

No. 05-

In the Supreme Court of the United States

MARYLAND STATE BOARD OF ELECTIONS,
ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the
Fourth Circuit

BRIEF OF PETITIONER

Id No. 10722

QUESTIONS PRESENTED

1. Is a statutory provision that permanently denies the right to vote only to persons who have committed a second or subsequent violent felony a voting qualification or prerequisite subject to §2 of the Voting Rights Act, 23 U.S.C. §1973, because it results in a denial of the right to vote on account of race?
2. Is Maryland's disenfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

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Jurisdictional Statement

The United States Court of Appeals for the Fourth Circuit issued its decision in this case on July 16, 2005, and the Supreme Court granted certiorari on October 14, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Statement of the Case

In 1982, Baltimore County police found 10 grams of cocaine on respondent Jeffrey Coolidge, hereinafter "respondent Coolidge" and he was later indicted for possession with intent to distribute a controlled substance, an infamous crime under Maryland Law. Record 10. During his probationary period, in 1984 following this conviction, Baltimore City police found 1 gram of cocaine on respondent Coolidge, of which he was convicted for misdemeanor possession of a controlled substance. *Id.* at 11. In April 2004, respondent Coolidge threatened to assault a convenience store clerk if she did not give him cash from her cash register. After this incident, respondent Coolidge was convicted of robbery, a crime of violence under Maryland law. *Id.* Following the sentencing of his conviction for robbery, respondent Coolidge became ineligible to vote and was removed from the registry of voters. *Id.* at 12.

The Maryland Constitution provides that "[t]he General Assembly by law may regulate or prohibit the right to vote of a

person convicted of infamous or other serious crime... ." Md.

CONST. art. I, § 4. Further, Maryland law provides that

an individual is not qualified to be a registered voter if the individual: has been convicted if the individual: (1) has been convicted of theft of theft or other infamous crime, unless the individual ... in connection with a first conviction has completed the court-ordered sentence imposed for the conviction, including probation... .

Md. Code Ann., Election Law § 3-102(b)(1) (Bender 2005).

With a second or subsequent crime of violence,

"[n]otwithstanding section (b) of this section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in §14-101 of the Criminal Law Article." Md. Code Ann., Election Law §3-102(c) (Bender 2005) (*emphasis added*). The crime of robbery is listed as a crime of violence, pursuant to Md. Code Ann., Criminal Law § 14-101(a)(9) (Bender 2005).

Respondent Coolidge was first convicted of an infamous crime in 1982, when he was convicted and sentenced for possession with intent to distribute a controlled substance. Record 10-11. He was sentenced to one year in prison and one year of probation, and then violated the terms of his probation when police found him with one gram of cocaine in his possession. *Id.* Following this conviction for a misdemeanor, he received a sentence of six months in jail. *Id.* at 11. Given these facts, respondent Coolidge was eligible to vote three

years after his completion of the sentence and any probation. However, in 2004 when respondent Coolidge was subsequently convicted of robbery he became permanently disenfranchised, pursuant to Md. Code Ann., Election Law § 3-102(c). *Id.* at 12.

Summary of the Argument

The United States Court of Appeals for the Fourth Circuit erred when it reversed the District Court's decision that Section 2 of the Voting Rights Act is applicable to the felon disenfranchisement laws of Maryland. When Congress passed the Voting Rights Act in 1965 it specifically exempted felon disenfranchisement from being covered. Congress amended the Voting Rights Act in 1982 to expand its scope beyond that of the Fourteenth Amendment's Equal Protection clause to allow claims that do not demonstrate intentional discrimination and instead rely on racially disparate results in voting. In these amendments however, Congress made no attempt to add felon disenfranchisement to the categories of voting qualifications regulated by the Voting Rights Act.

