Restoring the Vote: Former Felons, International Law, and the Eighth Amendment

by JOHN GHAELIAN*

> Your denial of my citizen's right to vote, is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to a trial by a jury of my peers as an offender against law, therefore, the denial of my sacred rights to life, liberty, property . . .
>
> –*Susan B. Anthony*[1]

Introduction

The right to vote is often, and accurately, described as the most important among the many rights guaranteed under the U.S. Constitution.[2] One commentator has gone so far as to describe the right to vote as "part of our ethos for what it means to be an American."[3] The importance in which the right to vote is described is

* BA, University of Kentucky; JD, University of Kentucky College of Law. The author would like to take this opportunity to thank Professor Joshua Douglas, Professor Beau Steenken, Jane Lyle Hord, and Hannah Alsgaard. Without their help this article would not have been possible. The author will always be indebted to them for their aid, contributions, and encouragement.

1. Douglas Linder, *The Trial of Susan B. Anthony for Illegal Voting*, UNIV. OF MO.-KANSAS CITY SCH. of LAW, (2001), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/anthony/sbaaccount.html.

2. *See* Carrington v. Rash, 380 U.S. 89, 94 (1965) (describing the right vote as "vital to the maintenance of democratic institutions"). *See also* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."). A study conducted in 1993, found that an overwhelming majority of Americans consider the right to vote to be one of the most important right guaranteed to them. Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1533–34 (2003).

3. Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 145 (2008).

easily understood when consideration is given to what is implicated by voting. When people go to the polls on Election Day, they are making their voices heard on matters ranging from who should run their children's school district to who should become the next President of the United States. By voting people are attempting to ensure their voices are heard in matters that impact both their daily lives and the direction of the country as a whole. Because of its importance, the denial of the right to vote should not be taken lightly.

Americans can take comfort in the fact that the chronicle of the right to vote is largely a story of removing barriers.[4] The practice of denying the vote to former felons, however, stands in stark contrast to the history of expansion that surrounds the right to vote in America.[5] Around 5.8 million Americans have lost the right to vote due to prior felony convictions.[6] The impact of felon disenfranchisement is striking.[7] These laws mean that approximately thirteen percent of African-American males cannot vote.[8] In some states the rate of disenfranchisement is as high as one in four.[9] Also, with the growth in incarceration rates, it is expected that "three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime. In states that disenfranchise ex-offenders, as many as 40% of black men may permanently lose their right to vote."[10] Given that the vast majority of felonies committed in the United States are for nonviolent crimes, these statistics are particularly disturbing.[11]

4. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003).

5. Angela Behrens, *Voting-Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 235 (2004).

6. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2011), *available at* http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf.

7. *Id*.

8. *Id*.

9. LEAGUE OF WOMEN VOTERS OF KY., FELONY DISENFRANCHISEMENT IN THE COMMONWEALTH OF KENTUCKY 2 (2006), *available at* http://www.prisonpolicy.org/scans/lwvky/Felony_Dis_Report.pdf.

10. THE SENTENCING PROJECT, *supra* note 6.

11. *Veronique de Rugy*, Prison Math*,* REASON (June 8, 2011, 1:30 PM)*, available at* http://reason.com/archives/2011/06/08/prison-math. Current estimates suggest that has many as sixty-percent make up the current felon population. *Id.*

Due to the troubling nature of these laws, various organizations have attempted to challenge their constitutionality.[12] Litigants have brought challenges under the Fourteenth Amendment's Equal Protection Clause, the Voting Rights Act, and the Eighth Amendment.[13] Courts have largely refused to strike down laws disenfranchising former felons, regardless of how advocates frame the issue.[14] Despite this refusal on the part of courts to recognize the legitimacy of these claims, this article will argue that the Eighth Amendment provides the best mechanism for challenging the disenfranchisement of former felons. A review of decisions that have explicitly considered this issue shows that they have neglected key issues in Eighth Amendment law. Namely, courts have refused to consider disenfranchisement a punishment and therefore have held that the Eighth Amendment is not applicable. Most courts have relied on dicta in Supreme Court cases and stereotypes about former felons' mental capacity to make this ruling without substantively analyzing whether denying the right to vote is a form of punishment or merely a regulatory measure.

Commentators in favor of the Eighth Amendment's use—and courts who have considered the issue—have also ignored the guidance that international law can provide. The disenfranchisement of former felons is largely unheard of in the international community, and the disenfranchisement of current felons is viewed as a form of punishment by virtually all countries that have considered it. Since its decision in *Trop v. Dulles*,[15] the Supreme Court has shown a willingness to use international law as a reason for striking down laws as cruel and unusual.[16] Thus, the approach taken by the international

12. Carl N. Frazier, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 488 (2007).

13. Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85 (2005). Richardson v. Ramirez, 418 U.S. 24 (1974) (challenge brought to California's bar on felon disenfranchisement with the Fourteenth Amendment's Equal Protection Clause); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (challenge brought to Florida's disenfranchisement law with the Voting Rights Act); Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (challenge brought to Washington's disenfranchisement law under the Eighth Amendment was rejected).

14. *See infra* Part II.

15. 356 U.S. 86 (1958).

16. Roper v. Simmons, 543 U.S. 551 (2005) (using international law to reach the conclusion that the execution of minors violated the Eighth Amendment); Atkins v. Virginia, 536 U.S 304 (2002) (using international norms to reach the conclusion that execution of the mentally retarded is cruel and unusual punishment); Graham v. Florida,

community is relevant to whether felon disenfranchisement laws constitute cruel and unusual punishment under the Eighth Amendment.

Some have called for ending challenges in courts and focusing on the political process to reform these laws.[17] Advocates have succeeded at the state level, by convincing state legislatures to outright repeal laws disenfranchising former felons or by convincing various elected officials to significantly amend them.[18] Challenges through the judiciary have not had nearly the same rate of success as challenges through the political process.[19] The lack of success in the court system has caused some commentators to advocate for changing these laws strictly through the legislative process, and largely abandoning legal challenges.[20]

There are two major problems with abandoning litigation as a mechanism for challenging felon disenfranchisement. First, several states have recently repealed reforms that were enacted to increase former felons' access to the ballot box.[21] Second, voting is a fundamental right, and therefore, legislators should not have nearly

130 S. Ct. 2011 (2010) (using foreign materials to decide a juvenile offender cannot be sentenced to life in prison without parole for a non-homicidal crime).

17. Martine J. Price, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 407–08 (2002).

18. The early part of the twenty-first century has seen significant progress made in the fight against felon disenfranchisement. For example in 2007, Governor Steve Beshear of Kentucky dramatically eased the process that former felons must follow to regain their voting rights, reversing many of the measures implemented by his predecessor. Dave Newton, *Voting Rights Victory: But a long way to go*, KENTUCKIANS FOR THE COMMONWEALTH (Mar. 7, 2008, 12:42 PM), http://www.kftc.org/blog/archive/2008/03/06/voting-rights-victory-but-a-long-way-to-go/?searchterm=Beshear. In 2001, Governor John Rowland of Connecticut signed into law a bill "that extends voting rights to felons on probation." THE SENTENCING PROJECT, *supra* note 6. Voters in Rhode Island passed a measure in 2006 that restored the vote to former felons who had completed their sentence. *Id*.

19. *See* discussion *infra* Part III.

20. Price, *supra* note 17, at 407–08.

21. In Iowa, Governor Terry Branstad rescinded an executive order of former Governor Tom Vilsack restoring the voting rights of all former felons. THE SENTENCING PROJECT, *supra* note 6. Florida has also seen a dramatic reversal on the issue of felon voting rights. "In 2007, the Office of Executive Clemency voted to amend the state's voting rights restoration procedure to automatically approve the reinstatement of rights for many persons who were convicted of non-violent offenses. This decision was reversed in 2011, and persons seeking rights restoration must now wait at least five years after completion of sentence." *Id*.

carte blanche authority to deny it to over five million Americans.[22] As one commentator has explained:

> [A]waiting further piecemeal reforms through legislation contradicts the notion that voting is a fundamental right and creates difficulties that cannot cure the problem. One of the biggest problems with legislation is that states are still picking and choosing who to enfranchise, drawing categorical lines based on correctional status or type of conviction; these factors should not vary the right to vote.[23]

Advocates should not abandon legislative efforts, but they should still bring suit. However, given the skepticism that courts have shown litigants trying to challenge these laws, advocates will need to make compelling and original arguments. An Eighth Amendment case that used both international and domestic law may be the boost necessary to convince courts to finally recognize these laws as cruel and unusual punishment.

Part I of this article will explore the history and modern impact of felony disenfranchisement and will explain the negative impact these laws have on the American political process. Part II will examine how litigants have brought suits under the Fourteenth Amendment's Equal Protection Clause, the Voting Rights Act, and the Eighth Amendment to challenge these laws. This section will explain why previous attempts have been unsuccessful and reveal why a new and different approach is needed. Part III will examine the Eighth Amendment from a domestic perspective. It will then provide a thorough examination of the Eighth Amendment's use in disenfranchisement challenges. Part IV will explore the debate about the role international law plays in determining whether a law constitutes cruel and unusual punishment. This section will conclude that the judiciary should consider international law when considering Eighth Amendment cases. Part V will explain the international approach to felon disenfranchisement and argue that critics of felon disenfranchisement should use consideration of international law to prove that felon disenfranchisement falls outside the "standards of decency that mark the progress of a maturing society."[24]

22. Behrens, *supra* note 5, at 273.

23. *Id.*

24. Trop v. Dulles, 356 U.S. 86, 101 (1958).

I. The Origins and Modern Impact of Felon Disenfranchisement

A. Origins of Felon Disenfranchisement

The origins of felon disenfranchisement can be traced back to ancient Greece and Rome.[25] Both the Greeks and the Romans imposed the status of *atimia* (dishonor) upon criminal defendants.[26] The status "entailed not only the loss of the right to participate in politics but also the loss of many other rights associated with full citizenship."[27] This notion was continued in medieval Europe with the concept of civil death.[28] "As with *atimia*, those punished with civil death generally suffered a complete loss of citizenship rights."[29] These European ideas gained traction in America during the colonial period.[30] Initially, disenfranchisement was used sparingly in the United States and was limited to things like "'moral' violations, such as drunkenness and fornication."[31] The eighteenth and nineteenth centuries saw the rise of states adding disenfranchisement provisions to their constitutions.[32]

The end of the Civil War and the Reconstruction period ushered in a new era of felon disenfranchisement in the United States.[33] Southern states used disenfranchisement to deny African Americans the vote and as a means of curtailing the rights they had gained after the Civil War.[34] The appearance of felon disenfranchisement laws often coincided with the passage of the Fourteenth and Fifteenth Amendments.[35] A major difference between the disenfranchisement

25. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 22–24 (Oxford Univ. Press 2006).

26. *Id*. at 23.

27. *Id.* Those who were given the status of Atimia lost the right to vote, to petition government, serve in the military, receive governmental assistance, and many other rights. KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 11 (Marilyn McShane & Frank P. Williams III, eds., 2005).

28. MANZA & UGGEN, *supra* note 25, at 23.

29. *Id.*

30. Behrens, *supra* note 5, at 236.

31. *Id.*

32. *Id.*

33. Alysia Robben, *A Strike at the Heart of Democracy: Why Legal Challenges to Felon Disenfranchisement Laws Should Succeed*, 10 UDC/DCSL L. REV. 15, 19 (2007).

34. *Id*.

