to Democrats.[108]

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[101] *Id.* at 16.

[102] *Governor Election Results*, N.Y. TIMES (Nov. 16, 2022), https://www.nytimes.com/interactive/2022/11/08/us/elections/results-governor.html?action=click&pgtype=Article&state=default&module=election-results&context=election_recirc&region=NavBar [https://perma.cc/8XV4-63QW].

[103] UGGEN, LARSON, SHANNON & STEWART, *supra* note 13, at 16.

[104] *See* Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1171–78 (2021).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 1180.

[108] An earlier study makes a more dramatic conclusion: felon disenfranchisement laws have no measurable effect on state rates of voter turnout. *See* Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 115 (2004). This is because, Miles argues, people who get felony convictions are unlikely to vote at significant rates beforehand. *Id.* Miles cites data from one state that only ten percent of people who got felony

These studies provide helpful context, but they do not fully answer our question in two respects. First, while Morse's study considers the effect of a *re*-enfranchisement law, we are focused on the effect of *dis*enfranchisement laws—and there likely is a difference. Disenfranchisement triggers long term consequences that cannot be wholly repaired by re-enfranchisement. For example, part of the reason Morse predicts muted political consequences of re-enfranchisement is that turnout is low for people who lost the right to vote and then regained it. Morse notes that one theory of that low turnout is confusion about how to regain the right to vote, even if eligible. That confusion and administrative hurdle would not exist, of course, had the right to vote never been taken in the first place. Monica Bell's legal estrangement theory also illuminates how the act of disenfranchisement could cause a sense of detachment and alienation from the law, which would predictably make one less likely to vote, even once they are formally allowed to vote again.[109] In these ways, the effect of disenfranchisement is stronger than the effect of re-enfranchisement, which can only recoup some of the participatory losses.

More fundamentally, though, the focus on *partisan* consequences is distinct from our interest in *policy* consequences. We care about the effect of disenfranchisement on a particular issue: habitual offender laws. It may be that out of one hundred disenfranchised people, fifty are Republicans and fifty are Democrats, but all support repealing a habitual offender law. In other words, partisan consequences do not necessarily track policy consequences. Notwithstanding these limitations, it is safe to take from these studies an indication that the scale of disenfranchisement is high enough in relation to the narrowness of elections to make a difference. The notion that disenfranchisement affects the likelihood and severity of habitual offender laws is not fanciful.

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convictions had registered to vote at the time of incarceration. *Id.* at 117. Uggen and Manza question this conclusion, noting that the phenomenon disappears once other demographic factors are controlled for. *See* Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 497, 499 (2004).

[109] *See* Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2143 (2017) ("For a panoply of reasons, [including] felony disenfranchisement and its chilling effects on turnout in high-incarceration communities . . . African Americans—particularly if they live in high-poverty communities—have little say in who their representatives are or in the legislation that their representatives ultimately pass.").

To learn more about the relationship between felony disenfranchisement and sentencing policy, I compared each state's rate of felony disenfranchisement with the severity of its habitual offender law. Of the twenty states with the highest rates of felony disenfranchisement, sixteen have the most severe form of a habitual offender law, which imposes a life sentence even when an individual has no violent prior offenses.[110] The other four states from this group of twenty have the second most severe form of habitual offender law, which reserves life sentences for specifically enumerated offenses.[111] Thus, all twenty states with the highest rates of felony disenfranchisement also have the most severe forms of habitual offender laws. I do not intend to suggest that this comparison is conclusive. Rather, it is simply consistent with the notion that felony disenfranchisement laws may increase the likelihood and severity of habitual offender laws.

The relationship between felony disenfranchisement and habitual offender laws can also be illustrated by sketching the specific mechanisms by which disenfranchisement may affect sentencing law. One mechanism, of course, is through the affirmative election of candidates based on their sentencing platforms. We can assume that candidates who pledge support for habitual offender laws would be less likely to get votes from people with felony convictions, who would be targeted by those laws. By excluding people with felony convictions from the election, those candidates do better than they otherwise would.