If the Court finds that the Voting Rights Act does apply to felon disenfranchisement laws, then several other issues arise. First, Congress failed to satisfy certain constitutional requirements the Court has established to determine valid prophylactic legislation. Congress did not establish a congruent and proportional remedy for racially neutral felon

disfranchisement laws that may affect minorities at a disproportionate rate. Congress has not addressed any discrimination resulting from felon disfranchisement, let alone set forth a history and pattern of unconstitutional discrimination needed to satisfy the prerequisite for prophylactic legislation. In addition, Congress never made a clear statement of its intention to give the federal government power over the constitutionally protected right states have to disfranchise felons, even though the Court has found such a clear statement is required when shifting the balance of federal power away from the states. Lastly, since Section 4 of the Fourteenth Amendment gave the states an affirmative sanction in creating and maintaining felon disfranchisement laws, any statute that attempts to repeal this provision of the Constitution is itself, unconstitutional.

The United States Court of Appeals for the Fourth Circuit also erred when it reversed the district court's decision that felon disenfranchisement laws are a cruel and unusual punishment. For a court to decide that felon disenfranchisement violates the Eighth Amendment, one must first determine that felon disenfranchisement laws are in fact penal in nature. The Respondent will point this Court to precedent, which provides that felon disenfranchisement laws are merely disqualifications to voting which the states are given an explicit right to do.

Further, even if this Court were to find that felon disenfranchisement is penal in nature, it would not amount to "cruel and unusual" given the history of felon disenfranchisement and prior precedent with regards to what this Court has determined to be "cruel and unusual punishment".

Argument

- I. The Voting Rights Act does not apply to felon disenfranchisement laws because it defies congressional intent, and if applied, would result in the unconstitutionality of Section 2 of the Voting Rights Act
 - a. Congress did not intend for the Voting Rights Act to apply to felony disenfranchisement provisions.
 - i. The strong history of felon disenfranchisement statutes in the states and the timing of the passage of the Reconstruction Amendments suggest Constitutional and Congressional support for felon disenfranchisement.

In early Europe, felon disenfranchisement was limited to cases of serious crimes. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, Wis. L.Rev. 1045, 1060 (2002). Colonists brought felon disenfranchisement to the United States. Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws* 1 (1998). "Eleven state constitutions adopted between 1776 and 1821 prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons." *Green v. Board of Elections of the City of New York*, 380 F.2d 445, 450 (2nd Cir. 1967). Further, 29 states had those

felony disfranchisement provisions when the fourteenth amendment was adopted. *Id.* Since then, felon disfranchisement has become a nearly universal practice in the United States, with all but two states using some form of felon disfranchisement. *Muntaqim v. Coombe*, 366 F.3d 102, 115 (2nd Cir. 2004).

- ii. Congress made its intention clear in the legislative history of the Voting Rights Act of 1965 to exempt felon disfranchisement laws.

Congress passed the Voting Rights Act, hereinafter "VRA", to combat the practices in some states, such as poll taxes, literacy tests, and other discriminatory practices, which effectively limited minority voting. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999). The text of Section 2 of the Voting Rights Act appears to claim jurisdiction over all qualifications to voting.¹ However, the discretion to deny felons the right to vote is rooted in the text of the Section 2 of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 2. The Supreme Court has held that provision is an "affirmative grant" of the right of states to create felon disfranchisement laws. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974). Applying the VRA to felon disfranchisement in a manner that would abridge this constitutionally protected right of the states presents a

¹"No voting qualification or prerequisite to voting, or standard practice, or procedure shall be imposed or applied by any State ... to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, §2, 79 Stat. 437, 437 (1965).

significant constitutional issue. Congress seems to have recognized this conflict and avoided the problem by exempting felon disfranchisement from the purview of Section 2 of the VRA.

The legislative history of the 1965 VRA references felon disfranchisement twice. Both Senate and House Judiciary Committee reports explicitly state their intention for the VRA to not apply to felon disfranchisement statutes. The Senate report includes an exception on the ban for "good moral character" tests in 1973b(c) that states it "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of a conviction of a felony." S. REP. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2652 (joint views of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits). The House report states that the 1965 VRA does "not proscribe a requirement of a state or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony." H.R. REP. No. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457. It is not clear why Congress spent little time reflecting on felon disfranchisement statutes when passing the 1965 VRA. One could infer that Congress recognized the long tradition of "the frequent

requirement" in choosing to distinguish it from other electoral requirements that the law was designed to reach.