35. *See* MANZA & UGGEN, *supra* note 25, at 55.

statutes of early America and the ones made in the Reconstruction period was that instead of merely "barring a small offense-specific group from voting, laws began to encompass all felonies, without attention to the underlying crime. In addition, most of these laws provided for indefinite disenfranchisement, typically requiring a gubernatorial pardon to restore the right."[36] The end of the nineteenth century continued the trend of expanding felon disenfranchisement in the United States.[37]

The impact felon disenfranchisement laws had on African Americans was profound. Despite being legally enfranchised by the "[r]econstruction amendments, many African Americans remained practically disenfranchised as a result of concerted efforts to prevent their exercise of these rights."[38] Historians and other commentators have made the story of minority voter intimidation widely know.[39] However, the role that felon disenfranchisement played in minority voter suppression during the time period following the Civil War is less publicized. While not used as heavily as measures like literacy tests and poll taxes, "the explicit use of felon disenfranchisement contributed to preventing African Americans and other 'undesirable' groups from voting."[40] Given our nation's repudiation of this disturbing period of its history, the origin of many of these disenfranchisement laws should give Americans pause.

B. Modern Felony Disenfranchisement

It is estimated that at any given time over five million Americans have lost the right to vote because of a felony conviction.[41] Only two states, Maine and Vermont, do not have any sort of voting restriction based upon a felony conviction; both states allow inmates to vote in prison.[42] There is little consistency in how states inhibit former felons' access to the polls.[43] While there are many inconsistencies between the states in how former felons are disenfranchised, some common

36. Behrens, *supra* note 5, at 237.

37. Frazier, *supra* note 12, at 484.

38. *See* MANZA & UGGEN, *supra* note 25, at 56–57.

39. *Id*.

40. *Id.* at 57.

41. NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2010 2 (2010).

42. PROJECT VOTE, RESTORING VOTING RIGHTS TO FORMER FELONS 1 (2010), *available at* http://www.projectvote.org/images/publications/Felon%20Voting/Felon Restoration-Policy Paper2010.pdf.

43. *Id.*

characteristics are discernible. Felon disenfranchisement laws fall into six broad categories, including: permanent disenfranchisement for all felony offenders,[44] permanent disenfranchisement for at least some offenders,[45] voting rights restored after completion of sentence including parole and probation,[46] voting rights restored after completion of sentence and parole,[47] voting rights restored after completion of sentence,[48] and finally no disenfranchisement for felony offenders.[49] Even though the vast majority of states eventually allow former felons to regain the vote, many ex-offenders find the process so cumbersome, confusing, and onerous that many ex-offenders who are theoretically eligible to vote never manage to get their voting rights back.[50] States might require payment of fees and fines, writing essays, obtaining letters of recommendation, or consultation with multiple agencies.[51] Michelle Alexander has questioned whether this process is the modern-day equivalent of poll taxes and literacy tests.[52]

Studies done on the matter demonstrate that the inconsistency between the states on disenfranchisement policy has resulted in several negative consequences.[53] Experts have concluded that this inconsistency creates confusion for "not only those former offenders who wish to regain the right to vote, but also the very officials charged with implementing the laws."[54] Such a patchwork system has resulted in two common negative outcomes: felons who are eligible to vote are discouraged from doing so, while other "former offenders who are unaware of their state's restrictions may register and vote,

44. PROJECT VOTE, FELON VOTING RIGHTS BY STATE 1 (2010), *available at* http://www.projectvote.org/images/publications/Felon%20Voting/felon_voting_rights_by_state_05-11-2010.pdf. Currently Kentucky and Virginia are the only two states that fall into this category. *Id*.

45. *Id.* States in this category include Alabama, Arizona, Delaware, Mississippi, Nevada, Tennessee, and Wyoming.

46. *Id.* Twenty-one states fall under this category. Examples include Alaska, Arkansas, Georgia, and Texas. *Id*.

47. *Id.* States in this category include Connecticut and New York. *Id*.

48. *Id.* States in this category include Hawai'i, Illinois, Massachusetts, and Pennsylvania. *Id*.

49. *Id.* Currently only Maine and Vermont fall in this category. *Id*.

50. PROJECT VOTE, *supra* note 42.

51. *Id.*

52. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, 154 (The New Press ed., 2010).

53. PROJECT VOTE, *supra* note 42.

54. *Id.*

and, in doing so, unwittingly commit a new crime."[55] Essentially, felons who operate in this patchwork system may make their situation worse by mistakenly registering to vote believing they can do so. Alternatively, they may fail to vote when eligible because they mistakenly believing they do not qualify.

Felon disenfranchisement continues to have a major impact on the modern political process.[56] Studies show that laws disenfranchising former felons prevent more people from voting than any other restriction.[57] Some experts worry that in states that impose a permanent ban on ex-offender voting, "forty percent of the next generation of African American males may eventually suffer permanent disenfranchisement."[58] The 2010 midterm elections provide an example of the impact that felon disenfranchisement laws can have on the political process.[59] During that election over five million people were denied the right to vote because of felon status, the vast majority of whom resided in one of the "35 states that that still prohibit some combination of persons on probation, parole, and/or people who have completed their sentence from voting."[60] A report conducted on felon exclusion in the 2010 election noted: "Racial disparities in the criminal justice system also translate into higher rates of disenfranchisement in communities of color, resulting in one of every eight adult black males being ineligible to vote."[61] While the impact these laws have on the political process is significant, others worry more about the "the ability of individuals to exercise their constitutionally protected rights. Felon disenfranchisement is the only ballot restriction, other than age or mental infirmity, imposed on American citizens. These exceptional laws represent the 'sole remaining vestige of states power to disenfranchise their citizens.'"[62]

55. *Id.*

56. Thomas G. Varum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges under the Voting Rights Act*, 14 MICH. J. RACE & L. 109, 117 (2008).

57. *Id*.

58. *Id.*

59. PORTER, *supra* note 41, at 3.

60. *Id*.

61. *Id.*

62. John Benjamin Schrader, "*Reawakening 'Privileges or Immunities': An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285, 1290 (2009) (*quoting* David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting*

II. Legal Challenges to Felon Disenfranchisement

Various legal challenges have been brought against felon disenfranchisement laws. This section will provide an overview of the suits that have been brought against these laws, and explore how courts have regarded them.

A. The Fourteenth Amendment's Equal Protection Clause

The Supreme Court first considered the constitutionality of disenfranchising former felons in 1974.[63] In *Richardson v. Ramirez*, the Supreme Court was presented with the question of whether the disenfranchisement of former felons ran afoul of the Fourteenth Amendment's Equal Protection Clause.[64] In *Ramirez,* three individuals who had previously been convicted of felonies attempted to register to vote in California after serving their sentences and completing parole, but were prevented from doing so because of their prior convictions.[65] The California Constitution denied the right to vote to those who had been convicted of an "infamous crime."[66] The petitioners' argument revolved around the fact that voting is considered a fundamental right, and laws limiting voting rights are subject to strict scrutiny.[67] The *Ramirez* plaintiffs reasoned that because California's Constitution denied them the right to vote, the Supreme Court should apply strict scrutiny and strike the provision down.[68] The Court held that felon disenfranchisement did not constitute a violation of equal protection.[69]

To reach its conclusion, Justice Rehnquist decided for the majority that it was necessary to review the interplay of sections one and two of the Fourteenth Amendment.[70] Section one of the Fourteenth Amendment provides:

Rights Act Can and Should Say About Felony Disenfranchisement, 47 B.C. L. REV. 411, 412 (2006)).

63. Richardson v. Ramirez, 418 U.S. 24 (1974).

64. *Id*. at 56.

65. *Id.* at 26.

66. *Id*. at 57.

67. *Id*. at 55–56; Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627–28 (1969) (holding that voting is a fundamental right and that statutes restricting this right are subject to strict scrutiny review).

68. *Ramirez*, 418 U.S. at 56.

69. *Id*. at 57.

70. *Id.* at 54–55.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[71]

A court will only apply strict scrutiny, in voting rights cases, when it believes that the law in question violates this section.[72] Section two of the Fourteenth Amendment, the Reduction of Representation Clause, generally prohibits states from restricting the right to vote "except for participation in rebellion, or other crime."[73]

Justice Rehnquist rejected the petitioners' argument that California had to justify its restriction on voting rights by demonstrating a compelling state interest, because of section two.[74] Explaining his reasoning, Justice Rehnquist declared: "[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely."[75] Essentially, since felon exclusion is explicitly allowed under the Reduction of Representation Clause, it could not run afoul of the Fourteenth Amendment's Equal Protection Clause.[76] The Court found affirmation for its

71. U.S. CONST. amend. XIV, § 1.

72. *Ramirez*, 418 U.S. at 54.

73. U.S. CONST. amend. XIV, § 2.

74. *Ramirez*, 418 U.S. at 56.

75. *Id.* at 54.

76. It should be noted that eleven years later in *Hunter v. Underwood* the Supreme Court did provide for a limited exception to its broad holding in *Ramirez*. 471 U.S. 222 (1985). In this decision stemming from an Alabama law, the Court held that felon disenfranchisement laws that were enacted for discriminatory purposes were *per se* invalid, unless the defenders of the state's laws could "demonstrate that the law would have been enacted without this factor." *Id*. at 228. Given that the vast majority of disenfranchisement laws were enacted to target African Americans, many felt that the Hunter decision would lead to a tipping point on the matter. Frazier, *supra* note 12, at 490. However, *Hunter* has been of little use to litigants attempting to challenge felon disenfranchisement laws, because most states have amended or reenacted their criminal disenfranchisement since they were enacted during the post Civil War period. *Id*. Lower courts have held that this process has removed the racist taint of felon disenfranchisement laws and restored their constitutional legitimacy. *Id*.

interpretation in the fact that some states disenfranchised felons at the time of the Fourteenth Amendment's enactment.[77] Also, since several former Confederate states were readmitted into the Union with criminal disenfranchisement statute intact, Congress gave affirmative approval to felon disenfranchisement.[78] While the *Ramirez* decision has been widely criticized by commentators and scholars, the decision is still good law and continues to present an impediment to advocates who hope to strike down disenfranchisement laws on constitutional grounds.[79]

B. Challenges outside of Equal Protection

The Supreme Court's decision in *Ramirez* has been a significant bar not only to challenges based upon the Fourteenth Amendment, but to other legal theories as well.[80] The problem is that "[c]ourts have adhered rather rigidly to the Ramirez [sic] decision, and its precedent has thus far remained untouched."[81] The impact of *Ramirez* has not been limited to challenges under the Fourteenth Amendment, but also to cases brought under the Voting Rights Act, and even the Eighth Amendment.[82]

1. The Voting Rights Act

Advocates have attempted to use the Voting Rights Act ("VRA") to challenge felon disenfranchisement.[83] Initially, the use of the VRA seemed reasonable given that it "has been successful at dismantling many barriers created to prohibit African Americans from voting."[84] Also, because Congress intended for the law to expand the right to vote, "courts interpret and apply this Act as broadly as possible."[85]

77. *Ramirez*, 418 U.S. at 48.

78. *Id*.

79. Behrens, *supra* note 5, at 257; Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1154 (2004); Mark E. Thompson, Comment, *Don't Do the Crime if you Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167 (2002).

80. Behrens, *supra* note 5, at 251.

81. *Id*.

82. Frazier, *supra* note 12, at 489–98.

83. *Id*. at 492.

84. Caren E. Short, *Phantom Constituents: A Voting Rights Act Challenge to Prison Based Gerrymandering*, 53 HOW. L.J. 899, 914 (2010).

85. Varum, *supra* note 56, at 120.

Cases brought under the VRA have typically been based upon section two[86] which provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.[87]

Challenges under section two fall into two broad categories: vote dilution claims and vote denial claims.[88] When alleging vote dilution, a plaintiff argues "that a voting scheme . . . diminishes minorities' political influence without denying them the opportunity to vote."[89] When a plaintiff brings a vote denial claim, however, the litigant alleges "a voting regulation disproportionately diminishes minorities' ability to cast ballots."[90] Given the modern method of disenfranchisement, African American and other minority communities as a whole are affected more by disenfranchisement than non-minority individuals.[91] Ultimately, African Americans and other minorities are subject to higher felony rate convictions.[92] Therefore, most litigants have brought vote dilution claims.