Another mechanism is through accountability after elections. When legislators in states with a felony disenfranchisement law consider voting for a habitual offender law, they know that the people who would bear the burden of the law—people with felony convictions—would not be able to vote them out of office. The incentive structure would thus predict that legislators

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[110] This represents the imperfect but still-probative comparison of 2016 data of rates of felony disenfranchisement and a 2013 analysis of the severity of habitual offender laws. *See* SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 1, 15–16 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf [https://perma.cc/YV95-A4KE] (providing data of felony disenfranchisement rates); PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW 22 (2018) (summarizing data of habitual offender laws that was originally compiled in an earlier article. *See* Caitlyn Lee Hall, Note, *Good Intentions: A National Survey of Life Sentences for Nonviolent Offenses*, 16 N.Y.U. J. Legis. & Pub. Pol'y 1101, 1125–38 (2013).

[111] *See* SENT'G PROJECT, *supra* note 110, at 1, 15–16; ROBINSON & WILLIAMS, *supra* note 110, at 22.

would not fairly protect the interests of people with felony convictions. Legislators can pass any law punishing people with felony convictions, and, conveniently, the moment someone is convicted of a felony and faces that punishment, she also loses the ability to hold the legislator accountable.

People with felony convictions are not just barred from electing and holding legislators accountable. They are also barred from running for office themselves.[112] This ensures that no one with a felony conviction will ever partake in the legislative process. This amounts to yet another democratic distortion. It would be like ensuring that no one with health insurance, or with a pre-existing condition, could partake in drafting or voting for health care legislation. Or ensuring that no one with a child could be involved in crafting education law. To remove the most affected group from the legislature entirely is to remove ordinary constraints on the political process.

People with felony convictions are also prevented from exercising rights of public protest while incarcerated. This is consequential. Daryl Levinson observes that even if a group is formally disenfranchised, they "may be able to preserve their rights" if they "can maintain a credible threat of taking to the streets."[113] But prisoners cannot take to the streets. Nor can they engage in much advocacy at all while incarcerated. The traditional tools of advocacy—learning, speaking, organizing, fundraising—are all constrained in jail and prison. Access to reading materials is limited in general, and political writings are often banned entirely.[114] Phone access is costly and limited.[115] Letters are screened, and the cost of stamps can be prohibitive.[116] Regardless of what one thinks about the merits of these policies, they

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[112] *See generally* Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801 (2003) (summarizing state legislation that removes the right to run for office). More recent data on the right to run for office is routinely compiled and updated by The Restoration of Rights Project. *See* RESTORATION RTS. PROJECT, https://ccresourcecenter.org/restoration-2/ [https://perma.cc/BPN7-AV45].

[113] Daryl Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1352 (2012).

[114] *See, e.g.*, Alison Flood, *US Prisons Banning Thousands of Books 'on Arbitrary Grounds'*, GUARDIAN (Sept. 26, 2019), https://www.theguardian.com/books/2019/sep/26/us-prisons-ban-thousands-of-books-on-arbitrary-grounds-banned-books-week [https://perma.cc/CCF4-HC29].

[115] *See* Tyler Kendall, *Why are Jail Phone Calls So Expensive?*, CBS NEWS (Oct. 13, 2020, 7:07 PM), https://www.cbsnews.com/news/why-are-jail-phone-calls-so-expensive [https://perma.cc/324L-HPJ4].

[116] *See* Mark Salay, *When in Prison, Costs are Steep and the Pay is Close to Nothing*, MARKETPLACE (Aug. 21, 2017), https://www.marketplace.org/2017/08/21/when-prison-costs-are-steep-and-pay-close-nothing [https://perma.cc/5VK4-ELM5].

undoubtedly create hurdles for incarcerated people to advocate for themselves in the political arena.

The disenfranchising effect of a felony thus controls who can be a candidate, who can vote for a candidate, and to whom the successful candidates are accountable. The carceral effect of a felony obstructs prisoner advocacy. The result is a distortion in the legislative process. Candidates are disincentivized from developing policy positions that serve people with felony convictions; elected bodies lack anybody with experience with a felony conviction; and elected individuals need not fear backlash from people they lock up for many years, because in locking them up, they simultaneously strip them of the right to vote. It is a legislative process without democratic accountability.