- iii. The amendments Congress passed to the Voting Rights Act in 1982 gave no indication that Congress had changed its mind and that felon disfranchisement was to be covered.

The Supreme Court first decided in *Washington v. Davis* to employ an intent-based test in Fourteenth Amendment Equal protection cases. *Washington v. Davis*, 426 U.S. 229, 240 (1975) (holding that a law claimed to be racially discriminatory must be shown to have a racially discriminatory purpose). The *Davis* ruling in turn led to a plurality opinion in *City of Mobile v. Bolden*, holding that the Voting Rights Act is coterminous with the Fifteenth Amendment, and therefore racially neutral voting standards violate the VRA only if they were motivated by intentional discrimination. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). In passing the Voting Rights Act Extension in 1982, Congress amended Section 2 by adding the phrase "in a manner which results in denial or abridgement". This addition of text reestablished the "result standard" as articulated in *White v. Regester*...as it was applied prior to the *Mobile* litigation" for analyzing claims brought under Section 2 of the VRA. S. REP. NO. 89-162, at 2 (1982). Congress, however, also preserved the provision "on account of race", suggesting a desire to retain the need for evidence of a causal connection

between racial disparities in voting with racial discrimination. *Johnson v. Bush*, 405 F.2d 1213, 1245 (11th Cir. 2005). It is important to note that neither the change in the text of Section 2 of the VRA, nor the legislative history of the 1982 amendments, indicate congressional intent to extend the VRA to felon disfranchisement laws.²

Congress may have been justified in ignoring felon disfranchisement provisions when amending the Voting Rights Act in 1982. The Voting Rights Act had been amended in 1970 to require states to lower voting ages to 18 in state and local elections. *Oregon v. Mitchell*, 400 U.S. 112, 281 (1970). However, in *Oregon v. Mitchell*, the Supreme Court struck down the provision, and held that Congress had exceeded its constitutional powers and encroached upon the power of states to conduct elections. *Id.* at 118 (holding that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 unconstitutional and unenforceable insofar as they pertain to state and local elections). Since *Mitchell* was decided prior to

² The Senate's legislative report details nine different criteria that courts should look to when considering vote denial and abridgment cases under the Voting Rights Act: (1) a history of discrimination in voting, (2) racially polarized voting, (3) voting practices or procedures that discriminate against minorities, (4) candidate slating, (5) discrimination in health, education, or employment, (6) racial appeals in campaigns, (7) minorities have a harder time winning elections, (8) representatives are unresponsive to minority communities, (9) unjustified policy. S. REP. NO. 89-162, at 27-28 (1982).

Bolden, the Court used a results-based standard in analyzing the claim. Congress may have recognized that if the Voting Rights Act could not reach a voting law pertaining to age requirements when no racial bias preceded its institution, regardless of whether a discriminatory effect occurred, it could not possibly reach felon disfranchisement laws. Such speculation is bolstered by the holding in *Richardson*, which provides that disfranchisement of felons has an "affirmative sanction" in Section 2 of the Fourteenth Amendment. *Richardson*, 418 U.S. at 54.

Congress has shown additional support for felon disfranchisement since the 1982 amendments to the VRA. In 1993, Congress passed the National Voter Registration Act which made it easier for states to expunge their voter rolls of felons by giving the states written notice of felony convictions. *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting). While this provides only indirect support for felon disfranchisement generally, it is antithetical to Congress' treatment of other voter qualifications that are explicitly banned by Section 4 of the VRA, such as poll taxes and literacy tests. Voting Rights Act of 1965 § 10, 42 U.S.C. § 1973h (1965).

- b. The Voting Rights Act fails to meet constitutional standards and requirements of Supreme Court precedent

necessary for the act to cover felon
disfranchisement.