While the disenfranchisement of former felons has diluted the vote of minorities in various places all across the county,[93] courts have not been receptive to section two claims.[94] In reasoning similar to that

86. *Id*.

87. 42 U.S.C. § 1973.

88. Varum, *supra* note 56, at 120.

89. *Id*.

90. *Id.*

91. Tushar Kansal, *Racial Disparity in Sentencing: A Review of the Literature,* (Marc Mauer ed., 2005), *available at* http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

92. *Id.*

93. *See supra* Section I.B; Kentucky provides a striking example of the impact felon disenfranchisement laws can have on minority voting. Currently it is estimated that the Kentucky disenfranchises over 186,000 people because of a prior felony conviction. Despite having a relatively small African-American population, Kentucky has one of the highest rates of minority disenfranchisement, with one out of every four African Americans being denied the right to vote because of a prior felony conviction. LEAGUE OF WOMEN VOTERS OF KY., *supra* note 9.

94. *See* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986); Muntaqim v. Coombe, 366 F.3d 102, 115 (2d Cir. 2004).

used in *Ramirez*, many courts have ruled that the VRA does not apply to felon disenfranchisement laws because the Fourteenth Amendment affirmatively sanctions them.[95] Other courts have been reluctant to strike down disenfranchisement laws under the VRA because Congress failed to manifest an "unmistakably clear" intent for the VRA to cover such voting restrictions.[96] Initially, the Ninth Circuit seemed more open to applying the VRA to overturn disenfranchisement laws.[97] However, when the circuit considered the matter *en banc*, it quickly realigned itself with the majority of other circuits.[98] Given the Ninth Circuit's swift reversal on the matter, it would seem that the VRA is not viable as a means for challenging disenfranchisement laws.

2. Eighth Amendment Challenges

The idea that the disenfranchisement of former felons constitutes cruel and unusual punishment under the Eighth Amendment is not new.[99] Advocates as early as the 1970s argued that these laws ran afoul of the Eighth Amendment in various ways.[100] One scholar made the argument that disenfranchisement of former felons violated the Eighth Amendment's proportionality requirement.[101] Given the fact

95. *Johnson*, 405 F.3d at 1228.

96. Hayden v. Pataki, 449 F.3d 305, 328 (2d Cir. 2006).

97. Farrakhan v. Washington, 338 F.3d 1009, 1011 (9th Cir. 2003). In *Farrakhan v. Washington*, the Ninth Circuit ruled that these laws could be challenged under the totality of the circumstances approach available in section two of the VRA. *Id*.

98. Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010). The court stopped short of saying that plaintiffs could not challenge felon disenfranchisement laws under section two of the VRA. *See id*. Despite still allowing challenges under section two of the VRA the court significantly raised the evidentiary bar for plaintiffs wishing to do so. The court held that plaintiffs would need to establish "that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent." *Id*.

99. *See* Gary L. Reback, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 860 (1973).

100. *Id*.

101. *Id*. In *Weems v. United States*, the United States Supreme Court ruled that "that punishment for crime should be graduated and proportioned to the offense." 217 U.S. 349, 367 (1910). The Supreme Court has struck down a number of punishments on proportionality grounds, since its decision in *Weems*. Despite their reliance on it "Justices have demonstrated chronic disagreement about the precise contours of the principle and about its application in specific cases and classes of cases." Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 322 (2010). Despite this disagreement "there has been near consensus about the more basic issue: namely, that the Eighth Amendment does in fact require

that it is possible for former felons to lose their rights for the entirety of their lifetimes for minor felonies, like drug possession or other non-violent crimes, it appears there is some merit to the argument that these statutes violate the Eighth Amendment. However, courts have thus far rejected Eighth Amendment challenges.[102]

Most courts that have considered this question have held that felon disenfranchisement is not punishment, and therefore the Eighth Amendment does not apply. In reaching this conclusion, courts have relied on dicta in *Trop v. Dulles*.[103] In *Trop*, the government attempted to revoke the citizenship of a soldier who had been dishonorably discharged from the military.[104] The defendant argued that his sentence violated the Eighth Amendment.[105] The government countered that the Amendment did not apply because the statute involved was civil, and not criminal.[106] Therefore, the government argued, revocation of citizenship was merely a regulatory measure and did not constitute punishment.[107] However, Justice Warren, writing for a controlling plurality, found these arguments unpersuasive and ruled that revocation of citizenship was a form of punishment as both cruel and unusual.[108] Applying a two-part test, Justice Warren found that the law was designed for punitive purposes and violated the Eighth Amendment's proportionality requirement.[109]

In the many years since the Supreme Court issued its *Trop* decision, several courts have relied upon its reasoning to hold that felon disenfranchisement does not constitute a form of punishment.[110]

proportionality whatever that may be—between punishment and the crime for which it is imposed." *Id*.

102. Frazier, *supra* note 12, at 492–94.

103. Trop v. Dulles, 356 U.S. 86 (1958).

104. *Id*. at 87–88.

105. *Id*. at 88.

106. *Id.* at 94.

107. *Id*.

108. *Id*. at 99, 101.

109. *Id.* at 95–104. Justice Warren's reasoning and the standards applied by the Court to reach its conclusion will be described in greater detail later in this article. The decision's implications for international law's use in Eighth Amendment cases will also be discussed at a later point in this article.

110. There are numerous examples of courts relying upon *Trop* to find that disenfranchisement does not constitute punishment. For example, in *Green v. Bd of Elections*, the court merely restated *Trop* to reach the conclusion that the Eighth Amendment did not cover disenfranchisement of felons. 380 F.2d 445, 449 (2d. Cir. 1967). Other courts have relied on *Ramirez* to find that disenfranchisement is not banned by the Eighth Amendment, because of its official sanction in the Reduction of Representation

This trend may seem odd at first glance, since *Trop* involved a form of punishment that the Court found to be cruel and unusual. To understand why several courts have relied upon *Trop*, an examination of Justice Warren's reasoning is necessary. In explaining how a measure could be regulatory and not punitive, Justice Warren posited the following example:

> The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, the law is sustained as a nonpenal exercise of the power to regulate the franchise.[111]

While only dicta, courts have used this text as proof that disenfranchisement does not constitute punishment.[112] Some courts have relied solely on *Trop*'s language to reach this conclusion.[113] Courts that rely on *Trop* engage in numerous legal inconsistencies.[114] However, courts ignore these problems and continue to invoke *Trop* in finding that the Eighth Amendment does not protect felon suffrage.

Clause of the Fourteenth Amendment. Farrakhan v. Locke, 987 F. Supp. 1304, 1313–14 (E.D. Wash. 1997).

111. *Trop*, 356 U.S. at 96.

112. *Id.*

113. Green v. Bd of Elections, 380 F.2d at 449 (2d Cir. 1967) (citing *Trop*, 356 U.S. at 97) (noting that "the Chief Justice used statutes depriving felons of voting rights to illustrate what was not a penal law").

114. Later sections of this paper will address the problem with relying upon *Trop's* hypothetical to decide that disenfranchisement is not punishment. *See supra* Part III.B. A court's reliance on Warren's hypothetical is misguided because "*Trop*'s statement that disenfranchisement is regulatory is (1) dicta, (2) based on an outdated conception of voting rights, and (3) logically and historically inconsistent with the Court's conclusion that expatriation is punitive." Wilkins, *supra* note 13, at 102.

III. Felon Disenfranchisement and the Eighth Amendment from a Domestic Perspective

As noted earlier, felon disenfranchisement has been unsuccessfully contested on Eighth Amendment grounds. This Part begins with an explanation of how commentators believe the courts are wrong. While these commentators have done an excellent job of using domestic materials to challenge the decisions of relevant courts, they have largely ignored the role international law should play. Therefore, the next two parts of this article will establish how litigants can use international law to convince courts that disenfranchisement is not just punishment, but cruel and unusual punishment. However, before considering international materials, this section of the article will examine disenfranchisement from a largely domestic standpoint.

A. An Overview of the Eighth Amendment

The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[115] What exact punishments the Founding Fathers were concerned with is not entirely clear, but it is believed they enacted the amendment to prohibit torture and others forms of barbarous penalties.[116] Initially, courts were reluctant to broadly apply the Eighth Amendment's prohibition against cruel and unusual punishment.[117] This reluctance ended, however, with *Weems v. United States*.[118] Here, the Supreme Court held that a fifteen-year sentence for falsifying government documents was cruel and unusual punishment.[119] In reaching its conclusion, the *Weems* Court held that a state imposed punishment must be "graduated and proportioned to [the] offense."[120] Several years later, the Supreme Court provided clarity as to how to determine whether a punishment is disproportionate to the offense. In examining if a punishment is disproportionate, and thus cruel and unusual, it is necessary to consider "the evolving standards of decency that mark the progress of

115. U.S. CONST. amend. VIII.

116. Gregg v. Georgia, 428 U.S. 153, 170 (1976) (citing Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 852–853 (1969)).

117. *See* Molly E. Grace, *Baze v. Rees: Merging Eighth Amendment Precedents into A New Standard for Method of Execution Challenges*, 68 MD. L. REV. 430, 437–39 (2009).

118. 217 U.S. 349 (1910).

119. *Id.*

120. *Id.* at 367.

a maturing society."[121] To do this, courts first consider "objective indicia of consensus" as to the punishment under review.[122] After examining objective criteria, courts then form its "own independent judgment" to determine if a punishment is disproportionate.[123]

The Eighth Amendment is meant to prohibit cruel and unusual punishment. While it may seem that all government imposed sanctions that follow a conviction would be punishment, some penalties are merely regulatory. What exactly constitutes punishment is not an easy question to answer.[124] Making the question even more complicated is the Supreme Court's refusal to create a clear test that addresses the matter.[125] This has made it difficult to resolve what test a court should "use to determine whether a putatively non-criminal sanction like disenfranchisement rises to the level of punishment as defined in the Eighth Amendment."[126]

Despite the lack of certainty on the matter, the Supreme Court has provided some guidance on the punishment versus regulation question. In *Trop v. Dulles*, the Court noted that in "deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal."[127] However, laws are not penal if they "accomplish some other legitimate governmental purpose."[128]

To determine whether there is some other legitimate purpose the court must consider if the governmental measure is reasonable to achieve its goal.[129] When courts examine a governmental act, they first decide whether it is punishment or regulation.[130] If a court finds the law to be penal it will then analyze whether it constitutes cruel

121. Trop v. Dulles, 356 U.S. 86, 101 (1958).
122. Roper v. Simmons, 543 U.S. 551, 564 (2005).
123. *Id*.
124. Wilkins, *supra* note 13, at 118.
125. *Id*. at 120.
126. *Id.* at 119–20.
127. 356 U.S. 86, 96 (1958).
128. *Id*.
129. *Id*.
130. *See infra* Part III.B.1.

and unusual punishment.[131] This involves looking at the objective indicia of consensus and its own independent judgment.[132]

After establishing that disenfranchisement constitutes punishment, litigants must show that it is *cruel and unusual* punishment.[133] This first requires ascertaining what the "objective indicia of consensus" is on the measure in question.[134] In *Coker v. Georgia*, the Court held that its "judgment should be informed by objective factors to the maximum possible extent."[135] The Court ruled in *Atkins v. Virginia* that the most reliable factor in determining the objective indicia of consensus is the actions of state legislatures.[136] Other factors the Supreme Court has relied upon include "public opinion polls, scientific and sociological data, and international opinion."[137]

The more controversial part of the test is the Supreme Court's reliance upon its own independent proportionality review.[138] Here, "the Court independently reviews the imposed sentence to determine whether it amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense."[139] Many find this prong of the test worrisome because as "the Court has not articulated what properly falls within the scope of this inquiry, litigants are left guessing what the Court may find relevant when exercising its independent judgment in resolving a case."[140] Despite this controversy, the Court has held that even if there is consensus on a particular matter, it must still determine "whether there is reason to

131. *See infra* Part III.B.2.

