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Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote

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CRUEL AND UNUSUAL PUNISHMENT: DENYING EX-FELONS THE RIGHT TO VOTE AFTER SERVING THEIR SENTENCES

AMY HEATH*

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I. INTRODUCTION

As a child, Perry Hopkins wanted to be president.¹ After a court convicted him of a non-violent drug felony, he lost more than his ability to be president; he lost the ability to even cast a vote in a presidential election.² Hopkins vividly remembers the night when Barack Obama, a fellow African-American man, became the first African-American president, and how he celebrated the win with his neighbors, family, and friends in the streets.³ The elation quickly subsided when someone looked to him and said, “You got a record, you couldn’t vote. You can’t claim this. You ain’t got nothing to do with this.”⁴

While Perry Hopkins *eventually* gained back his right to vote, other ex-felons have not been so fortunate.⁵ Desmond Meade, who has lived in Florida his entire life, has not been able to cast a vote since his release from prison for a felony conviction.⁶ Despite serving his time, Meade could not even vote for his own wife because of the felony conviction he received

1. See Rachel Martin, *Debate Over Restoring Voting Rights to Ex-Felons*, DIANE REHM SHOW (May 12, 2016, 11:00 AM), <http://thedianerehmshow.org/shows/2016-05-12/felony-disenfranchisement> (chronicling Hopkins’ life before he went to prison).

2. See Ian Simpson, *U.S. States Giving More Ex-felons Voting Rights Back*, REUTERS (Mar. 22, 2016, 2:53 PM), <http://www.reuters.com/article/us-usa-politics-felons-idUSKCN0WO27H> (detailing how a criminal background can impact a citizen’s future in more ways than one).

3. See Martin, *supra* note 1 (recounting Hopkins’ emotions surrounding the election night in 2008).

4. See *id.* (emphasizing the shame and stigma stemming from Hopkins’ felony conviction).

5. See *Voting Rights Restoration Efforts in Maryland*, BRENNAN CTR. FOR JUSTICE (Mar. 10, 2016), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-maryland> (explaining Maryland’s recent law restoring voting rights to felons who are completing probation or parole).

6. See Alice Miranda Ollstein, *More Than 1.5 Million Florida Voters Will Be Missing From Tuesday’s Primary*, THINK PROGRESS (Mar. 14, 2016), <https://thinkprogress.org/more-than-1-5-million-florida-voters-will-be-missing-from-tuesdays-primary-ec745315b6c8#.sxlvdkmnh> (describing Meade’s personal life and connection to politics that have influenced his fight for felon voting rights).

more than ten years ago.⁷

Perry Hopkins and Desmond Meade are two of nearly 6.1 million ex-felons that face nearly insurmountable barriers when trying to gain back their right to vote.⁸ Six states currently disenfranchise more than seven percent of its adult population.⁹

Although only four states completely disenfranchise felons, a mass majority of states still place some restriction on felons ability to vote.¹⁰ Only two states, Maine and Vermont, allow ex-felons to vote while they are still in prison.¹¹ As of 2016, fourteen states allowed felons to vote after being released from prison, four states permitted felons to vote after being released from prison and completing parole, eighteen allowed felons to vote after being released from prison, completing parole, and completing probation, while twelve states required a combination of completing prison sentences, completing parole, completing probation, and completing a waiting period.¹²

This Comment argues that restrictive felony disenfranchisement laws violate the Eighth Amendment to the United States Constitution.¹³ Part II describes the current felon voting rights laws in Florida, Tennessee, and Pennsylvania.¹⁴ Part II also describes past attempts to challenge felon disenfranchisement laws in the United States Supreme Court, as well as in State courts.¹⁵ Part III compares the felon disenfranchisement laws in

7. See *id.* (chronicling how Meade lost his voting rights and was unable to vote for his wife, who was the youngest African-American woman in Florida to become a state legislator).

8. See CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 at 3 (The Sent'g Project 2016) (highlighting the number of felons currently disenfranchised in the United States).

9. See *id.* (referring to Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia).

10. See *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT 1 (Apr. 28, 2014), <http://www.sentencingproject.org/wp-content/uploads/2015/12/Felony-Disenfranchisement-Laws-in-the-US.pdf> (discussing challenges to felon disenfranchisement laws).

11. See UGGEN ET AL., *supra* note 8, at 4 (describing how Maine and Vermont permit *all* citizens to vote, despite a criminal conviction).

12. See Simpson, *supra* note 2 (highlighting the most lenient states with respect to felon voting rights laws).

13. See U.S. CONST. amend. VIII (establishing that it is unconstitutional to inflict cruel and unusual punishments).

14. See *infra* Part II (comparing the felon voting rights laws of Pennsylvania to both Florida and Tennessee).

15. See *infra* Part II (discussing the Fourteenth Amendment, the Voting Rights Act of 1965, and the Eighth Amendment).

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Pennsylvania to the restrictive laws enacted in Florida and Tennessee, highlighting the clear oppressive nature of the laws.¹⁶ Part III further asserts that the more restrictive laws of Florida and Tennessee constitute cruel and unusual punishment under the Eighth Amendment.¹⁷ Part IV recommends that these restrictive laws encouraging felony disenfranchisement be eliminated.¹⁸ Part V concludes by reiterating that the laws in Florida and Tennessee fully deprive ex-felons of the right to vote and should constitute cruel and unusual punishment under the Eighth Amendment.¹⁹

II. BACKGROUND

A. State Felon Disenfranchisement Laws

1. Florida

Florida alone accounts for nearly half of the post-sentence felons disenfranchised nationally, with nearly 1.5 million disenfranchised in the state.²⁰ Florida's implementation of laws that prevent felons from voting goes back to its 1838 Constitution.²¹

The Florida Constitution outright excludes any felon or mentally incompetent person from voting until his or her rights are restored.²² Florida law provides that a governor, with the approval of two members of the Cabinet, may grant either full or conditional pardons to felons, commute their punishment, or restore their civil rights.²³ Additionally, any

16. See *infra* Part III (demonstrating the differences in how felons are treated state-to-state and the clear hardship felons face *after* completing their sentences and serving their time).

17. See *infra* Part III (suggesting that where challenges to the First Amendment, Fourteenth Amendment, and Voting Rights Act of 1965 fail, the Eighth Amendment should succeed).

18. See *infra* Part IV (voicing the unfairness of restrictive felon disenfranchisement laws and recommending that states adopt Pennsylvania's felon voting rights laws).

19. See *infra* Part V (concluding that the Eighth Amendment should be an avenue to repealing felon disenfranchisement laws).

20. See UGGEN ET AL., *supra* note 8, at 3, 13 (highlighting that, of the 1.5 million felons disenfranchised in Florida, only 271,982 restorations have been given from 1990-2015).

21. See *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 (11th Cir. 2005) (discussing the trend of felon disenfranchisement laws in Florida and its long history).

22. See FLA. CONST. art. VI, § 4 (placing limitations on certain people deemed ineligible to vote in Florida).

23. See FLA. STAT. § 940.01 (2003) (explaining the options available to a governor when presented with an individual felon).

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person convicted of a felony may petition to restore his rights if certain conditions are met.²⁴

A Floridian felon's right to vote is not lost forever, as he may seek clemency to restore his rights.²⁵ The Florida Constitution vests clemency power in the Governor.²⁶ A governor has the discretion to restore the right to vote to some felons, while denying that right to others.²⁷ Currently, all convicted criminals, regardless of the felony committed, must wait five to seven years after completing their sentence before they may begin the voting restoration process through the governor and the appointed clemency board.²⁸

2. *Tennessee*

Much like Florida, Tennessee currently disenfranchises 421,227 felons.²⁹ In Tennessee, felons that commit certain felonies are completely disenfranchised, whereas others not convicted of other felonies may apply to the Board of Probate and Parole for restoration.³⁰ The Tennessee Constitution requires that elections be free and equal, and voting rights not be denied unless a person commits an "infamous crime."³¹ If not convicted of an infamous crime, a felon in Tennessee may have full rights of citizenship restored upon: (1) receiving a pardon that does not contain a

24. See FLA. STAT. § 940.05 (2014) (explaining that restoration will be granted only by receiving a pardon, serving the maximum sentence imposed, or being granted release by the Florida Commission).

25. See *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *1 (M.D. Fla. July 7, 2014) (discussing Florida's clemency rules, which previously restored voting rights automatically to individuals convicted of non-violent crimes that served their sentence, but now requires felons to wait five to seven years after completion of their sentence to apply for restoration).

26. See FLA. CONST. art. IV, § 8(a) (providing that the clemency process is solely an executive branch function).

27. See *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (ruling that a man who was refused the right to register, solely because he was a convicted felon, was constitutional).

28. See *Verity*, 2014 WL 3053171, at *1 (explaining the expansion of the clemency rules put into place under Governor Scott).

29. See UGGEN ET AL., *supra* note 8, at 13, 15 (restoring only 11,581 out of 421,227 ex-felons voting rights during 1990-2015).

30. See *O'Neal v. Goins*, No. M2015-01337-COA-R3-CV, 2016 WL 4083466, at *1, *8 (Tenn. Ct. App. July 29, 2016) (dismissing the complaint by an ex-felon who argued that allowing discretionary approval by the court for restoration of voting rights was unconstitutional).

