

No. 04-480

AMERICAN CONSTITUTION SOCIETY MOOT COURT COMPETITION

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 FOR RESPONDENT, JEFFREY COOLIDGE

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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, 42 U.S.C. § 1973, because it results in a denial of the right to vote on account of race?

2. Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

Parties to the Proceedings

Petitioners:

Maryland State Board of Elections;
Janet Fallins, the State Administrator of Elections;
the Board of Elections of the City of Baltimore;
Edward Jones, the Election Director of the Baltimore Board of
Elections

Respondent:

Jeffrey Coolidge

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Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the lower court's dismissal and remanding for further proceedings is reported at 123 F.3d 29 (4th Circuit). The opinion of the United States District Court for the District of Maryland dismissing the claim under Fed. R. Civ. P. 12(b)(6) is reported at 123 F.Supp. 2d 20 (Md. 2005).

Statement of Jurisdiction

The judgment below was entered on July 16, 2005. A petition for a writ of certiorari was filed with this Court and certiorari was granted on October 14, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2005).

Constitutional and Statutory Provisions

Relevant portions of the U.S. Constitution, Voting Rights Act of 1965, Maryland Constitution, Maryland State Code, and the International Covenant on Civil and Political Rights are reproduced in the appendix, *infra*.

Summary of Facts

In October 2004, Petitioners removed Jeffrey Coolidge, an African-American citizen and resident of Baltimore, from the Baltimore Voter Registry. Petitioners took this action upon Mr. Coolidge's sentencing for an April 2004 robbery. This action denied him the opportunity to vote in the 2004 Presidential election and permanently disenfranchised him.

In 1982, on the pretense of investigating a reported robbery, two Baltimore County policemen stopped and searched Mr. Coolidge and his vehicle. Although African-Americans only constitute twenty percent of Baltimore County residents, thirty-two percent of Baltimore County traffic stops involve an African-American. Neither Mr. Coolidge nor any other individual were ever charged in relation to the professed robbery. But while searching Mr. Coolidge, the policemen found ten grams of cocaine and he was consequently charged with possession with intent to distribute a controlled substance. Mr. Coolidge was convicted of this charge, which is an infamous crime under Maryland law, by a jury composed of one African-American member and eleven white members. Though Baltimore County has one African-American resident for every five white residents, the average Baltimore County jury is composed of one African-American member and fourteen white members.

Despite Mr. Coolidge's struggles with his cocaine addiction, he successfully completed two years of substance abuse treatment upon his release from incarceration. After completion of his treatment, he returned to residency in Baltimore. In 1992, Mr. Coolidge registered to vote as a Baltimore citizen. After registering to vote and until his disenfranchisement in 2004, Mr. Coolidge voted in all subsequent Presidential elections.

In October 2004, Mr. Coolidge was sentenced to five years imprisonment for a robbery of 150 dollars. Although Maryland law classifies robbery as a crime of violence, Mr. Coolidge did not use a weapon in the commission of this crime. Because of Mr. Coolidge's conviction for one infamous crime and one crime of violence, Maryland law permanently disenfranchises Mr. Coolidge. Under this law, one percent of Maryland's white residents of voting age are permanently disenfranchised. Mr. Coolidge joins the almost four percent of Maryland's African-American residents of voting age who are permanently disenfranchised.

Mr. Coolidge filed suit in the United States District Court for the District of Maryland and appealed that court's dismissal of his claims to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals held that Mr. Coolidge had properly stated a cause of action under Section 2 of the Voting

Rights Act for vote denial on the basis of race. The Court of Appeals also held that Mr. Coolidge had properly stated a claim under the Eighth Amendment of the United States Constitution, since permanent disenfranchisement was a punishment subject to Eighth Amendment review. This Court subsequently granted the Petitioners' petition for a writ of certiorari to consider what Constitutional and statutory protections exist against the Petitioners' actions to deny Mr. Coolidge's right to vote.

Summary of Argument

A statutory provision, like Maryland's, that permanently disenfranchises an individual in a manner that results in discrimination on account of race, is both a violation of Section 2 of the Voting Rights Act and the Eighth Amendment of the United States Constitution.