132. *Id*.

133. Thompson v. Oklahoma, 487 U.S. 815, 821 (1988).

134. Roper v. Simmons, 543 U.S. 551, 564 (2005).

135. 433 U.S. 584, 592 (1977).

136. 536 U.S. 204, 312 (2002).

137. Bethany Siena, Kennedy v. Louisiana *Reaffirms the Necessity of Revising the Eighth Amendment's Evolving Standards of Decency Analysis*, 22 REGENT U. L. REV. 259, 268–69 (2010).

138. *Id*. at 278.

139. *Id*.

140. James I. Pearce, *International Materials and the Eighth Amendment: Some Thoughts on Method After* Graham v. Florida, 21 DUKE J. COMP. & INT'L L. 235, 248 (2010). This prong of the test has caused worry among the more conservative wing of the Court. For example, Justice Scalia has often criticized the Court's independent proportionality review in several of his Eighth Amendment dissents. *See* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting); *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting); Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting).

disagree with the judgment reached by the citizenry and its legislators."[141] Thus, it is possible that the Court might reject national consensus on a particular punishment by finding it to be cruel and unusual.

B. Eighth Amendment Analysis Applied to Felon Disenfranchisement

1. Is Disenfranchisement a Form of Punishment?

The first issue that must be addressed is whether disenfranchisement is a form of punishment. If a court does not find a particular measure to be a form of punishment, it will not apply the Eighth Amendment. As noted earlier, most courts have refused to find that disenfranchisement is a form of punishment. To do this, several courts have relied upon Justice Warren's hypothetical in *Trop v. Dulles*, in which a state revoked the voting rights of a bank robber because of the state's compelling interest in the regulation of the right to vote.[142] There are several problems with federal courts' reliance on this passage to determine that disenfranchisement is not punishment. Perhaps most troubling is the fact that Justice Warren's hypothetical is mere dicta, and thus is not binding upon any court in the United States.[143] Because the consequences of categorizing a measure as merely regulatory are so severe, when making the bold declaration that something is not a form of punishment, courts should actually apply a real analysis on the matter instead of relying upon a non-binding hypothetical.

Another problem with courts' dependence on *Trop* is that, in creating his hypothetical, Warren was relying upon an understanding of voting rights that is no longer valid.[144] One commentator has noted that "*Murphy v. Ramsey* and *Davis v. Beason* [sic], the two cases on which the *Trop* [sic] Court relied in its dicta about disenfranchisement, both hearken from an era before suffrage was generally considered a right of adult citizens."[145] Both cases came from an era where it was believed that the government had an almost unlimited right to disenfranchise its citizenry.[146] Since these two cases

141. *Atkins*, 536 U.S. at 313.

142. Trop v. Dulles, 356 U.S. 86, 97 (1958).

143. *See* Thompson, *supra* note 79, at 187.

144. Wilkins, *supra* note 13, at 103.

145. *Id.*

146. *Id.*

were issued, the right to vote has essentially been expanded to the point where it is "nearly a universal right of adult citizenship."[147]

Because reliance upon *Trop* is not sufficient, courts should apply a proper Eighth Amendment analysis to determine if disenfranchisement constitutes punishment. As noted previously, the analysis requires looking at the intent of the legislature and determining if the measure in question achieves a legitimate governmental goal in a reasonable manner.[148] The legislative histories of these laws are often unclear, and thus a review of the governmental interests involved is necessary to determine whether disenfranchisement is punishment.[149] The few commentators that have examined this issue have found that disenfranchisement clearly constitutes a form of punishment.[150]

Proponents of felon disenfranchisements provide a variety of justifications for their advocacy of withholding the right to vote. Among the most popular is the purity of the ballot box argument. The essential idea is that that "the presence of criminals within the polity erodes confidence in elections through a process of contamination in which dirty votes taint clean ones."[151] Statements by Kentucky Senator Mitch McConnell highlight how some influential and powerful people have come to accept this view. During a debate Senator McConnell declared "states have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of representative democracy . . . [T]hose who break our law should not dilute the votes of law-abiding

147. *Id*. at 105. The story of the expansion of voting rights in America is a fascinating one. With the ratification of the Constitution in 1787, the right to vote was mentioned only in passing, and most states restricted it "to property-owning, taxpaying white males over the age of twenty-one." Carl N. Frazier, *Removing the Vestiges of Discrimination: Criminal Discrimination Laws and Strategies for Challenging them*, 95 KY. L.J. 481, 482 (2006). In addition to passing Constitutional Amendments, in the middle half of the twentieth century Congress passed the Voting Rights Act to prevent states from infringing upon the rights of minorities to vote. Over time the right to vote would be given to those whom had previously been disenfranchised. In 1870, the Fifteenth Amendment enfranchised male African Americans; in 1920, women gained the right to vote with the passage of the Nineteenth Amendment, and in 1971, the right was given to any citizen above the age of eighteen. *Id*. The Voting Rights Act explicitly, "prohibits states from diluting minority voting power and charges the U.S. Department of Justice with monitoring some states voting practices." *Id*.

148. *See infra* Part III.A.

149. Thompson, *supra* note 79, at 188–89.

150. *Id*.; *see also* Wilkins, *supra* note 13, at 151.

151. MANZA & UGGEN, *supra* note 25, at 12.

citizens."[152] However, proponents of this attitude have been able to produce "little to no evidence that former felons are more likely to commit electoral fraud than any other element of the American citizenry."[153] Also weakening the argument that former felon voting will lead to voter fraud are the numerous measures states have taken to ensure that voter fraud does not occur.[154] Both "election reform and technological advances in the elective process" have dramatically decreased the ability of bad actors to commit voter fraud.[155]

Another argument advanced for disenfranchising former felons is to ensure that the "anti-social" voter does not wreak havoc on American communities.[156] People who advance this concern base it on two contentions.[157] The first is that a former felon's inherent immorality raises "questions about their ability to vote responsibly."[158] Second, there is worry that ex-felons will "vote to repeal or emasculate provisions of the criminal code."[159] Again, there is little evidence to demonstrate that either of these concerns is legitimate.[160]

Given the lack of evidence supporting a legitimate governmental interest, courts should find that the denial of the right to vote is not a regulatory measure. Therefore, courts ought to recognize that felon disenfranchisement is punishment. At the very least, courts should apply a real analysis of the issue. Once recognizing that felon disenfranchisement constitutes punishment, courts can begin to consider whether the disenfranchisement of former felons constitutes cruel and unusual punishment.

152. 148 CONG. REC. 107, S797–S809, S802 (Feb. 14, 2002) (debate on Equal Protection of Voting Rights Act of 2001).

153. MANZA & UGGEN, *supra* note 25, at 200.

154. Measures taken by states include increased scrutiny from law enforcement officials for electoral irregularities, requiring voter identification, and increasing the procedures to register to vote. PEOPLE FOR THE AMERICAN WAY, *The Right to Vote Under Attack: The Campaign to Keep Millions from the Ballot Box*, http://www.pfaw.org/rww-in-focus/the-right-to-vote-under-attack-the-campaign-to-keep-millions-of-americans-from-the-ball#the (last checked Apr. 12, 2013).

155. Thompson, *supra* note 79, at 190–91.

156. *Id*. at 195.

157. *Id*.

158. Shepard v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

159. Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting).

160. Thompson, *supra* note 79, at 195.

2. Is Disenfranchisement Cruel and Unusual Punishment?

Litigants will need to show that disenfranchisement falls outside "the evolving standards of decency that mark the progress of a maturing society," and thus is disproportionate to the government's purported goals in order to convince a court that it is cruel and unusual punishment.[161] The attempts to convince courts of this have focused on domestic sources of law. Courts have compared felon disenfranchisement to denaturalization to support the theory that disenfranchisement is cruel and unusual punishment.[162] Like denaturalization, disenfranchisement is "a denial by society of the individual's existence as a member of the human community."[163] As discussed earlier, the right to vote is something the vast majority of Americans cherish.[164] Americans place a high premium on the right to vote and denying it to so many citizens ensures that a large swath of the country is voiceless.[165] More troubling is that disenfranchisement fails to accomplish any legitimate purpose and thus is "nothing more than the pointless infliction of suffering."[166] Due to the lack of necessity for disenfranchisement, arguments that it is disproportional punishment gain credence and credibility.

The "objective indicia of consensus" also supports the argument that disenfranchisement is a form of punishment.[167] This has not always been the case. In 1967, when the Second Circuit in *Green v. Board of Elections* considered whether New York's disenfranchisement statute violated the Eighth Amendment, forty-two states had similar laws.[168] Relying on the vast popularity of these statutes, the *Green* court found that New York's law did not fall outside the "evolving standards of decency."[169] However, the *Green* court failed to take into account the significant amount of variation in how states implement disenfranchisement.[170] Also, while noting some

161. Roper v. Simmons, 543 U.S. 551, 561 (2005) (explaining the standard for what constitutes cruel and unusual punishment (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1968))).

162. *See* Thompson, *supra* note 79, at 200–01.

163. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 273–74 (1972)).

164. *See supra* Introduction.

165. *Id.*

166. *See* Thompson, *supra* note 78, at 200–01 (quoting *Furman*, 408 U.S. at 279).

167. Roper v. Simmons, 543 U.S. 551, 564 (2005).

168. 380 F.2d 445, 450 (2d Cir. 1967).

169. *Id.* at 451 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

170. *Id.*

factors in its analysis, the court mostly relied on *Trop's* dicta to reach its conclusion instead of conducting a thorough examination of the matter.[171] Significant changes have occurred since the Second Circuit considered the matter.[172] Now, only two states permanently bar former felons from voting, and thus, it appears the national consensus on disenfranchisement has changed.[173] Public opinion polling conducted on the matter also demonstrates a national consensus against felon disenfranchisement.[174] While the Supreme Court does not find opinion polls as persuasive as legislative action, it has referenced them when deciding what the objective "indicia of consensus" is on a particular matter.[175]

A petitioner's likelihood of success increases dramatically if he or she brought a narrowly tailored challenge to a disenfranchisement statute. For example, a petitioner in Kentucky or Virginia may have a greater chance of convincing a court that the state's disenfranchisement scheme constitutes cruel and unusual punishment, because both states absolutely deny former felons the right to vote.[176] It should be noted that some scholars who have considered the issue find that most forms of disenfranchisements are cruel and unusual punishment.[177] However, not everyone shares this view.[178] Professor Pamela A. Wilkins makes a very persuasive case that courts are unlikely to impose a blanket ban on disenfranchisement on Eighth Amendment grounds.[179] Wilkins provides several explanations for her beliefs including "the near universality of some form of felon disenfranchisement in the United States at present" and the "disagreement among the Supreme Court justices about whether non-capital punishments require *any* proportionality analysis, as well as the Court's generally narrow

171. *Id.*

172. *See supra* Part I.

173. *Id.* Kentucky and Virginia are the only two states who impose permanent disenfranchisement.

174. Polling shows that over eighty percent of Americans favor restoring the vote to former felons in most instances. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280–81 (2004), *available at* http://www.soc.umn.edu/~uggen/Manza_Brooks_Uggen_POQ_04.pdf.