31. See TENN. CONST. art. I, § 5 (allowing felonies of murder, rape, treason, or voter fraud to deny a felon of civil rights but allowing those not convicted of those crimes to restore voting rights through court order or certificate of restoration).

position on suffrage; (2) completion of a sentence imposed for the infamous crime; or (3) receiving final release from incarceration or supervision.³²

Tennessee has perhaps the most perplexing felony disenfranchisement laws in the United States.³³ Felon disenfranchisement laws in Tennessee require that those convicted before 1986 petition to the court while prosecutors are given an opportunity to object; those convicted after 1996 are subject to the same rules except those convicted of infamous crimes; and those convicted between 1986 and 1996 may petition for administrative restoration of rights, without a potentially adversarial hearing.³⁴ People convicted after 1996 are subject to the same rules, except that those convicted of infamous crimes in Tennessee are permanently disenfranchised.³⁵ Additionally, Tennessee also requires that an ex-felon pay his court-ordered victim restitution and child support obligations to regain voting rights.³⁶

3. Pennsylvania

As of 2016, Pennsylvania disenfranchises 52,974 felons.³⁷ However, Pennsylvania is one of fourteen states that only disenfranchises felons during their prison sentences.³⁸ The Pennsylvania Constitution provides that men are born equally free and independent, obtaining certain inherent and inalienable rights.³⁹

Moreover, the Pennsylvania Constitution stresses that no power, civil or

32. *See id.* (listing the circumstances in which a person who has not committed an infamous crime may regain their full rights).

33. *See Voting Rights Restoration Efforts in Tennessee*, BRENNAN CTR. FOR JUSTICE (Mar. 27, 2014), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-tennessee> (discussing the state's felon voting laws).

34. *See id.* (highlighting the complicated process for felons to regain their voting rights in Tennessee).

35. *See* TENN. CODE ANN. § 40-29-105(c)(2)(B) (2013) (defining infamous crimes as murder, rape, treason, or voter fraud).

36. *See id.* § 40-29-202(b)(1)-(2) (2013); *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) (holding that requiring a felon to pay \$40,000 restitution for wire fraud and more than \$1,000 in child support prior to restoration is constitutional).

37. *See* UGGEN ET AL., *supra* note 8, at 15 (highlighting that those 52,974 felons make up 0.52 percent of the adult population).

38. *See id.* (demonstrating that Pennsylvania is one of the more lenient states with respect to felon disenfranchisement).

39. *See* PA. CONST. art. I, § 1 (stressing that certain rights are so fundamental that all people should equally receive them, including enjoying and defending life and liberty).

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military, should interfere or prevent the exercise of the right of suffrage.⁴⁰ However, those who meet the age and residency requirements are allowed to vote unless the General Assembly enacts laws, within its powers, that regulate the registration of electors.⁴¹

Pennsylvania election code does not explicitly disenfranchise incarcerated prisoners.⁴² However, sections 102(w) and 1301 define a qualified absentee elector and provide that the definition shall exclude “persons confined in a penal institution.”⁴³ Despite the exclusion of incarcerated prisoners, this provision does not violate the Constitution.⁴⁴ Federal courts determined that the Code could not possibly violate the Constitution by denying incarcerated felons the right to vote while permitting those not incarcerated to do so.⁴⁵ Because lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, requiring some form of felon disenfranchisement is constitutional.⁴⁶ It is not the function of the court to superintend the treatment and discipline of incarcerated felons, but only to free those who are improperly confined.⁴⁷

Although Pennsylvania now does not disenfranchise felons who have completed their sentences, the state was not always so progressive.⁴⁸ The Pennsylvania Commonwealth Court (one of the two statewide intermediate appellate courts in Pennsylvania) found that no rational basis existed to

40. See PA. CONST. art. I, § 5 (reiterating the importance of allowing Pennsylvania’s citizens their right to vote).

41. See PA. CONST. art. VII, § 1 (expressing that, while voting is a fundamental right in Pennsylvania, federal law dictates that states can only regulate certain aspects of the process).

42. See *Martin v. Haggerty*, 548 A.2d 371, 373-74 (Pa. Commw. Ct. 1988) (discussing the lack of felon disenfranchisement laws in Pennsylvania).

43. See 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (effectively disqualifying *only* incarcerated felons from voting).

44. See *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (holding Pennsylvania provisions do not violate the Equal Protection Clause of the Fourteenth Amendment).

45. See *id.* (upholding the Pennsylvania provision because it only disenfranchised a small portion of felons and granted rights to non-incarcerated felons in general).

46. See *id.* at 27-28 (holding that it was constitutional to deny incarcerated felons the right to vote while simultaneously allowing non-incarcerated felons to vote).

47. See *Ray v. Pennsylvania*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (citing *Hoge v. Maroney*, 211 F. Supp. 197, 198 (W.D. Pa. 1962)) (arguing that a felon cannot vote while incarcerated because only when fundamental, humane, and necessary rights are breached will constitutional protections become involved).

48. See *Mixon v. Commonwealth*, 759 A.2d 442, 445 (Pa. Commw. Ct. 2000) (discussing the Pennsylvania Voter Registration Act which denies a felon the right to vote unless he been out of prison for over five years).

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preclude the registration of those incarcerated within the last five years when those legally registered prior to incarceration may vote upon their release.⁴⁹

B. Attempts to Provide Voting Rights to Felons in the United States

1. The Fourteenth Amendment

Felon disenfranchisement laws challenged under the Fourteenth Amendment have largely failed.⁵⁰ Generally, under the Fourteenth Amendment, political suffrage is not considered an absolute or natural right.⁵¹ Rather, state constitutions and statutes confer the right of political suffrage, making that right subject to exclusive regulation by the state.⁵²

Although courts generally deem the right to vote fundamental, the courts have not found it fundamental when evaluating felon disenfranchisement laws.⁵³ The United States Supreme Court looked to the prevalence of felon disenfranchisement laws during the adoption of the Fourteenth Amendment to justify the upholding of felon disenfranchisement laws.⁵⁴ The prevalence of felon disenfranchisement laws at the adoption of the Fourteenth Amendment led the Court to find that the crafters clearly did not think these types of laws violated due process.⁵⁵

2. Voting Rights Act (Act) of 1965

Courts have also examined the constitutionality of felon disenfranchisement laws under the Voting Rights Act of 1965.⁵⁶ Although

49. See *id.* at 451 (holding the Pennsylvania Voter Registration Act section at issue unconstitutional).

50. See Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 §§ 8-10 (2006) (listing the challenges to the Fourteenth Amendment).

51. See *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974) (rationalizing that state requirements on age and residence show that a previous criminal record can also be taken into consideration); see also *State ex. rel. Olson v. Langer*, 256 N.W. 377, 385 (N.D. 1934) (explaining that voting rights are restricted for minors, therefore, states can restrict voting rights for felons, too).

52. See *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (giving states the power to enact felon disenfranchisement laws).

53. See *Reynolds v. Sims*, 377 U.S. 533, 560, 561-62 (1964) (explaining that the right of suffrage is a fundamental right).

54. See *Richardson*, 418 U.S. at 48-49 (recognizing that, after the Civil War, every confederate state had to submit a state constitution—many of which were approved with felon disenfranchisement laws).

55. See *id.* (stressing the importance of the crafter's intent in the creation of laws).

56. See Miller, *supra* note 50, at §§ 14-15 (listing the challenges under the Voting

felon disenfranchisement laws generally do not violate the Act, courts have not determined whether the Act could be an avenue for finding specific felon disenfranchisement laws unconstitutional.⁵⁷ The United States Supreme Court has recognized that the Act's purpose was to rid any disparate racial impact of facially neutral voting requirements.⁵⁸ In line with this ruling, the Ninth Circuit further found that if felon disenfranchisement laws were enacted to discriminate on the basis of race, then that *may* violate the Voting Rights Act of 1965.⁵⁹

The United States Supreme Court has acknowledged the potential success of future felon disenfranchisement challenges under the Act and provides that it could afford disenfranchised felons the means to seek redress in limited circumstances.⁶⁰ Despite the Supreme Court's glimpse of hope for challenging these types of laws under the Act, both the Second and Eleventh Circuits have found that the Act does not prohibit the disenfranchisement of felons.⁶¹

3. *Cruel and Unusual Punishment and the Eighth Amendment*

Judges and academics have debated the proper interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause for some time.⁶² If the courts interpret the Eighth Amendment by the standards at the time of ratification, it may only refer to the most egregious of

Rights Act of 1965 that deal with disparate, discriminatory effects of felon disenfranchisement laws).

57. *See id.* (explaining that the Voting Rights Act has not been completely eliminated as a route to challenge felon disenfranchisement when the laws discriminate based on race).

58. *See Hunter v. Underwood*, 471 U.S. 222, 231-33 (1985) (holding that if any voting qualifications denied citizens the right to vote based on race, they would be considered unconstitutional).

59. *See Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) (holding that a claim that felony disenfranchisement provisions violate the Act is cognizable under certain circumstances, such as racial bias, where Alabama discriminated against African-Americans when disenfranchising felons).

60. *See Hunter*, 471 U.S. at 233 (holding that although *Richardson v. Ramirez*, 418 U.S. 24, 49 (1974) allows states to deprive felons the right to vote, 52 U.S.C. § 10301 (2016) allows felons to challenge disenfranchisement laws if discrimination occurs).

61. *See Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (holding that the Act generally does not prohibit felon disenfranchisement laws); *Muntaqim v. Coombe*, 366 F.3d 102, 129-30 (2d Cir. 2004) (upholding the felon disenfranchisement statute because finding it unconstitutional would alter the balance between the states and the Federal Government).