Thus, whether we focus formally on the portion of people disenfranchised in a group, or functionally on the mechanisms by which felony disenfranchisement effects the legislative process, people with felony convictions are a disenfranchised group in all but two states. Because habitual offender laws target this group, courts should scrutinize such laws. But as we know from Part I, courts do just the opposite.

III. A WAY FORWARD: IF DISENFRANCHISEMENT, NO DEFERENCE

This Article has made three arguments: First, that courts do not scrutinize habitual offender laws, but instead treat them as presumptively constitutional; second, that as a matter of theory and practice, laws that target formally disenfranchised groups are suspect; and third, that habitual offender laws target a formally disenfranchised group—people with felony convictions. If these three positions are valid, Eighth Amendment law must change.

The proposed change is simple: Courts should decline to apply deference to habitual offender laws from states with felony disenfranchisement. Phrased differently, courts should apply deference to habitual offender laws *only* where states have not gone out of their way to remove people with felony convictions from the political process.[117]

If this proposal were adopted, habitual offender laws from Maine and Vermont would be entitled to current levels of deference, while the habitual

[117] One might persuasively argue that felony disenfranchisement taints all laws. Here, I only make the narrower argument that felony disenfranchisement taints the laws that target people with felonies.

offender laws from every other state would not.[118] Those states would receive a more moderate deference, perhaps akin to what the Court now applies in categorical exemption cases.[119] In those cases, as noted, courts first look to other states to determine whether the practice is inconsistent with evolving standards of decency, and then make their own judgement about the proportionality of the crime to the punishment.[120] When reviewing habitual offender laws, however, courts would not be able to look to other states with felony disenfranchisement to assess the evolving standards of decency since such an assessment would be distorted. Instead, to measure evolving standards of decency, courts would need to look only at states *without* felony disenfranchisement. All the other states offer nothing but tainted data. This doctrinal approach, as evidenced in the categorical exemption cases, is sensitive to legislative decision-making, but not in a way that causes automatic dismissal of all claims. To analogize to equal protection law, the proposal would be moving from something like rational basis review to "rational basis with bite."[121]

This proposal may come across as novel, at odds with Eighth Amendment law, or otherwise as unrealistically asking courts to draw lines. This Part responds to such concerns. The proposal is actually quite familiar to American law and fits neatly within the current Eighth Amendment framework. As for line-drawing, the proposal poses no challenge that courts do not already overcome in other contexts—the question is just one of will.

A. PROCESS-SENSITIVE JUDICIAL REVIEW

There is nothing unusual in asking courts to pay attention to the underlying decision-making process and dole out deference accordingly. Courts do so regularly. In *Gregg v. Georgia*, the Court held that the death penalty would only pass constitutional muster in states with statutes that guided the discretion of judges and juries in deciding whether to apply the death penalty.[122] Thus, under *Gregg*, if legislatures put forth certain

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[118] *See* ROBINSON & WILLIAMS, *supra* note 110, at 22 (noting that, as of 2013, every state had a habitual offender law).

[119] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010).

[120] *Id.* at 60–61.

[121] For a description of this distinction, see Kenji Yoshino, *The New Equal Protection*, 14 HARV. L. REV. 747, 759–60 (2011).

[122] Gregg v. Georgia, 428 U.S. 153 (1976). Emerging from *Gregg* was another line of cases that also made procedural demands on the application of the death penalty, specifically

procedural safeguards, the Court will defer to their judgments about the death penalty. If they do not, the Court will strike down the death penalty as unconstitutional.[123] The proposal here operates in a similar way: if a state enfranchises the targeted group, the Court will view its habitual offender laws more deferentially; otherwise, scrutiny will be higher.