175. Atkins v. Virginia, 536 U.S. 304, 315–17 (2002).

176. VA. CONST. art. II, § 1; KY. CONST. § 145.

177. Reback, *supra* note 99, at 860.

178. *See* Wilkins, *supra* note 13, at 137–38.

179. *Id.*

conception of proportionality."[180] Given these factors, it is unlikely that the more relaxed approaches to disenfranchisement would be considered cruel and unusual punishment.

Ultimately though, these arguments are mostly a rehash of prior ones that courts have heard and rejected. The lack of success on these positions should make any litigant weary of relying solely upon them. The next sections of this article will provide petitioners with new arguments that they can use to convince courts that felon disenfranchisement is cruel and unusual punishment. Namely, I will discuss the role international law has in any Eighth Amendment analysis and how foreign materials can be used to convince a court that disenfranchisement is cruel and unusual.

IV. International Law and the Eighth Amendment

The few commentators and courts that have considered the Eighth Amendment's role in felon disenfranchisement cases have largely ignored international law.[181] One commentator has noted that there is "ample evidence of the international community's rejection of permanent disenfranchisement."[182] Other scholars have explored how various western nations approach felon disenfranchisement, but have not addressed whether international condemnation of this practice is relevant in an Eighth Amendment analysis.[183] Just recently, a majority of justices on the Supreme Court reaffirmed the notion that international law has at least some relevance in Eighth Amendment cases.[184] "The judgments of other nations and the international community are not dispositive as to the meaning of the Eighth Amendment. But '[t]he climate of international opinion

180. *Id*. at 137.

181. *See* Thompson, *supra* note 78. In his note Thompson argues that felon disenfranchisement is a form of cruel and unusual punishment, but he does not discuss the potential of international law. Other scholars have largely ignored this issue. A review of cases that have considered this issue also shows that courts have ignored international law when considering Eighth Amendment challenges to felon disenfranchisement. *See* Green v. Bd. of Education, 380 F.2d 445, 449 (2d. Cir. 1967); Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997); Kronlund v. Honrstein, 327 F. Supp. 71, 73–74 (N.D. Ga. 1971).

182. Wilkins, *supra* note 13, at 141.

183. AMERICAN CIVIL LIBERTIES UNION, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006) [hereinafter *ACLU Report*]; Reuven Ziegler, *Legal Outlier, Again?: U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J., 197 (2011).

184. Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

concerning the acceptability of a particular punishment' is also 'not irrelevant.'"[185] While this language does not call for a robust role for international law, it still affirms its relevance in Eighth Amendment cases. Given the Supreme Court's willingness to consider foreign materials in Eighth Amendment matters, this avenue should not be ignored. In a number of cases the Supreme Court has used international sources to find that certain punishments are cruel and unusual.[186] Litigants hoping to use the Eighth Amendment would be remiss to not use international law in their argument due to the Court's willingness to analyze international law when considering whether governmental measures constitute cruel and unusual punishment. The importance of using international law is especially potent since earlier unsuccessful attempts to challenge felon disenfranchisement under the Eighth Amendment failed to use international law. Therefore, international law can give courts a new avenue by which to consider the felon disenfranchisement.

The use of international law in Eighth Amendment cases has been a lightning rod for controversy.[187] Therefore, before addressing *how* to use international law to challenge felon disenfranchisement laws, the question to address is *whether* using international law is appropriate. While detractors of international law have made some compelling arguments as to why international law is not relevant in Eighth Amendment cases, ultimately the proponents of international law are correct.

A. The Debate Over International Law

Critics of international law find its use disturbing for several reasons. First, they believe that it supplants the views of the American public with those of foreign jurisdictions.[188] Detractors also

185. *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982)).

186. *See* discussion *infra* in Part B of this section.

187. Steven G. Calabresi & Stephanie Dotson Zimdahal, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 751 (2005).

188. Roper v. Simmons, 543 U.S. 551, 624–28 (2005) (Scalia, J., dissenting). It should be noted that Justice Scalia is critical of the use of international law in almost all contexts. Scalia has argued, "modern foreign legal materials can *never* be relevant to an interpretation of—to the meaning—of the U.S. Constitution." Justice Antonin Scalia, Keynote Address Before the American Society of International Law: Foreign Legal Authority in the Federal Courts (Apr. 2, 2004). However, as will be addressed shortly in more detail, Scalia is open to the use of international law in a few limited contexts, such as the interpretation of treaties. Olympic Airways v. Husain, 540 U.S. 644, 660 (2004) (Scalia, J., dissenting).

argue that using international law essentially allows the courts to cherry pick between punishments the courts approve and ones they do not.[189] For example, commentators have noted that the Court is less likely to rely on international law in cases involving freedom of speech, religious liberty, and the use of illegally obtained evidence, where international "law is more conservative than U.S. constitutional law."[190] Essentially, these critics argue that when the Court disproves of a sentence, it will use international law to strike down a punishment, but will ignore international practice when it concludes that a law is not cruel and unusual.[191] Abortion, for example, is cited as an example of when the Court cherry picks among international law of which it approves and the international law of which does not.[192] Critics on the Court for example have noted that the United States is one a few handful of countries that permits "abortion on demand until the point of viability."[193]

Justice Scalia has been the Court's leading critic of the use of international law in Eighth Amendment cases.[194] In *Roper v. Simmons*, Scalia wrote in dissent:

> The basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand . . . . I do not believe that approval by "other nations and peoples" should buttress our commitment to American principles any more than (what should logically follow) disapproval by "other nations and peoples" should weaken that commitment.[195]

Scalia was reacting to the Court's ruling that execution of minors (persons under the age of eighteen) is unconstitutional.[196] In reaching the conclusion that the execution of minors constituted cruel and

189. Pearce, *supra* note 140, at 240.

190. Calabresi & Zimdahal, *supra* note 187, at 751.

191. *Id.*

192. *Id.*

193. *Roper*, 543 U.S. at 625 (Scalia, J., dissenting).

194. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 74–81 (2006) (providing a thorough history on Scalia's criticism of international law in Eighth Amendment cases).

195. *Roper*, 543 U.S. at 624–28 (Scalia, J., dissenting).

196. *Id.* at 574–75.

unusual punishment, the Court employed various justifications.[197] Many of the factors were of an international nature, including that the United States was among only a handful of nations that still permitted the execution of minors, and that the Convention on the Rights of the Child expressly forbids the practice.[198] Scalia found the use of such factors unpersuasive and argued that the Court was continuing a disturbing trend of setting aside "American principles" in favor of international ones depending solely on the personal beliefs of the justices.[199]

The fears of Justice Scalia and other critics of using international law in Eighth Amendment cases are misguided. A review of how the Supreme Court has used international law since *Trop v. Dulles*, reveals a conservative approach.[200] Thus, the concerns that international law will usurp American principles do not seem justified by Supreme Court precedent. In *Trop*, the Supreme Court seemed to envision a broad role for international law in Eighth Amendment jurisprudence. Essentially, since *Trop* the Supreme Court has "firmly relegated the use of international law to the secondary role of reaffirming a perceived national consensus."[201] Given the subservient role the Supreme Court has given to international law in Eighth Amendment cases, the fear that American ideals will be discarded cannot be justified.

When reviewing what can be considered in an Eighth Amendment analysis, it is vital to examine the actual text of the amendment. As noted earlier, the Eighth Amendment succinctly provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[202] Despite the amendment's concise language, the Supreme Court has had difficulty interpreting its meaning.[203] Even with continuing ambiguity, several scholars have noted that the intentions of the Founding Fathers can

197. *Id*. at 575–78.

198. *Id*.

199. *Id.* at 628 (Scalia, J., dissenting).

200. *See* Cleveland, *supra* note 194, at 71 ("Of all the Eighth Amendment cases discussed here, the *Trop* plurality placed the greatest reliance on international perspectives."); *See also infra* Part IV.B (which provides a more thorough discussion of how international law has been used in Eighth Amendment cases since *Trop v. Dulles*).

201. *Id*. at 80.

202. U.S. CONST. amend. VIII.

203. *See* Weems v. United States, 217 U.S. 349, 368 (1910) ("What constitutes a cruel and unusual punishment has not been exactly decided.").

be drawn from the language of the Amendment.[204] Nothing in the text of the amendment suggests that the inquiry should be limited "to specifically domestic sources."[205] For example, "[w]hat is 'cruel' under the Eighth Amendment may warrant consideration of what practices have been outlawed under international treaties and customary international law."[206] Also, the amendment's "deep historical resonance, arguably envisions a more expansive construction."[207]

Other commentators, even those who believe the use of foreign sources should be strictly limited,[208] have argued that the Eighth Amendment's use of the word "unusual" provides sanction for the application of international materials in this context.[209] These scholars argue that the Eighth Amendment's "use of the word 'unusual' is essentially a synonym for the word 'unreasonable' in the Fourth Amendment, and that it thus constitutes a textual invitation to jurists to consider the practice of all civilized nations in assessing the validity of a punishment."[210] This view gains credence when one considers that the Eighth Amendment was "worded at a high level of abstraction and [was] arguably intended, as an original matter, to have some evolving content."[211] The reliance upon the word "unusual" to support the conclusion that international law should be considered in an Eighth Amendment analysis is supported by the simple fact that "[w]hat is 'unusual' on its face requires consideration of how common, or uncommon, a particular practice is."[212] Given that nothing in the text of the Amendment suggests that this inquiry

204. Pearce, *supra* note 140, at 240.

205. *Id*.

206. Cleveland, *supra* note 194, at 70.

207. Pearce, *supra* note 140, at 240.

208. Scholars Steven G. Calbresi and Stephanie Dotson Zimdahal have looked at the history of the Supreme Court's use of international law in a variety of circumstances, to address whether foreign materials should be used at all. After examining this history, they essentially concluded that the use of international materials can only be justified in a few areas. Eighth Amendment cases are one of the few areas where they believe that the use of international materials is appropriate. The authors concluded "that in the overwhelming majority of non-Fourth and non-Eighth Amendment cases, it is inappropriate for the Court to cite foreign law." Calabresi & Zimdahal, *supra* note 187, at 756.

209. *Id*. at 891–92.

210. *Id*.

211. Steven G. Calabresi, *Lawrence, the Fourteenth Amendment, and the Supreme Court's Reliance on Foreign Constitutional Law: An Originalist Reappraisal*, 65 OHIO ST. L. J. 1097, 1104 (2004).

212. Cleveland, *supra* note 194, at 70–71.

should be limited to domestic sources, courts should feel little hesitancy to consider international law.

In addition to the text of the Eighth Amendment, the Supreme Court's standard to determine whether a punishment is cruel and unusual invites study of international law.[213] In *Trop*, the Supreme Court held that "The Amendment must draw its meaning from *the evolving standards of decency that mark the progress of a maturing society*."[214] Since the *Trop* Court created this standard, both critics and proponents of the use of international law have accepted it—even the dissenters in *Trop* accepted the use of international law in their analyses.[215] The acceptance of *Trop*'s formulation of Eighth Amendment law is surprising since this standard seems to call for "a broad interpretation" and thus makes reliance on international sources reasonable.[216] As one commentator has noted, "nothing in this test appears to limit the appropriate judicial inquiry to American views on this subject."[217]

The *Trop* Court noted that when the Founders enacted the Eighth Amendment, its language "was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta."[218] Given that international materials played a vital role in creating the Amendment, using the same type of resources to subsequently interpret it seems both reasonable and logical. This belief gains more credence when one looks more broadly than the Eighth Amendment and examines how the Founders seemed to view international law. The Declaration of Independence, for example, calls for providing "decent respect to the opinions of mankind."[219] This statement has convinced some scholars that the Supreme Court should use international law.[220] In addition to the Declaration of Independence, the Federalist Papers declare that "the judgment of other nations is important to every government . . .