62. *See Miller*, *supra* note 50, at § 7 (stressing the complexity of the Eighth Amendment).

punishments.⁶³ Alternatively, if courts interpret the Eighth Amendment with a modern viewpoint, they would do so by looking at “evolving standards of decency.”⁶⁴

Since the adoption of the Bill of Rights, the Supreme Court has extended the Eighth Amendment to cover less traditional cruel and unusual punishments three times.⁶⁵ The first case adjudging a punishment to be cruel and unusual punishment occurred when a man was sentenced to fifteen years imprisonment for falsifying a public and official document.⁶⁶ The Court chose to administer a modern interpretation of the Eighth Amendment.⁶⁷

The second case adjudicating a punishment to be within the confines of cruel and unusual punishment occurred when a United States Army private was convicted of desertion, and sentenced to three years hard labor, loss of all pay and allowances, and a dishonorable discharge.⁶⁸ Trop later applied for a passport but was denied under Section 401(g) of the amended 1940 Nationality Act.⁶⁹ The Court extended the Eighth Amendment, finding the punishment to be cruel and unusual.⁷⁰

The third case declaring a punishment falls under the cruel and unusual punishment clause involved a state statute making addiction of narcotics a criminal offense.⁷¹ The Court determined that laws imprisoning people afflicted with narcotic addictions constituted cruel and unusual

63. *See id.* (discussing the history of the Eighth Amendment).

64. *See Trop v. Dulles*, 356 U.S. 86, 101-02 (1958) (accepting a modern interpretation of the Eighth Amendment that would allow a court to see what actions are considered cruel and unusual based on what society at that point in time finds cruel and unusual).

65. *See Miller*, *supra* note 50, at § 7 (explaining the very narrow range of Eighth Amendment application that generally focus on death penalty procedures or excessive physical punishment).

66. *See Weems v. United States*, 217 U.S. 349, 359 (1910) (holding that punishments must be proportionate to the crime).

67. *See id.* at 373-74 (explaining that a principle, to be vital, must be capable of wider application).

68. *See Trop*, 356 U.S. at 87-88 (detailing how Trop willingly surrendered to an officer after deserting the army for less than a day).

69. *See id.* (explaining that Trop lost his citizenship under the 1940 Nationality Act due to his conviction and dishonorable discharge for wartime desertion).

70. *See id.* at 101 (expanding cruel and unusual punishment to include expatriation because his crime should not cause him to lose his citizenship).

71. *See Robinson v. California*, 370 U.S. 660, 661-62 (1962) (explaining that Robinson was arrested and charged after an officer saw scar tissue and discoloration on his arms, which are consistent with signs of addiction to narcotics).

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punishment.⁷² The Court provided that if addiction was criminal, then “to be mentally ill, or a leper, or to be afflicted with a venereal disease” also had the potential to be criminalized.⁷³

Felon disenfranchisement does not neatly fit into any of the previously mentioned cases where the Court identified cruel and unusual punishment.⁷⁴ Generally, felon disenfranchisement matches closest with *Trop v. Dulles* and the punishment of expatriation.⁷⁵ However, depriving felons of voting rights is often not viewed as a punishment, but rather a non-penal exercise of the state’s power to regulate the franchise.⁷⁶ The legislature and the states, alternatively, find that evidence would exist if the framers considered disenfranchisement laws punishment.⁷⁷ Because a majority of the states exclude felons from voting, courts refuse to consider these statutes cruel and unusual punishment.⁷⁸

III. ANALYSIS

A. A Comparison of Pennsylvania to Florida and Tennessee’s Laws Demonstrates That the Latter States Unfairly Disenfranchise Ex-Felon Voters

Both Florida and Tennessee, unlike Pennsylvania, place nearly insurmountable barriers on a felon who is trying to gain back his right to vote.⁷⁹ While Florida and Tennessee boast more than two million

72. *See id.* at 666 (finding that statutes violate cruel and unusual punishment when they criminalize illnesses which may be contracted innocently or involuntarily).

73. *See id.* (cautioning about the slippery slope that would occur if the addiction criminalization statute were upheld).

74. *See Miller, supra* note 50, at § 7 (discussing the struggle of arguing the unconstitutionality of felon disenfranchisement laws under the Eighth Amendment).

75. *But see, e.g. Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1043 (D. Md. 1974) (allowing for the disenfranchisement of persons convicted of infamous crimes).

76. *See Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 452 (2d Cir. 1967) (holding the felon disenfranchisement laws are non-violative of the Eighth Amendment as they do not incur a harm egregious enough to be considered cruel and unusual).

77. *See id.* (stressing the popularity of felon disenfranchisement laws at the ratification of the Bill of Rights).

78. *See El-Amin v. McDonnell*, No. 3:12-cv-005380-JAG, 2013 WL 1193357, at *1, *6-7 (E.D. Va. Mar. 22, 2013) (finding widespread enactment of laws proves that they are not cruel and unusual punishment).

79. *Compare* 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (restricting incarcerated felons in Pennsylvania from voting), *with* FLA. CONST. art. VI, § 4 (allowing voting rights to be restored discretionally by the Governor), *and* TENN. CONST. art. I, § 5 (allowing restoration through court ordered approval).

disenfranchised voters combined, Pennsylvania disenfranchises a modest amount of less than fifty-three thousand.⁸⁰ This astronomically unequal amount of disenfranchised voters is not shocking when looking at the laws in place in each of these states.⁸¹ Pennsylvania's state Constitution mentions nothing about felon voting prohibitions, whereas both Florida and Tennessee actively choose to mention felon restrictions throughout their state Constitutions.⁸²

Pennsylvania, Florida, and Tennessee all implement some voting restriction on felons at various points in a felon's journey through the conviction, sentencing, parole, and rehabilitative process.⁸³ However, unlike Florida and Tennessee, Pennsylvania's state Constitution and laws encourage people to register and exercise their right to vote.⁸⁴ The Pennsylvania Constitution highlights the importance of voting in order to keep a free, democratic society.⁸⁵ It articulates that only the state itself may regulate laws that prevent the free exercise of the right of suffrage.⁸⁶ Although Pennsylvania recognizes that it retains the right to create laws that disenfranchise voters like felons, Pennsylvania has generally chosen not to enact more restrictive laws.⁸⁷

80. See UGGEN ET AL., *supra* note 8, at 15 (demonstrating Florida and Tennessee disenfranchise more than eight percent of population, while Pennsylvania disenfranchises only 0.52 percent).

81. Compare 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (indicating that only incarcerated felons are restricted from voting in Pennsylvania), with Fla. Const. art. VI, § 4 (restricting voting rights for convicted felons unless they were restored by a governor), and TENN. CONST. art. I, § 5 (requiring discretionally given court ordered approval of voting rights).

82. Compare PA. CONST. art. VII, § 1 (mentioning only that Pennsylvania's General Assembly maintains the right to create other voting related laws, but does not specify that they must be related to felon disenfranchisement), with FLA. CONST. art. VI, § 4 (stating that no person convicted of a felony is capable of voting without direct restoration from the Governor), and TENN. CONST. art. I, § 5 (mentioning directly that people convicted of certain felonies are immediately disenfranchised).

83. See UGGEN ET AL., *supra* note 8, at 4 (providing a current summary of state felon disenfranchisement restrictions).

84. See PA. CONST. art. I, § 1 (providing that "all men are born equally free and independent . . .").

85. See PA. CONST. art. I, § 5 (reiterating the importance of the right to vote by placing few limitations on voters).

86. See PA. CONST. art. VII, § 1 (mentioning how states can enact laws denying the right to vote).

87. Compare *Mixon v. Commonwealth*, 759 A.2d 442, 445-46 (Pa. Commw. Ct. 2000) (rejecting a law that placed more restrictions on felon voting rights), with *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *1 (M.D. Fla. July 7, 2014) (opting not to consider whether a waiting period of five to seven years after completing sentencing is unconstitutional).

In fact, in Pennsylvania's state Constitution, felon disenfranchisement is not referenced at all; the only time felon disenfranchisement is mentioned is in the Pennsylvania Election Code's definition of a "qualified absentee voter."⁸⁸ Even when a person has challenged a felon disenfranchisement law in Pennsylvania, the courts have denied the claims as being unconstitutional because clearly the disenfranchisement laws were so limited a court could not consider them excessive.⁸⁹ Pennsylvania's lenient felon disenfranchisement laws allow an ex-felon to regain his voting rights the moment he completes his sentence, unlike Florida and Tennessee.⁹⁰

The only way Pennsylvania could implement more lenient felon disenfranchisement laws would be to have no restrictions whatsoever on a felon's voting rights during incarceration.⁹¹ Since its first ratification in 1776, the Pennsylvania Constitution has allowed the state to create disenfranchisement laws so long as it resides within the framework of the Pennsylvania Constitution.⁹² The United States Supreme Court has argued that because felon disenfranchisement laws have existed throughout United States' history, the founders must have considered these laws constitutional and within a state's power to regulate.⁹³ However, the Court has ignored that other states, like Pennsylvania, were choosing to implement these laws in a less restrictive manner.⁹⁴

While the law requires some rights to be given during a prison sentence,

88. Compare FLA. CONST. art. VI, § 4 (stating that any felon or mentally incompetent person can be prevented from voting until his or her rights have been restored by a governor or clemency board), with *Martin v. Haggerty*, 548 A.2d 371, 373 (Pa. Commw. Ct. 1988) (explaining that only the definition of "qualified absentee elector" in the Pennsylvania Election Code does not include persons confined to a penal institution or mental institution).

89. See *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (denying an incarcerated felon voting rights while allowing an un-incarcerated felon to vote is not unconstitutional).

90. See UGGEN ET AL., *supra* note 8, at 4 (recognizing that twelve states restrict a felon's voting rights through parole, probation, and post-sentence while fourteen states restrict a felon's voting rights only during the period of incarceration).

91. See *id.* (highlighting that, if Pennsylvania's laws were any more lenient they would have no restriction whatsoever, like Maine and Vermont).

92. See PA. CONST. art. VII, § 1 (explaining that the Pennsylvania Constitution already dictates that age and residency are factors to be considered in voting laws, so the General Assembly could also craft laws that disenfranchise others, like felons).