- i. Section 2 of the Voting Rights Act fails to demonstrate congruence and proportionality or set forth a history and pattern of unconstitutional discrimination needed to satisfy the requirements for prophylactic legislation.

Section 5 of the Fourteenth Amendment gave Congress the power to pass prophylactic legislation that would help enforce the provisions of the article. U.S. CONST., amend. XIV, § 5. Given that the Voting Rights Act seeks to protect against racially discrimination, as provided for in the Equal Protection clause of the Fourteenth Amendment, such legislation is importantly categorized as prophylactic. Congress' enforcement powers are most expansive when enacting prophylactic legislation through Section 5 of the Fourteenth Amendment. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004). There are limits, however, to Congress' power under this authority.³ The Supreme Court, over the last several years has clarified the scope of Congress' prophylactic power under the Fourteenth and Fifteenth Amendments. *Muntaqim*, 366 F.3d at 199.

In order for a congressional prophylactic measure to be upheld as constitutional, there must be congruence and

³ "As broad as congressional enforcement power is, it is not unlimited. Specifically, there are ... limitations upon Congress' power to enforce the guarantees of the Civil War Amendments. First, Congress may not by legislation repeal other provisions of the Constitution." *Mitchell* 400 U.S. at 266.

proportionality between the injury and the remedy. *City of Boerne v. Flores*, 512 U.S. 507, 520 (1997). Given congruence and proportionality, Congress must also identify a history and pattern of unconstitutional discrimination that it seeks to redress. *Board of Trustees of the Univ. of Al. v. Garrett*, 531 U.S. 356, 374 (2001). If, however, there is no history that establishes a pattern of unconstitutional discrimination or the legislation is determined not to be congruent and proportional, then such prophylactic legislation is inappropriate and would redefine the Fourteenth Amendment in a way that is unconstitutional.

In *City of Boerne v. Flores*, the Court established the congruence and proportionality test, requiring that legislation enforcing constitutional rights show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 512 U.S. at 520. If Section 2 of the VRA is designed to reach felon disfranchisement laws that are racially neutral and void of discriminatory intent, it appears difficult to classify the regulation as congruent or proportional. Like the statute in *Boerne*, this vastly over-inclusive and far-reaching remedy might better be classified as "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional

behavior. It appears, instead, to attempt a substantive change in constitutional protections." *Id.* at 532.

In *Board of Trustees of the University of Alabama v. Garrett*, the Court found that the Americans With Disabilities Act did not apply to job discrimination against the states because "Congress did not make findings establishing a pattern of unconstitutional irrational job discrimination by the states." *Garrett*, 531 U.S. at 374. Similarly, in *Kimel v. Florida Board of Regents*, the Court again held that Congress had not identified sufficient evidence of age discrimination to justify applying the Age Discrimination in Employment Act to the states. *Kimel v. Fl. Board of Regents*, 528 U.S. 62, 91 (2000).

Congress has never put forth "a pattern of unconstitutional discrimination on which Section 5 legislation must be based" according to *Garrett* and *Kimel*. *Garrett*, 531 U.S. at 370. Congress may not need to identify every possible form of voting discrimination, but should certainly have mentioned a practice as prevalent and historical as felon disfranchisement if it intended to cover it within Section 2 of the VRA.⁴ Congress has never even asserted that felon disfranchisement has been used as

⁴ If felon disfranchisement had been a newly created practice to deny the right to vote, then it would be logical that Congress may not have mentioned the practice in the legislative history. However, felon disfranchisement statutes do in fact predate the Fourteenth Amendment and are used in 48 states and the District of Columbia.

a tool to discriminate against minority voters. The only instance of a felon disfranchisement law being used to discriminate based on race was found in *Hunter v. Underwood*. This instance, however, was a Supreme Court case, not a Congressional finding. Although the Court invalidated the statute in *Hunter*, it did so because the discriminatory intent with which it was passed violated the Fourteenth Amendment, not because the Court found a violation of the VRA. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

While Congress' enforcement power is particularly broad when prohibiting discrimination against a suspect class or seeking to protect a fundamental right such as voting, the Supreme Court still requires some record of constitutional violations to ensure an adequate constitutional basis for prophylactic legislation. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003). In this instance, because of the lack of any Congressional evidence or concern about racially disparate affects of felon disfranchisement, it is clear that Section 2 does not meet the standards required by precedent to be applied to felon disfranchisement.