213. Pearce, *supra* note 140, at 240.

214. Trop v. Dulles, 356 U.S. 86, 101 (1958) (emphasis added).

215. Cleveland, *supra* note 194, at 77.

216. Pearce, *supra* note 140, at 240.

217. Cleveland, *supra* note 194, at 77.

218. *Trop*, 356 U.S. at 100.

219. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

220. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 43–44 (2004). Koh believes that this statement shows that the founders "understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance." *Id.*

in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."[221]

B. The Use of International Law in Prior Eighth Amendment Cases

In *Trop v. Dulles*, reaching the conclusion that the Eighth Amendment prohibited the government from revoking the citizenship of an Army deserter, Chief Justice Warren wrote that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[222] Chief Justice Warren noted that the Amendment was not meant to be static, instead deriving "its meaning from the evolving standards of decency that mark the progress of a maturing society."[223] In reaching the conclusion that imposition of statelessness fell outside of appropriate punishment, Chief Justice Warren observed that denationalization was "deplored in the international community of democracies."[224] Chief Justice Warren also thought it notable that a United Nations survey found that only two countries imposed banishment as a form of punishment for desertion.[225] The dissenting judges in *Trop* did not argue with the plurality's use of international law.[226] Instead, Justice Frankfurter's dissent opined that "[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities."[227]

Despite the strong role that international law played in *Trop*, "[s]ubsequent Eighth Amendment cases have granted a weaker role to international law."[228] For example, a plurality in *Coker v. Georgia* held that priority should be given to objective factors like public opinion, juror reaction, and legislative responses to a particular matter.[229] Consideration of international law was relegated to a mere footnote, which remarked that *Trop* considered international law, and that it was not irrelevant that only a handful of countries still imposed

221. THE FEDERALIST NO. 63 at 361 (James Madison) (American Bar Association ed., 2009).

222. *Trop,* 356 U.S. at 100.

223. *Id*. at 101.

224. *Id*. at 102.

225. *Id*. at 103.

226. *Id*. at 114–28 (Frankfurter, J., dissenting).

227. *Id*. at 126 (Frankfurter, J., dissenting).

228. Cleveland, *supra* note 194, at 72.

229. 433 U.S. 584, 592 (1977).

the death penalty for rape.[230] The plurality concluded by stating that "in light of the legislative decisions in almost all of the States and in most of the countries around the world, it would be difficult to support a claim that the death penalty for rape is an indispensable part of the States' criminal justice system."[231]

Enmund v. Florida was the first case in which a majority of the Supreme Court adopted the plurality approach used in *Coker*.[232] The Court held in *Enmund* that the death penalty for vicarious felony murder was cruel and unusual.[233] In reaching its decision the Court referred to a variety of factors—including jury and prosecutor practice and the acts of state legislatures—to find whether a national consensus on the issue had been reached.[234] After examining these national considerations, the majority turned its attention to international practice.[235] Again, the Court found that international law was not irrelevant, and that imposition of the death penalty for vicarious felony murder was extremely rare outside of the United States.[236]

It was not until *Roper v. Simmons* when "the majority finally robustly recommitted itself to consideration of international law and simultaneously reaffirmed a role for an independent judicial determination of what constitutes cruel and unusual punishment."[237] In *Roper*, the Court held that prisoners could not be executed for crimes that had been committed while they were minors.[238] The Court began its analysis by noting that a national consensus against the juvenile death penalty had emerged, with a majority of states prohibiting it and few states actually using it.[239] After looking at domestic factors, the Court turned its attention to international considerations. The Court noted that only seven countries other than the United States had implemented the death penalty for minors in the past fifteen years, and the Convention on the Rights of Every

230. *Id*. at 596 n.10.
231. *Id*. at 592 n.4.
232. 458 U.S. 782 (1982).
233. *Id*. at 788.
234. *Id.* at 788–96.
235. *Id*.
236. *Id*. at 796 n.22.
237. Cleveland, *supra* note 194, at 77.
238. Roper v. Simmons, 543 U.S. 551, 568 (2005).
239. *Id*. at 564.

Child prohibited it.[240] After examining these factors the Court explained "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[241] These latter cases reveal the secondary nature that international law plays in an Eighth Amendment analysis. Basically, the Court relies on foreign materials to buttress a decision it has reached irrespective of international law.

V. International Law and Felon Disenfranchisement

A significant portion of the world's nations allow *incarcerated* felons the right to vote.[242] Countries in Europe and elsewhere clearly view disenfranchisement as a form of punishment.[243] This section will explore how other countries approach felon disenfranchisement and explain why the United States falls so far outside of the international norm. This part concludes with the recommendation that litigants use international law in Eighth Amendment cases to demonstrate that felon disenfranchisement is not only punishment, but that it is an unconstitutionally cruel and unusual punishment.

A. International Approaches to Felon Disenfranchisement

Studies examining how the western world approaches felon disenfranchisement reveal that the United States is far outside the international norm.[244] Examining disenfranchisement from an international context shows that other Western countries fall into three broad categories.[245] The majority of countries impose no ban on felon voting whatsoever.[246] Like Maine and Vermont in the United States, these countries allow all incarcerated prisoners to vote. Other countries "impose a ban on voting for a limited period of time, but generally only for a few, discrete categories of prisoners—those serving long sentences for certain serious crimes."[247] In this second category a few countries allow for limited post-incarceration

240. *Id*. at 576–77.

241. *Id*. at 578.

242. *ACLU Report, supra* note 183, at 4.

243. *Id*. at 5.

244. *Id*.

245. *Id.* at 4–5.

246. *Id.* at 6. Examples of countries that fall into this category include: Austria, Croatia, Denmark, Finland, Germany, Iceland, and Ireland. *Id*.

247. *Id*. at 4–5. Countries that fall into this category include: Belgium, France, Greece, and Italy. *Id.*

restrictions on voting.[248] The last and smallest category consists of countries that ban all current prisoners from voting.[249] However, it should be noted that even in this third category disenfranchisement "stops at the prison walls."[250]

Another major difference between the United States and most Western countries is the conception of disenfranchisement. In the United States, proponents of disenfranchisement insist it is not a form of punishment and argue that it is actually a regulatory measure.[251] In Europe and elsewhere, disenfranchisement is clearly understood as a form of punishment.[252] How disenfranchisement is imposed and administered reveals a significant difference between how the two continents view the matter.[253] However, in Europe the "sanction is usually considered and publicly imposed by a judge, often based on the nature of the offense and the offender."[254]

Given that most democracies outside of the United States grant most felons the right to vote, it is interesting to consider their justifications for doing so. Many European correctional officials argue that enfranchisement is good public policy. The United Kingdom, where there has been significant debate about whether prisoners should have the right to vote, provides numerous examples of this. Clive Fairweather, a former chief inspector of Scotland's prison system, has argued that inmates should have the right to vote because "[e]ven if you lose your freedom, you should still have the right to say something about the running of your country."[255] Others in the United Kingdom feel the same way as Mr. Fairweather and are advocating for all citizens, including those incarcerated, to have the right to vote.[256] Advocates believe granting felons access to the ballot box will provide inmates with a stronger connection to their

248. *Id.* at 4.

249. *Id*. at 5. Countries that fall into this category include: Bulgaria, Hungary, Russia, and the United Kingdom. *Id.*

250. *Id*. at 4.

251. *Id*. at 5.

252. *Id*.

253. *Id*.

254. *Id*.

255. Tanya Thompson, *Prisoner's Legal Fight to Vote May Open Floodgates,* THE SCOTSMAN, (Nov. 1, 2004, 1:05 PM), http://www.scotsman.com/news/politics/prisoner-s-legal-fight-to-vote-may-open-floodgates-1-560441.

256. UNLOCK & PRISON REFORM TRUST, BARRED FROM VOTING: THE RIGHT TO VOTE FOR SENTENCED PRISONERS, 5 (2010), *available at* http://www.prisonreformtrust.org.uk/uploads/documents/votesbriefingfeb2010.pdf.

community, and will thus be less likely to recidivate.[257] Studies conducted on the matter validate these views. Former felons who are allowed the right to vote are less likely to be rearrested as compared to those who are ineligible to vote.[258]

Another significant difference between the United States and other democracies is how the respective court systems have responded to prisoner disenfranchisement. As discussed earlier, most courts in United States have found affirmative sanction for disenfranchisement in the Constitution.[259] Therefore, most American courts are unwilling to strike down these laws on a variety of grounds.[260] Courts in other countries, however, have been very critical of the ability of governments to deny their citizenry the right to vote.[261] Viewing the right to vote as a fundamental human right, these courts have held that not only must former felons be given access to the ballot box, but that current prisoners must be as well.[262]

Canada has been one of the leading countries on this matter. After Canada enacted the Canadian Charter of Human Rights and Freedoms, Rick Sauvé—an incarcerated inmate—decided to challenge the country's universal ban on prisoner voting.[263] Sauvé argued that section three of the Charter, which provides "[e]very citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein," ensured his right to vote.[264] The Canadian Supreme Court held that the government did not have the authority to impose a blanket ban on prisoner voting.[265] In reaching its conclusion, the Court rejected the contention that the government was owed deference on the matter because "[t]he right to vote is fundamental to . . . democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful

257. *Calls for Prisoners Right to Vote Grows*, BBC NEWS (Mar. 2, 2004, 6:35 PM), http://news.bbc.co.uk/2/hi/uk_news/3523231.stm.

258. Christopher Uggen & Jeff Manza, *Voting & Subsequent Crime & Arrest: Evidence from a Community Sample*, 36 COLUM. HUMAN RIGHTS L. REV. 193, 213–14 (2004).

259. *See* discussion of Richardson v. Ramirez, *supra* Part II.

260. *See supra* Part II.

261. *ACLU Report, supra* note 183, at 8–11.

262. *Id.* at 11.

263. *Id.*

264. Sauvé v. Canada, [2002] 3 S.C.R. 519, para. 2 (Can.).

265. *Id.* at para. 1.

examination."[266] The Canadian government put forth a subversive voter argument,[267] but the Court found no merit in it, noting that it had "abandoned the notion that the electorate should be restricted to a 'decent and responsible citizenry.'"[268] The Court also held that there was no "rational connection" between the government's purported objective and the denial of suffrage.[269] The Court noted that by denying prisoners the right to vote the government had lost "an important means of teaching them democratic values and social responsibility."[270]

South Africa's Constitutional Court has also limited the ability of its government to deny the right to vote to prisoners. In *Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders* ("NICRO"), South Africa's highest court directly addressed the issue of whether the government had the authority to deny prisoners the right to vote.[271] In response to previous cases in South Africa that limited the ability of various governmental agencies to do so, Parliament amended the Electoral Act to deny prisoners the right to vote.[272] The South African government argued that it had the authority to disenfranchise prisoners as a means of punishment and allowing inmates the right to vote would impose too much of an administrative burden.[273] Like the *Sauvé* Court, South Africa's Constitutional Court searched for a logical connection between the government's interest and the chosen means and failed to find one.[274] The Court rejected the administrative burden argument by noting that the right to vote was fundamental under South Africa's constitution and that outweighed any logistical concerns.[275] Also, the Court flatly rejected the government's punishment argument by declaring that the government cannot

266. *Id*. at para. 9.

267. The subversive voter argument is the same as the anti-social voter concept. The basic notion is that prisoners or former felons will go into the ballot box with the objective of causing society harm such as purposely voting for bad candidates or supporting a weakening of the criminal code. *See supra* Part III.B.1.

268. *Id*. at para. 33.

269. *Id*. at para. 19.

270. *Id*. at para. 38.

271. 2004 (3) SA 280 (CC) at 2 para. 2 (S. Afr.).