93. See *Richardson v. Ramirez*, 418 U.S. 24, 48-49 (1974) (examining felon voting rights at the time of the adoption of the Constitution and evaluating the Framers' intent when crafting the Constitution and the Fourteenth Amendment).

94. See *Mixon v. Commonwealth*, 759 A.2d 442, 445-46 (Pa. Commw. Ct. 2000) (rejecting the five year waiting period law that placed more restrictions on felon voting rights).

a mass majority of the states recognize that voting rights do not have to be provided during a prison sentence.⁹⁵ However, states like Tennessee and Florida choose to continue to suppress a felon's right to vote long after he or she has been released.⁹⁶ Unlike Florida and Tennessee, Pennsylvania also has chosen to provide this previously restricted right back to an ex-felon at the first opportunity available.⁹⁷ After all, the United States Supreme Court has held that the right to vote freely is the essence of a democratic society and any restrictions on that right strike at the heart of a representative government.⁹⁸ Unlike Tennessee and Florida, Pennsylvania recognizes that the denial of voting rights to felons should only be used in the most limited of circumstances.⁹⁹

Despite recognizing that some suppression of voting rights for felons is constitutional, Pennsylvania courts have been quick to revoke felon disenfranchisement laws that place unnecessary burdens on felons, which is significantly different than other states.¹⁰⁰ When faced with the Pennsylvania Voting Rights Act that required a waiting period for ex-felons to regain their rights back, the Pennsylvania Commonwealth court

95. See *Ray v. Pennsylvania*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (explaining that incarcerated felons have rights like the right to unlimited access to the courts but not the right to vote); see also UGGEN ET AL., *supra* note 8, at 4.

96. See TENN. CONST. art. I, § 5 (requiring petitions through the courts for restoration); see also FLA. STAT. § 940.05 (2014) (requiring a pardon, service of the maximum sentence imposed, or release by Florida's Commission before petitioning for restoration).

97. Compare FLA. CONST. art. VI, § 4 (excluding any felon or mentally incompetent person from voting until his or her rights have been restored by a governor or clemency board), and TENN. CONST. art. I, § 5 (allowing felons not convicted of infamous crimes to restore voting rights through court order or certificate of restoration), with *Ray*, 263 F. Supp. at 631 (restoring voting rights once released from incarceration).

98. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that the right of suffrage is a fundamental right).

99. Compare *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (allowing a disenfranchisement provision because it only disenfranchised a small portion of felons), with *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) (requiring payment of debts before being allowed to restore voting rights), and *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *1 (M.D. Fla. July 7, 2014) (discussing a five to seven year waiting period after completion of sentencing, parole, or probation).

100. Compare *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217-18 (11th Cir. 2005) (declaring felon disenfranchisement constitutional because this power is given to state governments), and *Bredesen*, 624 F.3d at 753 (requiring that felons who want to regain voting rights to pay restitution), with *Mixon v. Commonwealth*, 759 A.2d 442, 451-52 (Pa. Commw. Ct. 2000) (rejecting a law that places waiting periods on felons).

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chose to overrule it.¹⁰¹ The court reiterated that it made no sense to install a waiting period on some but not all felons.¹⁰² Pennsylvania's felon disenfranchisement laws are ideal, as Pennsylvania recognizes the importance of voting but also acknowledges that under certain circumstances, the right to vote should be denied.¹⁰³

Pennsylvania's laws serve as a stark contrast when compared against Florida and Tennessee's felon disenfranchisement laws.¹⁰⁴ Florida boasts the most disenfranchised group of voters in America with nearly 1.5 million disenfranchised felons.¹⁰⁵ Tennessee only disenfranchises 421,277 ex-felons; however, this still accounts for over eight percent of its adult population.¹⁰⁶ Combined, both Florida and Tennessee disenfranchise nearly two million ex-felons.¹⁰⁷

Both Florida and Tennessee enacted laws denying those convicted of infamous crimes from voting.¹⁰⁸ Currently, no person convicted of any infamous crime in Florida is allowed to vote until the governor restores his civil rights.¹⁰⁹ This greatly contrasts with Tennessee, where those convicted of the infamous crimes of murder, rape, treason, or voter fraud are permanently disenfranchised.¹¹⁰ Unlike Pennsylvania, where felons must merely finish their prison sentence, both Florida and Tennessee place their felons into categories that determine when voting rights can be

101. See *Mixon*, 759 A.2d at 445, 451-52 (denying Pennsylvania's rational basis test because there is no valid reason a felon is better equipped to vote five years after completing his sentence).

102. See *id.* at 451 (rationalizing that it "could not disenfranchise similarly situated blue eyed-felons but not brown-eyed felons").

103. See *Barnes*, 711 F.2d at 27 (recognizing times when voting rights should be withheld, including during incarceration).

104. Compare PA. CONST. art. I, § 5 (stressing the importance of suffrage), with FLA. CONST. art. VI, § 4 (placing limitations that exclude a person voting in Florida), and TENN. CONST. art. I, § 5 (restricting those who commit certain crimes from voting).

105. See UGGEN ET AL., *supra* note 8, at 3 (comparing the amount of felons disenfranchised in Florida to other states).

106. See *id.* at 15 (revealing that only Florida and Virginia have more disenfranchised felons than Tennessee).

107. See *id.* at 13, 15 (noting that during the period of 1990-2015 both states have only voting rights to 283,563 out of nearly two million disenfranchised felons).

108. Compare FLA. CONST. art. VI, § 4 (excluding those who committed infamous crimes, e.g. any felony, from voting), with TENN. CONST. art. I, § 5 (defining infamous crimes as murder, rape, treason, or voter fraud).

109. See FLA. CONST. art. VI, § 4 (explaining that the governor has no set guidelines when determining who to restore voting rights to, excluding those convicted of infamous crimes).

110. See TENN. CONST. art. I, § 5 (expressing the limited crimes that are considered infamous).

restored, if ever.¹¹¹ Permanently disenfranchising a felon who committed murder or rape is far less of an injustice than permanently disenfranchising a felon who committed an astronomically less morally offensive crime, such as a non-violent drug felony.¹¹²

While Tennessee denies a felon the right to vote because he has committed a horrendous crime like rape or murder, Florida denies felons who commit crimes, such as a non-violent drug offense or bribery, from voting almost permanently.¹¹³ This partially accounts for the high amount of disenfranchised felons in Florida.¹¹⁴ The Florida courts have consistently chosen to ignore the astronomical amount of disenfranchised felons despite having a clear record that these types of laws are racially discriminative.¹¹⁵ Florida courts have reasoned that the denial of voting rights following a felony conviction is a longstanding and quite common practice.¹¹⁶ While this reasoning is true, even Pennsylvania recognizes that placing insurmountable barriers that result in a complete and permanent denial of a voter's rights does not create a better society.¹¹⁷

In order to maintain their 1.5 million disenfranchised voters in Florida, a waiting period of five to seven years is often required after the completion

111. Compare 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (excluding only those persons currently incarcerated from voting), with FLA. CONST. art. VI, § 4 (excluding those convicted of infamous crimes, e.g. any felony, from voting), and TENN. CONST. art. I, § 5 (defining infamous crimes as murder, rape, treason, or voter fraud).

112. See UGGEN ET AL., *supra* note 8, at 3 (noting Florida's restrictive voting laws as part of the reason that Florida's disenfranchises 1.5 million voters). Compare FLA. CONST. art. VI, § 4 (excluding any felon from voting), with TENN. CONST. art. I, § 5 (defining those who commit only the most egregious crimes).

113. Compare FLA. CONST. art. VI, § 4 (requiring that all those who commit felonies are subject to permanent disenfranchisement), with TENN. CONST. art. I, § 5 (limiting infamous crimes to only the most egregious crimes, such as rape or murder).

114. See *Voting Rights Restoration in Florida*, BRENNAN CTR. FOR JUSTICE (Oct. 6, 2016), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> (dictating that the clock resets if an individual is arrested for even a misdemeanor during the waiting period, even if no charges are filed).

115. See *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218-19 (11th Cir. 2005) (allowing laws because the legislative history did not show intent to discriminate despite the effects of the law).

116. See *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (highlighting that while the Constitution and the Fourteenth Amendment were being adopted, felon disenfranchisement laws persisted uniformly).

117. See *Mixon v. Commonwealth*, 759 A.2d 442, 451, 445 (Pa. Commw. Ct. 2000) (finding that there is no rational basis for denying previously unregistered felons the right to register for five years when previously registered felons are not subjected to an equal waiting period).

of incarceration, probation, and parole before a felon can even begin the process of restoring his voting rights.¹¹⁸ However, even if a felon waits the required minimum five years, a governor, with the help of his Clemency Board, may decide to give him back the right to vote *discretionally*.¹¹⁹ This discretion, in addition to the mandatory waiting period, prevents most felons in Florida from ever gaining their right to vote back.¹²⁰

Although Tennessee does not have a mandatory waiting period, Tennessee requires felons not convicted of the infamous crimes of rape, murder, treason, or voter fraud to apply for a court order to restore voting rights.¹²¹ While Tennessee's felon disenfranchisement laws seem to require a simple process for an ex-felon to follow, its application is far more complicated.¹²² Like in Florida, a court in Tennessee retains the right to restore an ex-felon's voting rights discretionally.¹²³ Unlike in Pennsylvania, a series of complex exceptions make it difficult for convicted felons in both Tennessee and Florida to ascertain when a felon might regain his right to vote.¹²⁴ Specifically, the felon disenfranchisement laws in Tennessee require that those convicted before 1986 petition to the court while prosecutors are given an opportunity to object; those convicted after 1996 are subject to the same rules but those convicted of infamous crimes are permanently disenfranchised; and those convicted between 1986 and

118. See UGGEN ET AL., *supra* note 8, at 3-4 (highlighting that Florida disenfranchises nearly 1.5 million individuals who are in prison, on probation, or on parole). Compare *Mixon*, 759 A.2d at 445-46 (considering whether waiting periods violate the Pennsylvania constitution), with *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *5-10 (M.D. Fla. July 7, 2014) (choosing not to acknowledge the five to seven year waiting period in place in Florida as unconstitutional).