Attention to underlying process is also evident in jury selection law. Under *Batson v. Kentucky*, courts assess whether the jury was selected in a racially discriminatory manner.[124] The doctrine is process oriented. Rather than vacating sentences that seem substantively racist, the doctrine instructs trial courts to assess whether the process of jury selection is racist (or sexist).[125] One of the rationales for the doctrine is that if certain populations are excluded from the jury's decision-making process, then the outcome of that process would be illegitimate.[126] As Susan Herman writes, "*Batson* is Justice Powell's attempt to provide the Court with a judicially modest, procedurally based response to racism. The solution . . . is to combat racism by providing an opportunity for those who might be the subjects of discrimination to be represented in the decision-making process."[127] Similarly, the proposal here offers the Court a modest path to combat excessive sentences by incentivizing states to allow people with felonies to be represented in the political process.

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the demand that the jury "consider mitigating circumstances when deciding whether to impose the death penalty." Jones v. Mississippi, 141 S. Ct. 1307, 1320 (2021). Justice Thomas recently gestured unapprovingly at this line of cases, noting that "[s]ome have argued that these cases and their progeny do not reflect the original meaning of the Eighth Amendment, whose prohibition 'relates to the character of the punishment, and not the process by which it is imposed.'" United States v. Tsarnaev, 142 S. Ct. 1024, 1037 n.2 (2022) (quoting Gardner v. Florida, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting)).

[123] Gregg, 428 U.S. at 222 (White, J., concurring) ("The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute, and I cannot accept the naked assertion that the effort is bound to fail . . . . There is, therefore, reason to expect that Georgia's current system would escape the infirmities which invalidated its previous system under *Furman*.").

[124] *See* Batson v. Kentucky, 476 U.S. 79, 99 (1986).

[125] *Id.*

[126] *Id.* ("In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

[127] Susan N. Herman, *Why the Court Loves* Batson*: Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1813–14 (1993).

The difference between the scheme in *Batson* and the proposal here is that in *Batson*, the Court actually attempts to *ensure* a fair jury selection process by vacating non-compliant convictions. If we were to apply that to this context, we would ask the Court to either abolish felony disenfranchisement laws or vacate any habitual offender sentence from a state with felony disenfranchisement. By contrast, this proposal merely asks for the Court to *account* for the disenfranchisement by backing away from its decades-long embrace of extreme deference. *Gregg* and *Batson* demonstrate that the Court is familiar with this type of process-sensitive analysis. The proposal here does not seek any novel function for the judiciary.

B. PROCESS-SENSITIVE EIGHTH AMENDMENT LAW

The key idea underlying this Article's proposal is that the standard for reviewing a legislative decision should depend, at least in part, on the process that produced that decision. Helpfully, the Eighth Amendment's proportionality decisions already embrace a version of this idea. For years, the Court has made an assessment about the underlying process (deeming it to be legitimate and rational) and then has decreased scrutiny on that basis. In doing so, the Court has made the question of legislative process central to Eighth Amendment law.

To be sure, the Court has done more procedural assumption than procedural assessment, but either way, it is clear that the Court has altered its level of review based on a claim about the underlying process. The only problem is that the Court's assessment or assumption has been wrong: the legislative process underlying habitual offender laws is not sufficiently legitimate to warrant strong deference. Thus, all this proposal asks is for the Court to genuinely engage in the process assessment it already purports to engage in.

Broader principles of Eighth Amendment law also support the idea that the doctrine should account for political exclusion. Taken as a whole, the central project of Eighth Amendment law has been to separate the cases that warrant scrutiny from those that do not, creating the patchiness described in Part I. There are many plausible accounts of why the Court has selected some groups—such as people who committed their crimes under eighteen and people with intellectual disabilities—for heightened scrutiny, but one compelling account is that these groups share something in common: an inability to participate in parts of the process that produced their conviction

and sentence.[128] People who committed their crimes before they turned eighteen lacked a right to vote, and people an intellectual disability sometimes lack the ability to fully assist in their defense. For these groups with limited access to the legislative and criminal process, judicial scrutiny has already been elevated. This frame offers a unifying theory of Eighth Amendment standards of review—call it the access theory of the Eighth Amendment. Groups whose identities hinder their access to the process that produces their sentences get heightened scrutiny. This Article's proposal to elevate scrutiny for people with felony convictions fits neatly within this theory.