272. *ACLU Report, supra* note 183, at 14.

273. *Minister of Home Affairs v. National Institute of Crime Prevention and the Reintegration of Offenders*, 2004 (3) SA 280 (CC) at para. 108 (S. Afr.).

274. *Id.* at 50 para. 102.

275. *Id*.

"deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals."[276] Essentially, the government could not deprive prisoners of the right to vote for the purpose of appearing tough on crime.

European courts have also been skeptical of the ability of governments to deny prisoners voting rights. In *Hirst v. United Kingdom*, the European Court of Human Rights examined the U.K.'s laws on the matter to determine if they violated the European Convention on Human Rights.[277] At the time of the decision the U.K.'s laws essentially operated as a blanket ban on inmate voting.[278] After failing to obtain relief in the British court system, Hirst took his case to the European Humans Rights Court.[279] After a lower court ruled in favor of Hirst, the United Kingdom appealed the decision to Grand Chamber of the European Court of Human Rights.[280] The Court examined whether "the United Kingdom's legislation was compatible with the right-to-vote provisions in Article 3 of Protocol No. 1 of the European Convention on Human Rights."[281]

To decide the case in the United Kingdom's favor, the Court noted that it would need to be convinced of three things: "that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate."[282] The Court first considered how the various European states had approached the issue, and noted that some states had no restriction on prisoner voting, others had a total ban, and the rest fell into some sort of middle group where the right to vote was withheld from certain classes of prisoners.[283]

276. *Id*. at 27 para. 56.

277. *ACLU Report, supra* note 183, at 15. *See* Hirst v. United Kingdom (No. 2), 74025/01 Eur. Ct. H.R. (2004)

278. *ACLU Report, supra* note 183, at 15.

279. *Id*.

280. *Id*. at 17.

281. *Id*. at 15–16. Article 3 of Protocol No. 1 of the European Convention on Human Rights provides that: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3 (Mar. 20, 1952) 213 U.N.T.S. 221.

282. Hirst v. United Kingdom (No. 2), App. No. 74025/01, 42 Eur. H.R. Rep. 41, para. 62 (2006) (Grand Chamber).

283. *Id*. at para. 33.

Like the high courts in South Africa and Canada, the *Hirst* Court found that despite their status as prisoners, inmates must be allowed to vote "to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Art.5 of the Convention."[284] However, unlike the other courts, the *Hirst* Court was more open to restrictions on prisoner voting.[285] The Court held that although the Convention ensures the right to vote, it does not prohibit restrictions on an inmate "who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations."[286] Some disenfranchisement was necessary, the Court reasoned, to allow democracies to take "steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention."[287] This did not mean, however, that governments had *carte blanche* authority to disenfranchise their prisoners.[288] Given the "severe" nature of disenfranchisement, the Court held that it cannot "be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned."[289]

The Court then examined the purpose the United Kingdom claimed it was achieving by imposing disenfranchisement, and then analyzed whether this aim was proportional to the means. The United Kingdom argued that disenfranchisement was meant to prevent crime and to increase "civic responsibility and respect for the rule of law."[290] While noting that both were legitimate governmental purposes, the Court held that disenfranchisement of all prisoners was not a proportional measure for accomplishing these goals.[291] The Court declared that "the measure lacked *proportionality*, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period

284. *Id*. at para. 69.
285. *Id*. at para. 71.
286. *Id*.
287. *Id*.
288. *Id*.
289. *Id*.
290. *Id*. at para. 74.
291. *Id*. at para. 76.

representing retribution and deterrence) had expired."[292] That the United Kingdom denied the vote 48,000 people—many of whom had been convicted of only minor offenses—and that felons were often not informed of their loss of the right to vote were particularly troublesome to the Court.[293] These factors in combination convinced the Court to hold that the "general, automatic and indiscriminate restriction on a vitally important convention right" was irreconcilable with "any acceptable margin of appreciation" and was "incompatible with Article 3, Protocol 1."[294]

The *Hirst* decision, along with the other cases previously discussed, reveals that the United States' practice of disenfranchising former felons falls far outside international norms and customs. Before considering how this would play into an Eighth Amendment analysis, it is important to discuss why the United States is so different from the rest of the world. Scholars have concluded that a major reason for the disparity is the "absence of a constitutional right to vote."[295] But many Supreme Court cases recognize the right to vote as fundamental. For example, in *Reynolds v. Sims*, Chief Justice Warren recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[296] Simply put, because of its importance, the right to vote was held by the *Reynolds* Court to be fundamental.[297] Despite courts recognizing voting as a fundamental right, they "often treat the right to vote as less than fundamental by employing a low level of scrutiny to election law challenges."[298] Unlike the United States, other countries are much more protective of the right to vote. Many of these nations have constitutional provisions that expressly guarantee the right to vote. When foreign courts are presented with restrictions on the right to vote, they are less likely to grant the government deference and more likely to apply a higher level of scrutiny.[299] Most foreign courts examine "disenfranchisement legislation by applying balancing or proportionality review, which

292. *Id.* (emphasis added).
293. *Id.* at para. 77.
294. *Id.* at para. 82.
295. Ziegler, *supra* note 183, at 238.
296. 377 U.S. 533, 555 (1964).
297. *Id.* at 561–62.
298. Douglas, *supra* note 3, at 145.
299. Ziegler, *supra* note 183, at 221.

arguably sets a higher threshold for reviewing legislation than the American strict scrutiny test."[300] This proportionality review was applied in all of the international cases discussed *supra*, and has led to greater protection of the right to vote than in similar cases in the United States.

B. Using International Law in an Eighth Amendment Challenge to Felon Disenfranchisement

For litigants hoping to challenge disenfranchisement laws as cruel and unusual punishment, international law can prove to be a boon in several ways. First, international case law and practice can be used to convince a court that disenfranchisement is a form of punishment, and thus entitled to Eighth Amendment review. Second, foreign sources might convince courts that disenfranchisement is cruel and unusual. International law demonstrates objective indicia of consensus against blanket or widespread disenfranchisement and it may convince judges to exercise their independent judgment against it.

1. Future Disenfranchisement Challenges under the Eighth Amendment

Litigants will need to choose wisely when deciding where to bring suit. Not all state disenfranchisement statutes have the same effect.[301] A challenge brought in a state where disenfranchisement does not have as big of an impact makes it easier for a court to dismiss the case. Advocates would be wise to bring a challenge in either Kentucky or Virginia, because they have the most restrictive disenfranchisement laws.[302] Under both states' laws a former felon is permanently barred from the polls unless they receive a pardon from the governor.[303] Kentucky provides as an excellent test case. Currently the Kentucky Constitution prohibits all former felons from voting for life, regardless of the crime committed, unless a felon manages to receive a pardon from the governor.[304] It is estimated that Kentucky's prohibition on former felon voting denies over 186,000 Kentuckians access to the polls.[305] That is roughly one out of every

300. *Id.*

301. THE SENTENCING PROJECT, *supra* note 6.

302. PROJECT VOTE, *supra* note 44.

303. VA. CONST. art. II, § 1; KY. CONST. § 145.

304. KY. CONST. § 145

305. LEAGUE OF WOMEN VOTERS OF KY., *supra* note 9.

seventeen Kentuckians.[306] Kentucky also has the added benefit of being located in the Sixth Circuit, which has been more open to challenges against felon disenfranchisement then other circuits have been.[307] Virginia would also be a good place to bring suit. Over 300,000 people are barred from voting in Virginia because of the state's disenfranchisement law.[308]

Advocates should also clearly consider what kind of plaintiff they want to represent their case. First, they will need to ensure that their plaintiff can meet standing requirements.[309] A former felon whose voting rights have been restored by a governor would not be able to bring a claim. Also, a court may be unlikely to hear the case if the petitioner has not actually tried to have his voting rights restored. In Kentucky, for example, there is a process that former felons can go through if they want to get their voting rights back. If a former felon in Kentucky brought suit challenging the state's law, but had not gone through this process, a court may find that his or her claim is not ripe or that standing requirements are not met. Also, litigants will need to consider the crime that the plaintiff committed that caused the loss of voting rights. They will need to do so for both legal and strategic reasons. As discussed earlier, a wide variety of crimes are felonies. A court will likely find a claim that permanent disenfranchisement is disproportional punishment more convincing if it is brought by someone who was convicted of relatively minor drug possession. However, courts will likely not find the claim of someone who has convicted of a serious or violent felony as convincing. In such instances, a court will likely find that the government has a legitimate interest in barring such people from the ballot.

The considerations of what kind of plaintiff to bring suit also raises the question of how broad the challenge should be. The question arises, should plaintiffs challenge these laws in their entirety or should they bring a more targeted suit? The best approach is to

306. *Id.*

307. In *Wesley v. Collins* the Sixth Circuit allowed plaintiffs to challenge Tennessee's denial of their right to vote by bringing a Section 2 claim. Most circuits have ruled that the Voting Rights Act does not apply to felon disenfranchisement laws, and thus plaintiffs cannot use it challenge these laws. 791 F.2d 1255 (6th Cir. 1986). While the plaintiffs were not successful in that case it is significant that the court made a decision on the merits of the plaintiff's argument and did not merely dismiss the case because it believed that the VRA did not apply to such laws. *See* Short, *supra* note 84, at 916–17.

308. ADVANCEMENT PROJECT, ACCESS DENIED: THE IMPACT OF VIRGINIA'S FELONY DISENFRANCHISEMENT LAWS 2 (2005), *available at* http://advancement project.com/sites/default/files/publications/VAdisencosts.pdf.

309. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

bring a narrow challenge. Petitioners would be wise to concede that states can impose time, place, and manner restrictions on a former felon's right to vote. For example, a state might require that a former felon complete parole before receiving the right to vote back. A state may also have the right to bar violent criminals permanently from the polls. A court would not believe that permanent disenfranchisement is disproportionate because of the reprehensibility of their actions.

A targeted approach has the added benefit of revealing whether any Eighth Amendment strategy is likely to succeed in the future, because if it does not work in states with the most restrictive disenfranchisement laws it almost certainly will not work in states that have the least. While this strategy may not be a silver bullet for ending all disenfranchisement laws, it could lead to their restriction. Given how federal courts have previously treated this issue, that limited achievement would, in and of itself, be a major accomplishment.

Once deciding strategic matters like where to file suit, which plaintiff has the best chance of success, and how broad the challenge should be, legal arguments will be made. As mentioned earlier, litigants will need to show that disenfranchisement is punishment before a court will apply an Eighth Amendment analysis. Commentators who believe that disenfranchisement is punishment have based their reasoning almost strictly on domestic sources. Like the international courts mentioned earlier, they have attempted to show that—regardless of the governmental interest at stake—disenfranchisement is a disproportional means of achieving that aim. However, largely because of dicta in *Trop*, American courts have rejected these arguments. Therefore, merely rehashing them with no new material is unlikely to succeed. International law is the boost litigants need to show that disenfranchisement is punishment.

As previously discussed, many countries recognize disenfranchisement as a form of punishment.[310] For example, in *Sauvé v. Canada* the Canadian government argued that disenfranchisement was a form of legitimate punishment.[311] In addition, the South African government argued that disenfranchisement was necessary to convince the public that it was tough on crime.[312] Also, since most international courts hold that disenfranchisement is disproportional to most governmental purposes, litigants could cite to these passages

310. *ACLU Report, supra* note 183, at 1, 12–20.

311. *Id.* at 12.

312. *Id.* at 20.

as evidence of their claims. While international opinion on the matter might not seem like new information, it may be enough to convince courts not to rely solely on *Trop,* but to conduct a full analysis on the issue. If more jurists are willing to review the matter *in toto*, there is a greater chance that courts will find that disenfranchisement is a form of punishment.