119. See *Beacham*, 300 F. Supp. at 184 (allowing a governor, with the approval of three members of the Cabinet, to use discretion when restoring voting rights).

120. See UGGEN ET AL., *supra* note 8, at 4 (emphasizing the obstacles Floridian felons face when trying to regain voting rights).

121. Compare TENN. CONST. art. I, § 5 (disenfranchising those who commit infamous crimes in Tennessee), with *Verity*, 2014 WL 3053171, at *1 (allowing a five to seven year waiting period in Florida).

122. See *Voting Tennessee*, *supra* note 33 (discussing Tennessee's complex voting laws).

123. See *O'Neal v. Goins*, No. M2015-01337-COA-R3-CV, 2016 WL 4083466, at *1, *5 (Tenn. Ct. App. July 29, 2016) (requiring the court to discretionally provide a felon with a certificate of restoration before a restoration of rights is possible).

124. Compare 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (regulating only incarcerated felons, with no requirements of waiting periods or applications to a court or Governor), with FLA. CONST. art. VI, § 4(a) (preventing persons convicted of felonies from voting until their civil rights have been restored), and TENN. CODE ANN. § 40-29-202(b) (2013) (requiring felons to pay all debts).

1996 may petition for administrative restoration of rights.¹²⁵ Tennessee's requirements easily confuse felons in that state, potentially accounting for why so few felons have regained their right to vote.¹²⁶

Additionally, Tennessee's laws require that an ex-felon pay his court-ordered restitution and child support obligations before becoming eligible for voting rights, which also greatly hinders a felon's ability to quickly restore his voting rights.¹²⁷ If a felon fails to comply, the court can deny a certificate of restoration.¹²⁸ However, eligibility is not freely given, even if a felon meets these requirements.¹²⁹ A state election coordinator will look at the eligibility of a felon and communicate to the administrator of elections whether or not a felon is truly eligible to gain back his voting rights; this act, too, is done discretionally.¹³⁰

While Pennsylvania courts have recognized that restricting an incarcerated felon's rights is within their constitutional power, Pennsylvania has chosen not to implement laws that confuse and hinder any felons right to vote after being released from prison.¹³¹ Alternatively, both Florida and Tennessee have multiple requirements that both confuse and hinder the process.¹³² Court ordered restoration and Governor approved restoration results in only a small amount of felons restoring their rights after a period of nearly twenty years.¹³³ These court orders and

125. See *Voting Tennessee*, *supra* note 33 (discussing Tennessee's irrational and confusing felon voting laws).

126. See UGGEN ET AL., *supra* note 8, at 13, 15 (showing that of the 421,227 felons disenfranchised in Tennessee, this requirement of court ordered restoration only restored voting rights to approximately 11,500 felons in a twenty-five-year period).

127. See TENN. CODE ANN. § 40-29-202(b)-(c) (2013).

128. See *O'Neal*, 2016 WL 4083466, at *5-6 (listing eligibility requirements such as receiving a pardon, discharge from custody after serving the maximum sentence, or being granted a certificate of final discharge from supervision of the board of parole).

129. See *id.* at *1, *6 (recognizing that, even if a felon meets the requirements of eligibility, the state election coordinator still holds discretion in restoring voting rights).

130. See *id.* at *6 (explaining that the state election coordinator may formulate a uniform procedure for verifying registration eligibility of felon).

131. See *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (denying laws with no rational basis that restrict voting rights); see also, UGGEN ET AL., *supra* note 8, at 4 (highlighting that Pennsylvania disenfranchises felons only during the incarceration period).

132. See *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *3-*4 (M.D. Fla. July 7, 2014) (explaining that, because clemency in Florida is controlled by the governor, the Clemency board rules may change with each new administration); *Johnson v. Bredesen*, 624 F.3d 742, 745 (6th Cir. 2010) (stating that the ability to pay off debts is a prerequisite to voting right restoration in Tennessee).

133. See UGGEN ET AL., *supra* note 8, at 13, 15 (estimating that during a 15-year period Florida and Tennessee have restored voting rights to only 283,583 ex-felons

governor approval restoration methods both allow a figure to discretionally and unfairly apply voting rights to some felons while denying others.¹³⁴

If Florida and Tennessee were to follow Pennsylvania's approach to disenfranchisement statutes, they would drastically increase the number of eligible voters in their states, restoring rights of people who have served their time.¹³⁵ When nearly two million people are disenfranchised from voting based on non-violent convictions, the governments of these states are effectively hindering a person's fundamental right to vote entirely.¹³⁶

It is clear why the courts have allowed felon disenfranchisement laws generally.¹³⁷ It is also clear why in some states like Tennessee, those who commit the most egregious crimes will be permanently disenfranchised.¹³⁸ However, the United States Supreme Court has established that voting is one of the most basic rights given to us through the United States Constitution.¹³⁹ In Pennsylvania, unlike Tennessee and Florida, the courts have recognized that the state has no interest in crafting waiting periods or complicated procedures for restoration of voting rights.¹⁴⁰ Neither Florida nor Tennessee has provided a clear reason for refusing to restore voting

while more than two million individuals remain disenfranchised).

134. See FLA. CONST. art. VI, § 4(a) (refusing to allow any felon to vote unless he has had his civil rights restored); FLA. STAT. § 940.01(1) (2003) (permitting the governor, along with two members of the cabinet, to discretionarily restore civil rights); see also TENN. CONST. art. I, § 5 (denying voting rights to ex-felons without discretionary court-ordered approval).

135. See UGGEN ET AL., *supra* note 8, at 15 (demonstrating that Pennsylvania has substantially less disenfranchised felons than Florida and Tennessee).

136. See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (holding that the right to vote is fundamental); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234-35 (11th Cir. 2005) (stating that policy decisions are up to the state government, not federal courts).

137. See *Ray v. Pennsylvania*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (explaining that incarcerated felons have the right to mail, the right to unlimited access to the courts, and the right to purchase and receive law books, but not the right to vote); *Governor of Fla.*, 405 F3d at 1234-35 (finding that states have authority to set public policy).

138. See TENN. CONST. art. I, § 5 (defining infamous crimes as murder, rape, treason, or voter fraud).

139. See *Reynolds*, 377 U.S. at 555 (declaring the right of suffrage to be a fundamental right in a democratic society).

140. Compare *Mixon v. Commonwealth*, 759 A.2d 442, 451-53 (Pa. Commw. Ct. 2000) (rejecting post-sentence the waiting period), with *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *8-9 (M.D. Fla. July 7, 2014) (upholding a waiting period of five to seven years in Florida), and *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) (requiring payment of debts in addition to other requirements before being allowed to restore voting rights).

rights to an ex-felon after he has completed his sentencing.¹⁴¹ If Tennessee and Florida truly want to uphold the right of suffrage as one of the United States' most basic and fundamental rights, they should adopt the more inclusive felon disenfranchisement laws in place in states like Pennsylvania.¹⁴²

*B. The Restriction of Felons' Voting Rights in Florida and Tennessee
Should Constitute Cruel and Unusual Punishment Under the Eighth
Amendment*

Currently, felons in states which require the completion of prison, parole, probation, and a post-sentence waiting period have no reasonable, achievable means to restore their right to vote.¹⁴³ While these states claim the right will be returned after applying to a clemency board or court, the current number of felons disenfranchised in these states demonstrates how these insurmountable requirements lead to a marginal amount of restorations.¹⁴⁴ Moreover, these felons have no guarantee that their rights will ever be restored because the courts have consistently allowed this right to be given back discretionally.¹⁴⁵

Despite having the Fourteenth Amendment and the Voting Rights Act of 1965 as outlets to pursue, both of which were created to better provide men and women the right to vote, courts have consistently chosen to dismiss challenges to felon disenfranchisement statutes.¹⁴⁶ The Fourteenth

141. Compare *Bredesen*, 624 F.3d at 745 (explaining that a state is within its rights to require debt payment), with *Governor of Fla.*, 405 F.3d at 1218 (relying on historical tradition to justify disenfranchising felons).

142. Compare FLA. CONST. art. VI, § 4(a) (requiring felons with even non-violent convictions to apply to the Governor for restoration of voting rights), and TENN. CODE ANN. § 40-29-202(b) (2013) (requiring felons to pay all debts prior to restoring their right to vote), with 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (disenfranchising incarcerated felons and not creating barriers, such as waiting periods or application requirements, against individuals who have completed their sentences).

143. See UGGEN ET AL., *supra* note 8, at 3 (stating that individuals who are in the twelve states that disenfranchise people post-sentence and who have completed their sentences constitute more than fifty percent of the entire disenfranchised population, totaling almost 3.1 million people).

144. See *id.* at 13, 15 (demonstrating that, of those currently disenfranchised, twenty-three percent are incarcerated while seventy-seven percent have finished their sentences and are living in their communities, or are under supervision through probation or parole).

145. See *O'Neal v. Goins*, No. M2015-01337-COA-R3-CV, 2016 WL 4083466, at *1, *8 (Tenn. Ct. App. July 29, 2016) (allowing a court to restore voting rights discretionally); see also *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (allowing a governor to restore voting rights discretionally).