- ii. Absent a clear statement from Congress indicating intent to upset the balance between federal and state power, Section 2 of the VRA should not be construed to extend to state felon disfranchisement statutes.

Prior to 1982, the reach of the VRA was coterminous with the Equal Protection clause of the Fourteenth Amendment. S. REP. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2652. Congress amended the Voting Rights Act in 1982 to institute a results-based test for establishing a vote abridgment or vote dilution claim. *Id.* Instituting the results test for VRA claims allowed plaintiffs to dispense with intentional discrimination, an element required in other Equal Protection claims. *Davis*, 426 U.S. at 430.

Section 2 of the Fourteenth Amendment establishes an explicit constitutional balance between the states and the federal government, giving the states the authority to continue the prevalent practice of disfranchising felons as long as such laws do not violate other provisions of the Constitution. U.S. CONST., amend. XIV, § 2. States are also given discretion on the "times, places and manner for holding elections." U.S. CONST., art. I, § 4, cl. 1. Therefore, if the VRA prohibits forms of felon disfranchisement that are constitutional, then Congress by passing the 1982 amendments to the VRA, shifted the balance of power instituted by the Fourteenth Amendment. *Muntaqim*, 366 F.3d at 115. "If Congress intends to alter the usual constitutional balance it must make its intention unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). If there is any ambiguity in the VRA as

to whether felon disfranchisement statutes are covered, it is unnecessary to resolve the question of whether it is within Congress' power to ban those not violative of the Fourteenth or Fifteenth Amendments, since the clear statement rule states the statute should not be construed to cover felon disfranchisement unless Congress made its intentions readily apparent. *Id.*

For the clear statement rule to apply, there must be some ambiguity within the Statute. *Conn. Nat'l Bank v. Germain*, 503 U.S. 239 (1992). Determining what conduct is prohibited by §2 of the VRA, and by §1973 more generally, is exceedingly difficult. *Goosby v. Town Board*, 180 F.3d 476, 499 (2nd Cir. 1999). "Moreover, the deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is unclear." *Johnson*, 405 F.3d at 1229. The language of Section 2 of the VRA, specifically "no qualification or prerequisite to voting" implies an intention to cover all voting qualifications. Not all voting qualifications, however, fall under the results test of the VRA. The Supreme Court has held that a violation requires a "certain electoral law or practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 487 U.S. 30, 47 (1986). More specifically, the Court found in *Oregon v. Mitchell* that the VRA did not extend to age

qualifications in voting. *Mitchell*, 400 U.S. at 118. Since the VRA does not in fact cover all qualifications for voting, there is significant ambiguity as to whether felon disfranchisement provisions are covered given their historical practice, prevalence, and affirmative sanction in Section 2 of the Fourteenth Amendment.

To satisfy the clear statement rule, Congress must make an affirmative intention, to alter the state-federal balance, "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460. When Congress changed the balance of power by enacting the 1982 amendments, Congress did not mention felon disfranchisement either in the legislative history, let alone the text of the statute.⁵

- c. If Section 2 of the Voting Rights Act applies to felon disfranchisement, Congress has exceeded its authority, and Section 2 of the Voting Rights Act is unconstitutional.

Assuming that this court were to find that Section 2 of the Voting Rights Act extended to felon disfranchisement, there is a direct conflict as felon disfranchisement is a constitutionally

⁵ Congress' only reference to felon disfranchisement in the legislative history of the VRA came in 1965, when it declared its unwillingness to cover felon disfranchisement in its discussion of Section 4, which elaborates on the illegal "devices or tests" used by states to disqualify persons from voting. S. REP. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2652.

protected activity.⁶ Further "it is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." *Mitchell* 400 U.S. at 125. In addition, states also possess "primary authority for defining and enforcing criminal law." *United States v. Lopez*, 513 U.S. 549, 561 n.3 (1995).