The key point here is that if the Court can use the supposed legitimacy of the underlying process to decrease scrutiny—as it has—then the Court can also use the illegitimacy of the process to increase scrutiny. And, indeed, doing so would be consistent with the broader efforts of Eighth Amendment law to increase scrutiny when groups lack access.

C. LINE DRAWING

One predictable objection to increasing scrutiny of habitual offender laws is that the Court will be put in the difficult position of drawing lines between sentence lengths and crimes to determine what counts as cruel and unusual. The Court has articulated this objection in the past, perhaps most forcefully in Justice Burger's dissent in *Solem*, which is worth quoting at length:

> By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price-fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several States punish severely a crime

[128] *See* YAFFE, *supra* note 18, at 1 ("[K]ids should be given a break because they are disenfranchised, denied as much say over the law as adults, and so denied an equal role in authoring the law's demands.").

> that the Court views as trivial or petty? I can see no limiting principle in the Court's holding.[129]

We should not be discouraged by Justice Burger's polemic for two reasons. First, the Court's self-asserted incompetence to draw these lines is undermined by the fact that it actively draws similarly arbitrary lines in other Eighth Amendment cases. It draws these lines on both axes of crime and punishment, making subjective decisions about which crimes are worse than others and which punishments are worse than others. The Court, for example, made the judgment that the death penalty is worse than life without parole and builds a significant architecture of doctrine on that distinction.[130] Fair enough. This is a relatively intuitive and stable distinction. But importantly, reasonable people might prefer the death penalty to life without parole.[131]

Another example of the Court's reliance on subjective values is the Court's distinction between homicide and non-homicide crimes. The Court has held that people who committed their crimes before they turned eighteen cannot be sentenced to life without parole for non-homicide offenses. Again, fair enough—the distinction makes intuitive sense. But embedded here is the belief that no crime could be worse than homicide. This is probably true, but not objectively so: some people might consider other crimes morally more objectionable than murder.

A stronger example is the Court's reliance on the violent/non-violent distinction. In evaluating the severity of punishment, the Court readily draws the violent/non-violent distinction: a punishment of being whipped or losing a hand violates the Eighth Amendment, but life without parole does not. This is because the first is violent, but the second is not.[132] Justice Burger relies

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[129] Solem v. Helm, 463 U.S. 277, 314–15 (1983) (Burger, J., dissenting).

[130] Justice Rehnquist argues in *Rummel* that while death affords an objective distinction from term-of-year sentences, two term-of-years sentences cannot be objectively distinguished. Rummel v. Estelle, 445 U.S. 263, 275 (1980). So, for him, when he says death is different, what he means is that the challenge of applying the right is decreased in the context of death, not that the right itself is different. *Id.* at 273.

[131] *See, e.g.*, *Would You Rather Have Life Without Parole, or the Death Penalty?*, REDDIT, https://www.reddit.com/r/WouldYouRather/comments/9w2mnh/would_you_rather_have_life_without_parole_or_the [https://perma.cc/YAU7-JJHC].

[132] For the limited purpose of this argument, I will adopt the Court's assessment that a prison sentence is "not violent"—but only reluctantly. *Contra, e.g.*, U.S. DEP'T OF JUST., INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN 11–27 (2019), https://www.justice.gov/opa/press-release/file/1150276/download [https://perma.cc/6MQ4-H9HR] (documenting sustained, systemic violence in Alabama prisons).

on this distinction in *Weems*, claiming that a line can be drawn between physical punishment and imprisonment.[133] While his claim is intuitive at first glance, it obviously relies on subjective values, which are themselves questionable. I for one would rather lose my hand than serve life without parole. You might disagree. The Court evidently does. But that is the point—the hierarchy the Court imposes is subjective.

Yet even as the Court defends the violent/non-violent distinction with respect to punishment, it rejects it as unmanageable when it comes to the crime committed. Just after Justice Burger discussed the "objective" boundary between physical punishments and prison, he called the distinction between violent and nonviolent offenses "subjective," noting that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular individual."[134] I agree. But that same logic, as I just noted, applies to the state's exercise of violence as punishment: violent punishment is not always worse than non-violent punishment.