146. See, e.g., *Governor of Fla.*, 405 F.3d at 1228-29 (denying both claims under

Amendment and the Voting Rights Act of 1965 seem like the most obvious ways to challenge felon disenfranchisement laws, perhaps accounting for the plethora of cases that have already brought challenges under this Amendment and Act.¹⁴⁷

However, both the Fourteenth Amendment and the Voting Rights Act of 1965 are essentially inaccessible for felon disenfranchisement claims.¹⁴⁸ Even when presented with overwhelming evidence that felons are being discriminatorily disenfranchised, the courts continue to dismiss challenges under the Fourteenth Amendment and the Voting Rights Act of 1965 because these laws were not crafted with the *intent* of discriminating against minorities.¹⁴⁹ Additionally, the prevalence of felon disenfranchisement statutes throughout America's history have allowed courts to seemingly ignore the 6.1 million people in the United States who have a small probability of ever regaining their right to vote back despite the United States Supreme Court's confirmation that voting is a fundamental right.¹⁵⁰

While both the Fourteenth Amendment and the Voting Rights Act of 1965 are effectively prevented from providing any relief to felons wishing to restore their voting rights, the Eighth Amendment should provide felons with the tools to overrule these oppressive, unbeatable laws currently existing in twelve states.¹⁵¹ For the most part, the courts have largely

the Fourteenth Amendment and the Voting Rights Act of 1965 because these protections exist to halt discrimination, rather than undo policies that have been accepted and permitted throughout history, *e.g.*, felon disenfranchisement).

147. *See id.* (challenging felon disenfranchisement laws on both Fourteenth Amendment and Voting Rights Act of 1965 grounds).

148. *Compare* Richardson v. Ramirez, 418 U.S. 24, 54-56 (1974) (upholding a felon disenfranchisement law under the Fourteenth Amendment, unless discrimination is found), *with* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (upholding felon disenfranchisement laws under the Voting Rights Act of 1965, unless discrimination is proven).

149. *See* Hunter, 471 U.S. at 233 (explaining that if voting qualifications deny citizens the right to vote and were crafted with the intent to discriminate against a race, those qualifications would be held unconstitutional); *see also* UGGEN ET AL., *supra* note 8, at 3 (stating that Florida and Tennessee each separately disenfranchise twenty-one percent of its African-Americans with more than one in five African-Americans in these states disenfranchised).

150. *See* Richardson, 418 U.S. at 48-49 (referring to the fact that after the Civil War, the Union approved southern states' Constitutions—many of which contained felon disenfranchisement statutes); *see also* Reynolds v. Sims, 377 U.S. 533, 559-60 (1964) (explaining that voting is fundamental right).

151. *Compare* Richardson, 418 U.S. at 53 (allowing disenfranchisement because factors such as age and residence are considered), *and* Muntaqim v. Coombe, 366 F.3d 102, 129 (2d Cir. 2004) (providing that statutes must not alter the balance of power

ignored and dismissed Eighth Amendment claims challenging felon disenfranchisement laws without much thought.¹⁵² The courts that have discussed Eighth Amendment claims, simply dismiss them because they assert that felon disenfranchisement statutes should be analyzed under the Amendment or Act that deal substantively with voting rights.¹⁵³

However, the courts only choose to truly analyze these statutes under the Fourteenth Amendment or Voting Rights Act of 1965 when a statute has been created with the intent to discriminate, leaving no viable outlet for felons.¹⁵⁴ Nonetheless, it has been held that because only a few states require an application to a court or clemency board to restore voting rights, these laws cannot be considered cruel and unusual.¹⁵⁵ This argument is a feeble one when it is nearly impossible to restore voting rights because these states often allow these rights to be approved or denied discretionally.¹⁵⁶ If these few states only accounted for a small amount of people with repressed rights, then the argument for felon disenfranchisement laws might seem less compelling.¹⁵⁷ However, when 6.1 million felons are disenfranchised nationwide, and the state of Florida alone accounts for more than a quarter of the disenfranchised population nationally, it is not merely a small percentage of people disenfranchised.¹⁵⁸

between the states and the federal government), *with* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (proscribing a modern interpretation of the Eighth Amendment which considers society's current understanding of cruel and unusual).

152. *See* *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 451-52 (2d Cir. 1967) (dismissing cruel and unusual punishment challenges immediately because these functions are a non-penal exercise of the power to regulate, and tradition permits it).

153. *See* *Thiess v. State Admin. Bd. of Election Laws*, 387 F. Supp. 1038, 1039-40, 1042-43 (D. Md. 1974) (finding that only the Fourteenth Amendment should apply to felon disenfranchisement laws).

154. *See* *Hunter*, 471 U.S. at 220 (holding that disenfranchisement statutes that deny citizens the right to vote because of their race are unconstitutional).

155. *See* *El-Amin v. McDonnell*, No. 3:12-cv-00538-JAG, 2013 WL 1193357, at *6-7 (E.D. Va. Mar. 22, 2013) (explaining that the widespread enactment of felon disenfranchisement laws proves that even the strictest laws are not cruel and unusual punishment).

156. *Compare* *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (allowing a governor to restore voting rights discretionally), *with* *O'Neal v. Goins*, No. M2015-01337-COA-R3-CV, 2016 WL 4083466, at *1, *8 (Tenn. Ct. App. July 29, 2016) (dismissing a complaint stating that discretionary approval by the court for restoration of voting rights was unconstitutional).

157. *See* *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) (allowing a disenfranchisement provision because it only disenfranchised a small portion of felons and granted voting rights to non-incarcerated felons in general).

158. *See* *UGGEN ET AL. supra* note 8, at 3 (highlighting that Florida's nearly 1.5 million disenfranchised post-sentence citizens account for nearly half of the national

Although courts have essentially ignored the Eighth Amendment felon disenfranchisement claim because they do not consider it punishment *per se*, the nature of disenfranchisement is fundamentally punitive, and accordingly, falls within the confines of cruel and unusual punishment.¹⁵⁹ Each of the cases that have extended the Eighth Amendment's definition of cruel and unusual punishment provide one of several arguments as to why felon disenfranchisement laws constitute cruel and unusual punishment.¹⁶⁰

For example, the Court in *Weems* found that a punishment *must* be proportional to the offense.¹⁶¹ The Court recognized in *Weems* that even after *Weems* finished his sentence he would forever be kept under the shadow of his crime and would likely never retrieve his fall from rectitude.¹⁶² This perpetual limitation of his liberty was not proportional to his crime.¹⁶³ When considering the twelve states that nearly permanently disenfranchise felons, it is questionable to definitively argue that this essentially permanent punishment is proportional to the committed offense.¹⁶⁴ Each of these 6.1 million felons is kept within the shadow of his or her crimes, unable to move forward.¹⁶⁵

In Tennessee and Florida alone, many felons are excluded from the franchise *discretionally*.¹⁶⁶ The law does not consider whether the felon

total).

159. *See* *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (considering felon disenfranchisement laws acceptable because the states were given the power to regulate elections).

160. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 666 (1962) (proscribing punishments that criminalize addiction as cruel and unusual); *see also* *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (advocating for a modern interpretation of the Eighth Amendment); *Weems v. United States*, 217 U.S. 349, 381 (1910) (calling for punishments to be proportional to the crime).

161. *See Weems*, 217 U.S. at 381 (explaining that for *Weems*, a sentence of fifteen years was not proportional to his crime of falsifying an official public document).

162. *See id.* at 366 (arguing that even when a felon is released from prison he would still be "subject to tormenting regulations that . . . deprive [citizens] of essential liberty.").

163. *See id.* at 367 (stating it is necessary that the punishment be graduated and proportional to the offense).

164. *See Felony Disenfranchisement, supra* note 10, at 1 (explaining that the restoration process is so cumbersome that few people take advantage of it).

165. *Compare Weems*, 217 U.S. at 366 (explaining after a felon leaves prison he may not be imprisoned with iron bars and stone walls but he will still be oppressed due to the deprivation of liberty that follows), *with* UGGEN ET AL., *supra* note 8, at 3 (highlighting that 6.1 million people in the United States are currently unable to regain voting rights).

166. *Compare* *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (allowing a governor to restore voting rights discretionally), *with* *O'Neal v. Goins*, No.

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committed a non-violent drug felony or is simply unable to pay his debts because he has struggled to obtain and maintain employment.¹⁶⁷ *Weems v. United States* recognizes that cruel and unusual does not just apply exclusively to punishments that inflict torture or incarceration but also those which, by their excessive length or severity, are greatly disproportionate to the offenses charged.¹⁶⁸

It is generally understood that when a prisoner pays his debt to society, he will emerge from prison rehabilitated.¹⁶⁹ When a felon leaves prison, the purpose of his punishment is fulfilled and the crime is repressed by penalties of just, not tormenting severity.¹⁷⁰ This discourages the felon from repeating prior crimes.¹⁷¹ By denying felons their basic rights, it is clear that these states have no interest in restoring voting rights, but rather intend to further punish them outside the scope of their original punishment.¹⁷² Instead, these states choose to enact punishments that carry on long after the crime and sentencing is completed, clearly permitting disproportionate punishments in violation of *Weems v. United States*.¹⁷³

While crimes like murder or rape seem to justify a complete denial of voting rights, crimes like possession of controlled substances or other drug related felonies are small in comparison and disproportionate to the

M2015-01337-COA-R3-CV, 2016 WL 4083466, at *1, *8 (Tenn. Ct. App. July 29, 2016) (permitting discretionary approval by the court for restoration of rights).

167. Compare FLA. CONST. art. VI, § 4 (withholding voting rights to all felons), with *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) (requiring a felon to pay roughly \$40,000 in order to begin the process of restoration of his civil rights).

168. See *Weems*, 217 U.S. at 369-71 (discussing the evolution of the Eighth Amendment in the courts and how its protections do not simply cover punishments that inflict pain or physical harm).