Petitioners will also need to show that disenfranchisement is cruel and unusual punishment, and international law provides evidence of this. The Supreme Court has often relied on international law to determine whether there is indicia of consensus on a form of punishment. Typically, when the Court has done this, American and foreign principles are largely in line with each other.[313] At first glance, it may seem that the international community and the state are far apart on the issue. This is because the vast majority of states have some form of disenfranchisement, and the Supreme Court has held that the best place to look for consensus on a particular measure is the actions of state legislatures. However, a more careful examination reveals that not all hope is lost on the matter. First, as discussed *supra*, the past decade has seen state legislatures strike down restrictions on former felon voting.[314] While a few states have regressed on the matter, the general trend still strongly tilts towards increasing former felon access to the ballot.[315] Litigants could use this evidence to show that states are becoming uncomfortable with the practice. The recent actions of state legislatures coupled with international scorn of the practice should demonstrate that there is consensus that disenfranchisement is not an appropriate form of punishment.

This argument gains more merit when one considers that only a handful of states disenfranchise former felons for a lifetime. Most states have a more lenient approach and allow former felons to vote either once they complete their sentence or when they finish their prohibition and parole.[316] In the international community, disenfranchisement of former felons is exceedingly rare and is permitted only for limited periods of time for certain serious offenses.[317] Therefore, international practices will be most convincing in a challenge brought to either Kentucky's or Virginia's law. These

313. Cleveland, *supra* note 194, at 79.

314. *See supra* Introduction.

315. *Id.*

316. PROJECT VOTE, *supra* note 44.

317. *ACLU Report, supra* note 183.

sources would highlight how the disenfranchisement laws of these two states fall outside of international norms in addition to domestic customs.

While the Supreme Court has placed great importance on the actions of state legislatures in determining consensus, it has not limited its review to these matters. The Court has also examined public opinion polls and sociological studies to determine whether consensus has formed on an issue. Public opinion polls concerning disenfranchisement reveal significant support for giving former felons the right to vote.[318] Some studies show that eighty percent of Americans disfavor the disenfranchisement of former felons.[319] Sociological studies prove that disenfranchisement has many negative consequences for communities and giving former felons the right to vote decreases recidivism.[320] These studies and opinion polls would counterbalance the less than satisfactory approach taken by state legislators on the matter in convincing federal courts that there is consensus against felon disenfranchisement. If litigants use evidence like this in coordination with the opinion of the international community, courts may be more willing to revisit the issue with a new eye and conduct a more stringent analysis.

However, the use of public opinion polls and sociological studies would likely not be enough to counteract fully the approach that state legislatures have taken on the issue because of the importance the Supreme Court has placed on state legislative action. Therefore, the objective indicia of consensus approach would likely work only in a state like Kentucky or Virginia, due of their statuses as the only two states still imposing a lifetime ban. Since most American legislatures have not come out against the disenfranchisement of former felons nearly as strongly as the international community, federal courts would likely uphold less restrictive approaches. Therefore, litigants will need to be very careful in selecting a state to bring a challenge.[321]

The best hope for litigants planning to use the Eighth Amendment to strike down felon disenfranchisement laws is to convince a court to use its independent judgment to determine that that denying the vote is a form of punishment. One commentator

318. Manza et al., *supra* note 174.

319. *Id.*

320. Uggen & Manza, *supra* note 258.

321. Other commentators who have advocated using the Eighth Amendment to challenge these laws have also advocated for a more targeted approach. Wilkins, *supra* note 13, at 142–44.

notes that "[w]here an international rule directly contrary to U.S. punishment practice does exist, international law could play a much more robust role in Eighth Amendment analysis, given the standard the Court has articulated."[322] This is because, "rather than serve as evidence supporting a national consensus, international law could be considered in the 'independent' judgment that the Court recognizes that judges should bring to bear in Eighth Amendment analysis."[323] The Supreme Court has recognized that where American practice falls far outside international custom, it may have "reason to disagree with the judgment reached by the citizenry and its legislators."[324]

Such an approach does have some precedent. For example, in *Trop v. Dulles*, the Court found persuasive that the vast majority of countries did not allow the revocation of citizenship as form of punishment.[325] *Trop* was decided before the Court exercised its own independent judgment in determining whether a punishment is cruel and unusual. However, *Trop* still shows that the Court has been willing to strike down American laws largely because the law in question falls outside of international norms. Relying on *Trop* in this manner would also have the ironic benefit of allowing detractors of disenfranchisement laws to cite to it in a positive manner as opposed to a negative one.

The international community has come out strongly against the disenfranchisement of former felons. In fact, in most democracies the question of whether former felons should be disenfranchised would be a moot because "among Western industrial nations, only the United States and Belgium continue to disenfranchise ex-felons for life."[326] Therefore, litigants would have ample evidence that the United States is not in line with international norms on the matter. Because of this, courts may be willing to consider exercising their independent judgment to either prohibit or restrict a state's ability to deny former felons the right to vote.

Ultimately a court will need to be convinced that disenfranchisement is a disproportional form of punishment. To compel a court of this, litigants should rely upon the judgments of international courts to persuade American jurists that disenfranchisement is not proportional to any state aims that may be

322. Cleveland, *supra* note 194, at 79.

323. *Id.*

324. Atkins v. Virginia, 536 U.S. 304, 313 (2002).

325. *See supra* Part III.

326. Wilkins, *supra* note 13, at 90.

achieved. While most foreign cases deal with the voting rights of prison inmates and not of former felons, they still provide guidance on the issue. For while this may seem to be a critical distinction, it could be argued that if disenfranchisement of a current prisoner is incorrect, logically so would be the disenfranchisement of a former one. The international cases discussed *supra* have considered whether disenfranchisement is proportional to the various governmental goals under which they are justified. All of these cases have found disproportion between the two. The governments in those cases advanced arguments that are similar to the ones by proponents of disenfranchisement in this country, and the courts summarily dismissed all of them. This precedent should give detractors of disenfranchisement some hope that American courts would also be willing to do so, if they were made aware of the international community's reasoning and views on the matter.

2. Barriers to Success: Counterarguments Against the Use of International Law

States and proponents of disenfranchisement will not allow these arguments to go unchallenged. Once litigants have commenced suit, they will likely face a barrage of arguments against their approach. Should litigants attempt to apply the approach advocated in this article, they will likely face two objections. The first is that *Richardson v. Ramirez* stands for the proposition that disenfranchisement is constitutional and therefore these laws cannot be challenged and foreign precedent has no bearing on the issue. The second is that international treatment of the right to vote is too different from American practice to have any bearing on an Eighth Amendment challenge.

It cannot be denied that *Richardson v. Ramirez* was damaging to challenges against disenfranchisement. First, it has almost entirely foreclosed equal protection challenges.[327] The decision also likely impaired challenges to disenfranchisement brought under different constitutional provisions.[328] Despite this, the Court never did address the actual substantive constitutionality of felon disenfranchisement.[329] The question answered in *Ramirez* was merely whether California's

327. Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) (holding "*Richardson* is generally recognized as having closed the door on the equal protection" challenges to disenfranchisement).

328. *See* Thompson, *supra* note 79, at 185.

329. Richardson v. Ramirez, 418 U.S. 24, 53 (1974).

disenfranchisement of former felons violated the Equal Protection Clause.[330] The Court specifically failed to consider other constitutional grounds for a challenge.[331]

Despite its limited holding, courts have read *Ramirez* to mean that felon disenfranchisement cannot be challenged by any constitutional provision.[332] The willingness of some courts to do this is erroneous for a variety of reasons. First, assuming *arguendo* that one agrees with the proposition that *Ramirez* does give affirmative sanction to disenfranchisement, *Ramirez* still does not mean that states can implement it without limitation. The death penalty is a prime example of a punishment that states have the authority to impose, but must adhere to multitudinous limitations before they exercise it.[333] For example, the Court has ruled that the execution of minors is not appropriate.[334] Therefore, the Court may recognize limitations on power that the states clearly have. Unlike the death penalty, however, the Court has not affirmatively provided sanction for disenfranchisement. It should also be noted that even when the Supreme Court has upheld a law under one constitutional provision it may subsequently decide the same practice is unconstitutional on other grounds. The use of standardless jury selection in death penalty cases is a prime example of this. In *McGautha v. California*, the Court held that such standard-less jury selection did not violate the Due Process Clause,[335] but in *Furman v. Georgia* it held that the practice violated the Eighth Amendment.[336] Litigants will need to have these arguments prepared before they enter court to ensure that their case is not decided prematurely or for the wrong reasons.

Petitioners will also need to show that international views on the right to vote and felon enfranchisement are relevant in an Eighth Amendment case. Proponents of felon disenfranchisement will argue that international law has no relevance on the matter because, unlike other countries, America does not consider the right to vote to be an explicit Constitutional requirement. Therefore, states have a greater right to infringe upon the right to vote as compared to other countries that affirmatively provide for a right to vote in their constitutions.

330. *Id*. at 26–27.

331. *Id*.

332. Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997).

333. Gregg v. Georgia, 428 U.S. 153, 156 (1976).

334. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

335. 402 U.S. 183 (1971).

336. 408 U.S. 238 (1972).

While it is true that the Constitution does not explicitly guarantee the right to vote, the Supreme Court has interpreted it to find that it actually does contain an implied right to vote.[337] For over a hundred years the Court has not only recognized a right to vote, it has gone so far as to call it "fundamental."[338] The Court has gone so far as to declare that even the most basic rights "are illusory if the right to vote is undermined."[339] Therefore, arguments that the United States Constitution does not guarantee the vote are deceptive. Case law clearly provides that Americans have a right to vote, and although this right is not explicitly stated in the Constitution it is still treated as fundamental.[340] Also, many state constitutions clearly recognize a right to vote.[341] In fact, foreign jurisdictions "examining voting rights cases frequently cite American voting rights jurisprudence."[342] The recognition of the right to vote in American case law and in many state constitutions proves that the United States is not as unique on the matter as some might argue. While federal courts may not be as diligent as they should be in enforcing the right, such failure does not show there is absence of the right. Therefore, litigants should have plenty of ammunition to counter the argument that foreign cases are not relevant in an Eighth Amendment challenge to felon disenfranchisement.

Conclusion

The disenfranchisement of former felons stands in stark opposition to America's democratic traditions because it ensures that a large portion of this nation's populace has no say in its governance or its future. Recognition of this inequity has gained significant traction in the last decade. Scholarship on the matter has drawn attention to the inequality these laws create. Many state legislatures have significantly eased the burden on former felons attempting to vote. The American judiciary, however, has refused to overturn these laws on the bases of the Eighth Amendment, the Equal Protection Clause, or the Voting Rights Act.

337. Yick Wo v. Hopkins, 118 U.S. 356, 371 (1886).

338. *Id.*

339. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

340. *Id.*

341. Josh Douglas, *State Constitutions: A New Battleground in Voting Rights*, JURIST - FORUM, (Apr. 3, 2012), http://jurist.org/forum/2012/04/joshua-douglas-voter-id.php.

342. *ACLU Report, supra* note 183, at 1.

Despite prior failure, the Eighth Amendment remains the best avenue for challenging disenfranchisement. There are original Eighth Amendment arguments that the courts have not heard that, if made properly, may rejuvenate the legal struggle against these laws. Namely, international law has never been used by litigants in Eighth Amendment cases challenging disenfranchisement. Relying solely on domestic arguments has failed and will likely continue to fall short. However, the arguments made in the past coupled with international materials could prove advantageous to felon disenfranchisement suits. Therefore, litigants bringing Eighth Amendment challenges to felon disenfranchisement laws should highlight international law in their briefs. Doing so presents the best option of finally getting courts to recognize that these laws need to be struck down as unconstitutional.

* * *