If felon disfranchisement statutes are judged strictly by a results-based standard, then the right of states to enact these provisions is dependent on felons committing crimes in a racially proportionate manner. The right of states to enact these provisions does not allow them to disfranchise based on race, as that would violate the Fourteenth Amendment's Equal Protection clause. *Hunter*, 471 U.S. at 233. In addition, because of the widespread historical practice of felon disfranchisement laws and their specific constitutional endorsement, they are presumptively constitutional, unlike any other voting qualification. *Farrakhan*, 359 F.3d at 1121.

⁶ *Richardson* provides that through Section 2 of the Fourteenth Amendment, states are given an affirmative sanction to disenfranchise felons. It is important to note that section 2 of the Fourteenth Amendment gives states the right to enact and enforce race neutral felon disfranchisement laws, but does not give states the right to disenfranchise felons on the basis of race.

Applying the VRA to felon disfranchisement provisions would also open the door to challenges of other forms of legitimate state electoral practices; essentially whenever a citizen can demonstrate disparate racial impact on voting. Such claims could range from challenges to weekday voting, to claims that people with lower incomes are less likely to participate in the political process. It is a long-held rule that "Congress may not by legislation repeal other provisions of the Constitution." *Mitchell*, 400 U.S. at 128. Since the VRA may not repeal Section 2 of the Fourteenth Amendment, finding that felon disfranchisement is covered by the VRA would render at least that particular section unconstitutional. Considering the historical significance and unquestionable importance of the VRA, following the jurisprudence of the clear statement rule in avoiding a constitutional question, would seem much more appropriate under the circumstances.

II. Felon disfranchisement does not fall within the purview of the Eighth Amendment and is a constitutional practice of disqualification.

a. Felon disfranchisement has been recognized as a form of voter disqualification, and not considered a form of punishment.

Disfranchisement serves as a disqualification of the right to vote, set out by the legislature, when an individual has committed certain crime(s). In order for disfranchisement to

violate the Eighth Amendment, it must first constitute a form of punishment.

It is well recognized that the concept of "punishment", specifically with regards to cruel and unusual punishment, has expanded in its social definition as well as its legal definition. In *Trop v. Dulles*, the Supreme Court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Integral in recognizing the evolving standards of decency, is acknowledgement that an action does not have to involve physical mistreatment in order for it to violate the Eighth Amendment. *Id.* at 101. An example of a form of punishment that violates the Eighth Amendment, which is not physical in nature, is expatriation. In *Trop*, the Court determined that expatriation violated the Eighth Amendment as expatriation caused the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture... The punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress ... [h]e may be subject to banishment, a fate universally decried by civilized people ... The civilized nations of the world are in virtual unanimity that

statelessness is not to be imposed as punishment for crime. *Id.* at 101, 102.

Though the definition of cruel and unusual punishment is inclusive to forms of non-physical punishment, the states still have a right to impose penalties upon its citizens. In order to determine whether a law is penal, the Court has looked to the purpose of the statute. *Id.* at 96. If the statute is one that reprimands the wrongdoer, is intended to have a deterrence effect, then it is considered penal. *Id.* If, however, the statute imposes a disability and accomplishes "some other legitimate purpose", then the statute is considered nonpenal in nature. *Id.* The *Trop* court used the illustration of felon disfranchisement as a clear example of a statute whose purpose had a "reasonable ground of eligibility for voting" and "sustained as a nonpenal exercise of the power to regulate the franchise." *Id.* at 96-97.

In addition to felony disfranchisement, the Supreme Court has found that the suspension of disability benefits is not a form of punishment. In *Davis v. Bowen*, an incarcerated felon challenged the suspension of his social security retirement benefits. *Davis v. Bowen*, 825 F.2d 799 (4th Cir. 1987). The *Davis* court found that there was no constitutional violation,

and specifically stated that the suspension of disability benefits is not punishment.⁷ *Davis*, 825 F.2d at 800.