Section 2 of the Voting Rights Act extends to all voting qualifications that result in discrimination on account of race. No special exemption can be found in the plain language of the VRA that would prevent Section 2 from applying to racially discriminatory felon disenfranchisement statutes. Furthermore, the extensive legislative history of the VRA and the record of the court supports the broadest possible interpretation of Section 2, no exceptions. Those who object to applying Section 2 of the VRA to felon disenfranchisement raise three primary concerns: Section 2 of the Fourteenth Amendment, the "clear

statement" rule, and the "congruent and proportional" test. These concerns are misplaced. Section 2 of the Fourteenth Amendment does not prevent Congress from enforcing the Fifteenth Amendment in cases where felon disenfranchisement results in discrimination. The "clear statement" rule does not prohibit applying Section 2 of the VRA to racially discriminatory felon disenfranchisement for two reasons. First, there is no ambiguity in Section 2. Second, the federal-state balance in the area of voting regulation was altered by the Civil War amendments, not by the enactment of the VRA. Finally, Court doctrine related to the "congruent and proportional" test actually supports the VRA as proper prophylactic legislation.

Next, it is clear that Maryland's disenfranchisement of Mr. Coolidge and other felons who have committed both violent and infamous crimes violates the Eighth Amendment of the Constitution. Under the Eighth Amendment, cruel and unusual punishments are prohibited. Mr. Coolidge's disenfranchisement serves as a punishment because it confers a disability without being rationally related to a legitimate non-punitive interest. Possible legitimate government interests, such as preventing voter fraud, are not reasonably related to permanent felon disenfranchisement. Other governmental interests, such as restricting the franchise to felons who might vote to alter the criminal law system, are not legitimate interests in an

electoral democracy. Mr. Coolidge's disenfranchisement is cruel and unusual because it is excessively disproportionate in light of his crime. Under the evolving standard of the Eighth Amendment, the permanent disenfranchisement of any felon is a disproportionately excessive punishment. Mr. Coolidge's permanent disenfranchisement is no exception, and it thus violates the Eighth Amendment's prohibition.

Argument

I. A STATUTE THAT PERMANENTLY DISENFRANCHISES SECOND-TIME VIOLENT OFFENDERS AND RESULTS IN DISCRIMINATION ON ACCOUNT OF RACE IS A VOTING QUALIFICATION SUBJECT TO SECTION 2 OF THE VOTING RIGHTS ACT.

The Voting Rights Act (VRA) has been fundamental in realizing the vision outlined in the Fourteenth and Fifteenth Amendments (the Civil War Amendments) that every American should have an equal opportunity to vote regardless of one's race. Critical to the effectiveness of the VRA has been Section 2, which bans any voting qualification in any state that results in denying any person the right to vote on account of race. 42 U.S.C. § 1973(a). In the present case it is apparent that the broad scope of Section 2 encompasses felon disenfranchisement: the plain meaning of the statute, the extensive legislative history, and the common law history of the VRA all support this interpretation.

A. The plain meaning, legislative history, and common law record support a broad interpretation of Section 2 of

the VRA that encompasses racially discriminatory felon disenfranchisement.

The Fourth Circuit recognized in the present case that the language of Section 2 of the Voting Rights Act (VRA) is “perfectly clear.” *Coolidge v. Maryland State Bd. of Elections*, 123 F.3d 29, 34 (4th Cir. 2005). “Statutory interpretation requires us to ‘presume that [the] legislature says in a statute what it means and means in a statute what it says...’ Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249 (1992)). Section 2 of the VRA is unambiguous. It prohibits any “voting qualification or prerequisite to voting... which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C. § 1973(a). It is also clear that a statutory provision that permanently prohibits second time violent offenders from voting, such as Maryland Code, Election Law, § 3-102, constitutes a “voting qualification” within the meaning of Section 2.¹ The language of Section 2 also does not distinguish between facially discriminatory or facially neutral statutes or between statutes

¹ In a decision prior to the enactment of the VRA, the Court considered residence requirements, age, and *previous criminal record* as examples of what constitute voting qualifications used by states. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959). The Court has never disputed that felon disenfranchisement statutes are “voting qualifications” within the meaning of Section 2.

that were motivated by racial animus and those with no intent to discriminate. What is important is whether the statute results in preventing a person from voting on account of race. Section 2 does not offer any exceptions to the scope of its application, either for felon status or any other prerequisites to voting. There is nothing in the plain terms of Section 2 that would prevent its application to felon disenfranchisement statutes.