169. Compare *Ray v. Pennsylvania*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (allowing the restriction of a felon's civil rights during sentencing), with *Mixon v. Commonwealth*, 759 A.2d 442, 451 (Pa. Commw. Ct. 2000) (holding that once released from prison, there is no reason to continue depriving voting rights).

170. See *Weems*, 217 U.S. at 381 (explaining that the state operates best, suffers nothing, and loses no power when it releases a felon after the completion of a sentence).

171. See *id.* (explaining that hope is given for the reformation of the criminal when a felon is released).

172. Compare *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *5 (M.D. Fla. July 7, 2014) (explaining that the previous governor of Florida loosened restrictions on restoration of voting rights for felons, but the current governor reinstated the more restrictive waiting period), with *Bredesen*, 624 F.3d at 745 (noting that, while payment of debts has not always been a requirement, the state may institute this more restrictive change).

173. See *Weems*, 217 U.S. at 366 (stating that it is precept of justice when punishment for a crime is proportionate to the offense).

punishment of disenfranchisement.¹⁷⁴ Furthermore, in states like Tennessee and Florida, the states claim that the right to vote may easily be given back, but in practice these requirements are insurmountable, requiring significant time, money, and status to be one of the special individuals granted restoration.¹⁷⁵ The majority of these felons whose rights are essentially permanently taken away are adults who live, work, and pay taxes in their communities, and thus, the deprivation is cruel and unusual punishment.¹⁷⁶

Because only twelve out of fifty states implement this kind of restriction on ex-felons, it is clear that this deprivation of rights is not widespread throughout the United States.¹⁷⁷ If a majority of the states incurred this restriction, then the argument that deprivation of felon voting rights constituted cruel and unusual punishment would be moot.¹⁷⁸ Rather, several states have chosen to lessen their felon voting restrictions substantially, recognizing the unfairness in felony voting laws and making the argument stronger that these restrictions are cruel and unusual punishment.¹⁷⁹

If the United States Supreme Court chooses to ignore that the punishment of nearly permanent disenfranchisement is not proportional to the majority of crimes committed by felons, the argument that the Eighth Amendment is held to evolving standards still demonstrates that restrictive

174. See FLA. CONST. art. VI, § 4 (placing limitations on any felon, regardless of the crime convicted, from voting); see also TENN. CONST. art. I, § 5 (precluding those who commit the most egregious of crimes from voting permanently).

175. Compare *Beacham v. Braterman*, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (permitting the governor to restore voting discretionarily), with *O'Neal v. Goins*, No. M2015-01337-COA-R3-CV, at *1, *8 (allowing discretionary approval by the court for restoration of voting rights), and *UGGEN ET AL.*, *supra* note 8, at 3 (naming both Florida and Tennessee among the six states that disenfranchise more than seven percent of the adult population in their state).

176. See *UGGEN ET AL.*, *supra* note 8, at 14 (explaining that, if the laws were changed to require a felon to have his rights restored for people on probation or parole, seventy-seven percent of the 6.1 million people currently disenfranchised would regain the right to vote).

177. See *id.* at 3-4 (highlighting that the near total deprivation of voting rights most frequently occurs in the states whose laws continue to disenfranchise individuals after they complete their prison sentences).

178. Cf. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1220 (11th Cir. 2005) (relying on tradition to demonstrate that felon disenfranchisement was always considered constitutional).

179. See *UGGEN ET AL.*, *supra* note 8, at 4 (demonstrating that in 2013, Delaware removed the five-year waiting period and in 2016 Maryland eliminated the ban on voting for persons on probation or under parole supervision).

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felon disenfranchisement laws constitute cruel and unusual punishment.¹⁸⁰ Both *Weems v. United States* and *Trop v. Dulles* provide an argument for why certain felon disenfranchisement laws should fall under a modern interpretation of the Eighth Amendment's Cruel and Unusual Punishment clause.¹⁸¹ In *Trop v. Dulles*, the Court announced that the Eighth Amendment should draw its meaning from the "evolving standards of decency that mark the progress of a maturing society."¹⁸² Similarly, in *Weems*, the Court explained that the Cruel and Unusual Punishment Clause could be progressive and change as public opinion becomes enlightened by a humane justice.¹⁸³ The Court's adoption of a modern interpretation of the Cruel and Unusual Punishment clause procures that if society understands the deprivation of voting rights as unjust punishment, then felon disenfranchisement statutes would be unconstitutional.¹⁸⁴

As more states depart from post-sentencing restrictions and court or clemency board approval, states that impose the harshest restrictions are receiving increased scrutiny and disapproval.¹⁸⁵ The duties of citizenship are numerous, many of these obligations being essential to the security and well-being of the nation.¹⁸⁶ Depriving someone of her right to vote essentially cripples that person from carrying out her duties of citizenship.¹⁸⁷

180. Compare *Weems v. United States*, 217 U.S. 349, 378 (1910) (stating that the Eighth Amendment "may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice"), with *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (reasoning that the words of the Eighth Amendment are not precise, and their scope is not static).

181. Compare *Weems*, 217 U.S. at 378 (arguing for a modern interpretation of the Eighth Amendment), with *Trop*, 356 U.S. at 102-3 (explaining that a modern interpretation of the Eighth Amendment is necessary).

182. *Trop*, 356 U.S. at 102-03 (adopting a modern interpretation of the Eighth Amendment because expatriation for the crime of desertion went far beyond the normal punishment).

183. See *Weems*, 217 U.S. at 373 (stating that "a principle, to be vital, must be capable of wider application than the mischief to which it give it birth.").

184. See *Trop*, 356 U.S. at 102-03 (expressing that a modern interpretation of the Eighth Amendment might better serve today's society); see also UGGEN ET AL., *supra* note 8, at 3 (highlighting that there are currently six million disenfranchised felons in the United States).

185. See *Felony Disenfranchisement*, *supra* note 10, at 2-3 (listing recent policy changes in eighteen states).

186. See *Trop*, 356 U.S. at 92 (reasoning that citizenship cannot be revoked every time a duty of citizenship is shirked).

187. See *Reynolds v. Sims*, 377 U.S. 533, 559-560 (1964) (stating that the right to vote is fundamental); *Trop*, 356 U.S. at 92 (permitting *Trop* to keep his citizenship); *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *8 (M.D. Fla. July 7,

Although cruel and unusual punishment typically only applies to the most egregious of punishments, the United States Supreme Court extends it when faced with an injustice.¹⁸⁸ In *Robinson v. California*, the Court recognized that depriving someone of a liberty for something menial is unjust.¹⁸⁹ Alternatively, while expatriation was not something generally deemed as cruel and unusual, the Court reasoned that deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, no matter how reprehensible that conduct might be.¹⁹⁰

Felon disenfranchisement laws requiring waiting periods and Governor approval could also be seen as a penal law because they disenfranchise so many people.¹⁹¹ *Trop* sets forth the idea that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.¹⁹² It is less than the dignity of man to require someone to pay nearly fifty-thousand dollars to restore his right to vote after completing his prison sentence.¹⁹³ Similarly, requiring an individual to wait five to seven years after completion of his sentence to apply for restoration appears to be an attempt to further punish felons outside the boundaries of the original sentence.¹⁹⁴ This waiting period bares striking similarity to the concept articulated in *Weems v. United States* that even after men and women are released from prison they have a shadow over them that deprives them of their liberty at

2014) (allowing waiting periods before restoration of voting rights).

188. See *Robinson v. California*, 370 U.S. 660, 661-62 (1962) (holding that criminalization of addiction is cruel and unusual punishment); *Trop*, 356 U.S. at 101 (considering expatriation cruel and unusual punishment); *Weems*, 217 U.S. at 362 (finding excessive imprisonment for falsification of a document cruel and unusual punishment).

189. See *Robinson*, 370 U.S. at 667 (explaining that “even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).

190. See *Trop*, 356 U.S. at 92-93 (reasoning that citizenship cannot be revoked every time a duty of citizenship is shirked).

191. Compare UGGEN ET AL., supra note 8, at 15 (highlighting that felons in Florida and Tennessee account for nearly two million of the six million disenfranchised felons), with *Trop*, 356 U.S. at 97 (stating that the denial of rights was a penal punishment because the punishment was disproportionate to the crime).

192. See *Trop*, 356 U.S. at 102-03 (recognizing that the Eighth Amendment stands to assure that its power be exercised within the limits of civilized standards).

193. Cf. *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010) (requiring a felon to pay \$40,000 restitution for wire fraud and more than \$1,000 in child support in order to regain his right to vote was constitutional).

194. Compare *Mixon v. Commonwealth*, 759 A.2d 442, 451-53 (Pa. Commw. Ct. 2000) (rejecting waiting periods in Pennsylvania), with *Verity v. Scott*, No. 2:12-cv-609-FtM-38, 2014 WL 3053171, at *8 (M.D. Fla. July 7, 2014) (permitting waiting periods that were recently implemented by the current governor of Florida).

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any chance available.¹⁹⁵

In Florida, felons are faced with the reality that they must wait several years just to begin the process of applying for restoration of voting rights.¹⁹⁶ This waiting period is clearly not proportional to the crime.¹⁹⁷ Pennsylvania found that there was no just reason to require a felon to wait this extended amount of time because it was beneath the dignity of man.¹⁹⁸ Pennsylvania recognizes that in many cases disenfranchisement is not proportional to the crime.¹⁹⁹ Felons released from prison should be entitled to the fundamental right to vote.²⁰⁰

Since the courts have established that the Fourteenth Amendment and the Voting Rights Act of 1965 effectively preclude all felon disenfranchisement challenges, it is up to the courts to recognize that the Eighth Amendment provides an opportunity to fix the wrongs implemented by twelve states.²⁰¹ The courts must open the door to felon disenfranchisement succeeding under the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁰²

195. See *Weems v. United States*, 217 U.S. 349, 366 (1910) (arguing that punishments can be ongoing long after the period of incarceration ends).