- b. If the Court were to find that felon disfranchisement is a form of punishment, it would still not violate the Eighth Amendment as it would not be considered "cruel and unusual".

Even if the Court were to find that felon disfranchisement is penal in nature, there is strong evidence that disfranchisement would not violate the Eighth Amendment as "cruel and unusual" punishment. The framers of the Bill of Rights would not have considered disfranchisement cruel and unusual. *Green*, 380 F.2d at 450. Between 1776 and 1821, eleven state constitutions prohibited or authorized felony disfranchisement. *Id.* Further, 29 states had those felony disfranchisement provisions when the fourteenth amendment was adopted. *Id.* Currently, 48 of the 50 states have some form of the felony disfranchisement provision. *See supra*, note at 16. Given "the great number of states excluding felons from the franchise forbids a conclusion that this is a cruel and unusual punishment within the context of 'evolving standards of decency that mark the progress of a maturing society'". *Green*, 380 F.2d

⁷ Challenges to the suspension of disability benefits have been upheld against similar challenges, and both the Tenth and Eighth Circuits have found that such suspension is not punishment. *See, Peeler v. Heckler*, 781 F.2d 649 (8th Cir. 1986); *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985); *Jensen v. Heckler*, 766 F.2d 383 (8th Cir.), *cert denied*, 474 U.S. 945, 106 S.Ct. 311, 88 L.Ed.2d 288 (1985).

at 451, *citing to Dulles*, 356 U.S. at 101. The Second Circuit has recognized that "the propriety of excluding felons from the franchise has been so frequently recognized ... that such expressions cannot be dismissed as unconsidered dicta." *Green*, 380 F.2d at 451.

In *Furman v. Georgia*, the Supreme Court provided history and context to the language of the Eighth Amendment. Historically, "[t]here is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." *Furman v. Georgia*, 408 U.S. 238, 242 (1972); see Granucci, 'Nor Cruel and Unusual Punishments Inflicted.' *The Original Meaning*, 57 Calif.L.Rev. 839, 845-846 (1969). Assuming for a moment that felon disfranchisement has a discriminatory effect, it is important to note that any discriminatory result is mitigated by the laws set out by congress, police enforcement, the criminal investigation process, judges, and in most situations a jury. In comparison to economics restrictions on the right to vote or racially based gerrymandering, where the legislature's decision has an immediate and direct impact on who is allowed to exercise the right to vote, disfranchisement goes through a series of legal processes before one is

disenfranchised. *See, Harper v. Virginia Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966); *See, Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816 (1993).

Conclusion

The Voting Rights Act does not apply to felon disenfranchisement. Congress made this clear in the legislative history of the original Act. When Congress amended the Voting Rights Act in 1982, it gave no indication it had changed its mind about felon disenfranchisement. Congress chose not to list this voting qualification in its extensive list of circumstances that courts should examine when analyzing discrimination claims.

The Voting Rights Act does not meet the requirements of prophylactic legislation intended to cover felon disenfranchisement. It provides neither a congruent and proportional remedy to racially neutral felon disenfranchisement provisions, nor a history and pattern of unconstitutional discrimination arising from disenfranchisement of felons. Additionally, Congress failed to clearly state any intention to create a shift in the balance of federal power that would result after an abridgement of the right of states to disenfranchise felons. With Section 2 of Fourteenth Amendment providing an affirmative sanction to felon disenfranchisement, any statute that attempts to repeal this provision should be found unconstitutional. While disenfranchising felons may be a

questionable policy choice, the final decision on felon disfranchisement rests with the legislatures of the several states.

Felon disfranchisement has been recognized as a constitutional form of voter disqualification and should not be considered a form of cruel and unusual punishment. Even if felon disenfranchisement is considered penal in nature, it does not amount to "cruel and unusual" as defined by the Eighth Amendment. Furthermore, felon disfranchisement is sanctioned by the Fourteenth Amendment, passed more than seventy years after the Eighth Amendment.