Outside of the Eighth Amendment context, the Court also frequently applies subjective values and draws seemingly arbitrary lines. One example is the determination of the speedy trial right.[135] Who is to say what is speedy? Doing its best with a series of factors, the Court has engaged in the task of literally choosing what number of days becomes a constitutional violation.[136] Try distinguishing the Court's task there—drawing lines between numbers of days—with the Court's task in sentencing decisions—drawing lines between numbers of days.

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[133] *See Solem*, 463 U.S. at 309–10 (Burger, J., dissenting) ("'Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative . . . . Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence' violates the cruel-and-unusual-punishment of the Eighth Amendment.'" (quoting *Rummel*, 445 U.S. at 282–83, n.27)).

[134] *Solem*, 463 U.S. at 308 (Burger, J., dissenting).

[135] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) ("[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.").

[136] Barker v. Wingo, 407 U.S. 514, 530–36 (1972) (listing four factors to assist courts as they determine, on an ad hoc basis, whether the speedy trial right has been violated).

The right to a jury trial is another example. The Court has decided that the right triggers for defendants facing sentences of six months or more.[137] I suspect that the defendant convicted by a judge instead of a jury and sentenced to five months would regard this as arbitrary. She would be even more confused when she challenged five months as excessive, and the Court dismissed her claim as unmanageable, asserting incompetence to distinguish between four months, five months, and so on. The Court, then, is inconsistent in its asserted incompetence to draw lines along the crime and sentence spectrums. Line drawing is not a serious hurdle to applying the Eighth Amendment. The Court can manage the task if it wants to.

The Court's claim to incompetence is also overly fatalistic for another reason: the word "unusual" provides a limiting principle more effective than the Court has been willing to concede.[138] The approach taken in *Solem*, which the Court has since abandoned, is illustrative. The Court applied three factors to determine whether the sentence was cruel and unusual.[139] First, it compared the severity of the crime with the severity of the punishment, a step which unavoidably asks courts to draw lines.[140] The next factors, though, provide limits that are less malleable. To determine if the sentence is "unusual" the Court first compared the sentence to sentences for similar crimes in the jurisdiction and then to sentences outside the jurisdiction.[141] Under this doctrine, even if a court finds that the comparison of a punishment to its underlying crime makes it cruel, it will often identify in the second prong that the punishment is applied to similar crimes in other states, and thus the sentence will not be unusual.[142]

No part of this argument denies Justice Burger's concern that determining "cruelty" is difficult. It merely notes that the difficulty is not disabling. As Justice Stevens wrote, "The absence of a black-letter rule does

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[137] Baldwin v. New York, 399 U.S. 66, 73 (1970) ("Of necessity, the task of drawing a line requires attaching different consequences to events which, when they lie near the line, actually differ very little.").

[138] *See generally* Julia Fong Sheketoff, *State Innovations in Noncapital Proportionality Review*, 85 N.Y.U. L. REV. 2209 (2010) (discussing the limiting effect of the word "unusual," and detailing the narrow ways that state courts have applied state constitutional prohibitions on cruel and unusual punishments).

[139] *See Solem*, 463 U.S. at 295–96.

[140] *Id.* at 296–98.

[141] *Id.* at 298–300.

[142] As noted, under the proposal of this Article, the appropriate comparison would be to states that do not disenfranchise their citizens on the basis of criminal convictions.

not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes."[143] Construing the Eighth Amendment's outer limits is especially necessary for habitual offender laws, because as we know, these laws run riot without the usual constraints of the political process.

CONCLUSION

Speaking at the Prayer Pilgrimage for Freedom in 1957, Martin Luther King, Jr. spoke to the relationship between rights and votes. "Give us the ballot," he said, "and we will no longer have to worry the federal government about our basic rights."[144] The right to vote, he understood, could achieve on its own what he had been forced to seek by asserting rights in court and petitioning the federal government. "Give us the ballot," he said, "and we will quietly and nonviolently, without rancor or bitterness, implement the Supreme Court's decision of May seventeenth, 1954."[145] Indeed, he was not asking for *Brown II*, not asking for the Court to protect his interests, but rather simply asking for the right to vote to protect his interests himself. But without the vote, he acknowledged, he was left to petition for rights.