196. Compare *id.* at 366 (explaining that after prison a person is often kept within voice and view of a magistrate), with *Verity*, 2014 WL 3053171, at *5 (allowing for a waiting period that was implemented by the current governor of Florida).

197. Compare *Weems*, 217 U.S. at 366-68 (considering hard labor for falsifying documents cruel and unusual punishment), with *Verity*, 2014 WL 3053171, at *1 (permitting a waiting period that continues for nearly a decade).

198. See *Mixon*, 759 A.2d at 445 (recognizing there was no legitimate reason to say a felon was in a better position to vote because he had been out of prison for five years).

199. Compare *Weems*, 217 U.S. at 366 (introducing punishment being proportionate with crime), with *Mixon*, 759 A.2d at 445 (recognizing that the punishment was not proportionate to the crime).

200. See *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964) (explaining that the right of suffrage is a fundamental right).

201. Compare *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (denying felon disenfranchisement challenges under the Fourteenth Amendment), and *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003) (denying felon disenfranchisement challenges under the Voting Rights Act of 1965), with *Weems*, 217 U.S. at 362 (requiring punishment be proportional to the crime and opening up the Eighth Amendment to modern interpretation).

202. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (adopting a modern interpretation of the Eighth Amendment leaves many arguments available as society continues to progress).

IV. POLICY RECOMMENDATION

One of the staples of American democracy is the right to vote in elections.²⁰³ While the United States has not always provided each individual in America with the right to vote, as society progresses we have seen voting rights expanded to those who have been oppressed.²⁰⁴ After the Civil War, voting rights were given to African-American slaves, despite the Founding Fathers' intent to disenfranchise slaves.²⁰⁵ After the woman's suffrage movement, voting rights were given to women even though when "all men are created equal" was written in the Constitution it was intended to only refer to white men.²⁰⁶ When African-American's rights were still being denied, a Voting Rights Act was created to ensure that every person had the opportunity to vote in America.²⁰⁷

Currently, 6.1 million people are forbidden from voting in the United States because they have committed felonies.²⁰⁸ The percent of felons disenfranchised is even higher among minorities, specifically within the African-American population.²⁰⁹ Twelve states and legislatures claim it is better to have ex-felons apply to have their civil rights restored only well after they have been released from prison.²¹⁰ However, research has shown

203. See *Presidential Elections*, HIST. CHANNEL, <http://www.history.com/topics/us-presidents/presidential-elections> (last visited Nov. 4, 2016) (explaining that the United States left the British monarchical tradition and created a system where people could vote and select their leaders).

204. See *U.S. Voting Rights Timeline*, N. CAL. CITIZENSHIP PROJECT, 1-5 <http://www.kqed.org/assets/pdf/education/digitalmedia/us-voting-rights-timeline.pdf> (highlighting how voting rights have been expanded since 1776 to include African-Americans and women).

205. See *The Civil War: The Senate's Story*, UNITED STATES SENATE, <http://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> (last visited Nov. 4, 2016) (explaining the admission of the Civil War Amendments).

206. See *id.* (highlighting that it took 100 years for women voting rights to be implemented).

207. See Jamelle Bouie, *The Voting Rights Act: A 20th Century American Revolution*, AMERICAN PROSPECT (Aug. 6, 2012) <http://prospect.org/article/voting-rights-act-20th-century-american-revolution> (explaining that previously, the ability for African-Americans to vote was virtually nonexistent).

208. See UGGEN ET AL., *supra* note 8, at 3 (highlighting that 2.5 percent of the total U.S. voting age population — one of every forty adults — is disenfranchised due to a felony conviction).

209. See Editorial, *Florida Should Restore Ex-Felon Voting Rights*, SUN SENTINEL (August 31, 2016), <http://www.sun-sentinel.com/opinion/editorials/fl-editorial-felons-voting-20160829-story.html> (noting that in Florida alone felon disenfranchisement laws disqualify nearly one in four African-American residents from casting ballots).

210. See UGGEN ET AL., *supra* note 8, at 13 (showing that even though states claim these restrictive rules are better, these states generally do not provide restoration to

that felons in states who are given back their right to vote after being released from prison with a reasonable time frame are far less likely to become repeat offenders.²¹¹

Additionally, efforts to change felon disenfranchisement laws have come to the forefront of conversations during election years.²¹² In the summer of 2016, the Governor of Virginia executed a blanket restoration of voting rights for felons who had completed their sentences that was quickly overturned by the Virginia Supreme Court.²¹³ As more states move away from post-sentencing restrictions and court or clemency board approval, states that impose the harshest restrictions are receiving additional scrutiny and disapproval.²¹⁴

Felons like Perry Hopkins and Desmond Meade have paid back their debts to society, yet they are precluded from one of the most sacred rights in our society.²¹⁵ At this point, it is not necessary to claim that all felon disenfranchisement laws should be unconstitutional.²¹⁶ Depriving someone of the right to vote because of transgressions committed against society should be allowed as tradition at the time of the Ratification demonstrates that our Founder Fathers accepted it.²¹⁷ However, our Founding Fathers also allowed many other things that are now repugnant. Felon disenfranchisement laws in states that prevent more than seven percent of adults the right to vote after they have paid back their debts to society should also be considered repugnant.²¹⁸

felons).

211. See James Call, *Study Shows Ex-Cons Benefit from Rights Restoration*, WFSU, <http://news.wfsu.org/post/study-shows-ex-cons-benefit-rights-restoration> (explaining that in Florida, ex-felons, whose rights to vote was automatically restored, were less likely to commit new crimes).

212. See UGGEN ET AL., *supra* note 8, at 3.

213. See *id.* at 4 (highlighting that since the Virginia Supreme Court overturned the blanket restoration, the Governor of Virginia has individually approved voting rights for 12,832 individuals).

214. See *Felony Disenfranchisement*, *supra* note 10, at 2-3 (listing recent policy changes in eighteen states, which allow for felons to regain their voting rights with greater ease).

215. Compare Martin, *supra* note 1 (detailing the struggle Perry Hopkins faced to regain his right to vote), with Ollstein, *supra* note 6 (describing Desmond Meade's personal life and how he is still being denied the right to vote in Florida).

216. See *Ray v. Pennsylvania*, 263 F. Supp. 630, 631 (W.D. Pa. 1967) (arguing that a felon cannot vote while incarcerated because it is only when fundamental, humane, and necessary rights are breached that constitutional protections become involved).

217. See *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 450 (2d Cir. 1967) (explaining that eleven constitutions adopted between 1776 and 1821 authorized the legislatures to prohibit exercise of the franchise by convicted felons).

218. See UGGEN ET AL., *supra* note 8, at 12 (asserting that 6.1 million felons

V. CONCLUSION

Although felon disenfranchisement laws are common throughout the United States and disenfranchise millions of people, the judicial system has consistently chosen to permit the states to draft and enforce their own unique election laws.²¹⁹ When comparing Pennsylvania, Florida, and Tennessee, each state has addressed felon disenfranchisement laws in some way.²²⁰ Pennsylvania acknowledges that it maintains the right to enforce felon disenfranchisement but chooses to do so in the least restrictive means.²²¹ If Florida and Tennessee were to adopt laws similar to Pennsylvania they would enfranchise over seven percent of each of their populations.²²² By not restoring felons' voting rights, states are intentionally excluding citizens from one of our most basic and fundamental rights.²²³

While challenges to these felon disenfranchisement laws generally fail, there may be a path to success through the Eighth Amendment's Cruel and Unusual Punishment Clause.²²⁴ This clause has only considered three non-traditional punishments to be cruel and unusual, generally because the punishment is not proportional to the crime.²²⁵ If courts were to look at the proportionality of felon disenfranchisement laws and their punishment, it

disenfranchised reside mostly in states with strict felon disenfranchisement laws).

219. See *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (holding it is not a court's decision to determine values).

220. Compare FLA. CONST. art. VI, § 4(a) (requiring all felons to apply to the Governor for restoration of voting rights), and TENN. CODE ANN. § 40-29-202(b) (2013) (requiring felons to pay all debts prior to restoration), with 25 PA. STAT. AND CONS. STAT. ANN. § 2602 (West 2012) (denying only incarcerated felons voting rights).

221. See *Mixon v. Commonwealth*, 759 A.2d 442, 451-53 (Pa. Commw. Ct. 2000) (condemning waiting periods because waiting periods have not proven to create better voters).

222. See UGGEN ET AL., *supra* note 8, at 15 (noting that Florida and Tennessee disenfranchises more than eight percent of its adult population while Pennsylvania only disenfranchises 0.52 percent).

223. See *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964) (explaining that the right of suffrage is a fundamental right).

224. See *Felony Disenfranchisement*, *supra* note 10, at 1-3 (discussing the history of felon disenfranchisement in the United States and the courts' consistent failure to recognize the unconstitutionality of these laws under the Voting Rights Act and the Fourteenth Amendment).

225. Compare *Weems v. United States*, 217 U.S. 349, 362 (1910) (holding imprisonment for falsification of an official public document to be cruel and unusual punishment), with *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (finding that expatriation for desertion is cruel and unusual punishment), and *Robinson v. California*, 370 U.S. 660, 661-62 (1962) (holding punishment for addiction to be cruel and unusual punishment).

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would be clear that these laws violate the Eighth Amendment.²²⁶

226. See *Weems*, 217 U.S. at 385-86 (requiring that punishments must be appropriate and proportional to the crime).