In *Rights and Votes*, Daryl Levinson explains that "the interests of vulnerable groups in collective decision-making processes can be protected either by disallowing certain outcomes that would threaten those interests (using rights) or by enhancing the power of these groups within the decision-making process to enable them to protect their own interests (using votes)."[146] The tradeoff between rights and votes, Levinson illustrates, was well understood by the framers, and animated parts of our constitutional design. "Convinced that direct protection of constitutionally enumerated rights would be futile, the Federalist Framers, led by James Madison, attempted to secure rights indirectly, by creating a structure of government that would empower vulnerable groups to protect their interests through the political process."[147] The tradeoff has also been well understood by marginalized

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[143] Ewing v. California, 538 U.S. 11, 33 (2002) (Stevens, J., dissenting).

[144] Martin Luther King Jr., "Give Us the Ballot," Address Delivered at the Prayer Pilgrimage for Freedom (May 17, 1957), https://kinginstitute.stanford.edu/king-papers/documents/give-us-ballot-address-delivered-prayer-pilgrimage-freedom [https://perma.cc/8ZQD-U6JV].

[145] *Id.*

[146] Levinson, *supra* note 113, at 1289.

[147] *Id.* at 1293.

groups. Levinson explains that "The NAACP in the Jim Crow South had to decide whether to allocate resources to securing access to the ballot or to strengthening substantive rights protection—whether to push first for the Voting Rights Act or for the Civil Rights Act."[148]

Individuals with felony convictions find themselves with neither the vote, nor the ability to petition courts to vindicate their rights. Indeed, the striking feature of deference despite disenfranchisement is that it leaves people with felony convictions with neither rights nor votes. Perhaps the best way to remedy this harm would be to give people with felony convictions the vote, and in doing so enable them to protect their interests. That is what Martin Luther King, Jr. asked for. But for the time being, people with felony convictions are restricted from voting in most of the country, and the Court is faced with the question of how to account for that fact in its Eighth Amendment doctrine.

The best way to account for this political exclusion is to condition deference accordingly. The proposal here is not that courts should force legislatures to abolish felony disenfranchisement. States can make that decision. The proposal here is simply that once states make their decision, courts should take it into account before they bless the state's habitual offender law with extreme deference. If states would like to exclude people with felony convictions from the electorate, and then pass legislation that uniquely targets those people, they should understand that such legislation will not enjoy deference. The same should be true if states disenfranchise doctors before passing health insurance laws, disenfranchise police officers before passing police accountability laws, or disenfranchise women before passing abortion laws. Such laws demand heightened scrutiny. By contrast, if states want deference, including the targeted group in elections is a pre-requisite.

It is not hard to predict what happens when a group lacks rights and votes for an extended period. Because the group's interests are underrepresented in the political process with no judicial review on the back end, we would expect to see laws passed that uniquely target that group. We would further expect to see no accountability for those laws—either through subsequent elections or through judicial review. And finally, we would expect to see the process iterate and become increasingly severe. Laws targeting groups with neither rights nor votes operate as invasive species with no natural predators, left to proliferate unchecked.

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[148] *Id.* at 1289.

For half a century, most individuals convicted of felonies have lacked the right to vote and lacked the constitutional right to have their sentences reviewed. It is no surprise that we find ourselves in an era of mass incarceration and extreme sentences. Legislatures wrote these habitual offender laws, but by ignoring the political exclusion that produced those legislatures and by declining to review these laws with appropriate standards under the Eighth Amendment, courts have rubberstamped these cruelly extreme sentences and condoned mass incarceration.[149] The necessary path forward is to take account of political exclusion by eliminating the practice of deference despite disenfranchisement.

[149] As John Pfaff has observed, habitual offender laws are a powerful tool that prosecutors have used to usher in the era of mass incarceration. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 135–36 (2017). The causes of mass incarceration are complex, and I do not mean to flatten that complexity by suggesting that deference despite disenfranchisement plays a contributing role. For an account of the rise of mass incarceration and the "one-way ratchet" of criminal law that looks beyond voter preferences to the institutional arrangement of criminal justice decision-making, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001).