The legislative history of the Voting Rights Act also supports the broadest possible scope of Section 2. The Voting Rights Act of 1965 was enacted by Congress in order to "eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate." S. Rep. No. 89-162 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2540. The broad provisions of the Act were a response to "the ingenuity and dedication of those determined to circumvent the guarantees of the Fifteenth Amendment." H.R. Rep. No. 89-439 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

Congress intended Section 2 of the Voting Rights Act to provide the most expansive enforcement of the Civil War Amendments, covering all voting qualifications throughout the nation. The need for such a provision was detailed in both the House and Senate reports, which provided extensive documentation of the intransigence of local officials and their multifarious

array of discriminatory tactics. During Senate hearings on the VRA, a Senator raised the fear that the draft language of Section 2 might not be construed as sweeping broadly enough to cover all state attempts at discrimination. In response to this concern, the language of Section 2 was expanded from "voting qualification or procedure" to "voting qualification or prerequisite to voting or standard, practice, or procedure," with Attorney General Katzenbach clarifying that the language "was intended to be all-inclusive of *any kind of practice.*" *Hearings on S. 1564 before the Senate Committee on the Judiciary*, 89th Cong., 191-192 (1965)(statement of Nicholas Katzenbach, U.S. Attorney General)(emphasis added) (*quoted in, Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). This amendment clarified the broad scope of Section 2 and, when considered along with the House and Senate Reports, reflects a clear intent to apply Section 2 to all racially discriminatory voting practices without exception.

The claim that Congress intended Section 2 to apply to all voting qualifications, without providing an exception for racially discriminatory felon disenfranchisement was challenged in several Circuit Court decisions. *Johnson v. Governor of Florida*, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 650 (Mem) (2005); *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004), *cert. denied*, 543 U.S. 978 (2004), and *vacated pending*

reh'g, 396 F.3d 95 (2d Cir. 2004); and *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). These decisions improperly rely on the exclusion of felon disenfranchisement statutes in the "tests and devices" of Section 4(c) as evidence that Congress intended a broad exemption in the VRA to state requirements that "an applicant for voting or registration be free of conviction of a felony." 42 U.S.C. § 1973 (4)(c). The test and devices defined in Section 4(c) are banned *per se* and relate to whether or not a jurisdiction is subject to preclearance requirements. The phrase "test and devices" used in Section 4(c) is entirely distinct from the phrase "voter qualification or prerequisite" and has no impact on Section 2. The explicit presence of an exemption for felon disenfranchisement in Section 4(c) and the conspicuous absence of a similar exemption in Section 2 actually provides evidence for the conclusion that Congress never intended Section 2 to have such an exception. Indeed, the interpretation relied upon in *Montaqim*, *Johnson* and *Baker*, that Congress intended to exempt discriminatory felon disenfranchisement from Section 2, entirely contradicts the primary expressed purpose of the VRA: to extinguish all forms of discriminatory voting practices.

The 1982 Congressional reauthorization of the VRA, which made it easier for claimants to show discrimination in voting on account of race, reinforces that Congress intended Section 2 of

the VRA to have as broad a scope as possible. Following *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (requiring discriminatory intent, not just result), Congress amended Section 2 to restore the pre-*Bolden* "results test." In doing so, Congress made clear that under the amended provision, "plaintiffs need not prove a discriminatory purpose... in order to establish a [Section 2] violation." S. Rep. No. 97-417 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205. Indeed, the 1982 Senate Report disavowed that discriminatory purpose was ever an essential requirement, citing 1965 testimony from Attorney General Katzenbach that Section 2 would ban "any kind of practice... if its purpose or effect was to deny or abridge the right to vote on account of race." *Id.* at 194 (emphasis added). The more expansive interpretation of the VRA proffered in the 1982 amendments precludes a restrictive view that Congress intended some racially discriminatory voting qualifications to fall outside the scope of Section 2.

The restrictive interpretation of Section 2 also runs counter to the broad interpretation that has been supported by the courts. In *State of South Carolina v. Katzenbach*, which upheld the Constitutionality of Section 5 of the VRA, the Court stated that the VRA was designed "to banish the blight of racial discrimination in voting" 383 U.S. 301, 308 (1966). In *Allen* 393 U.S. at 566 (rejecting a narrow construction of state voting

qualification subject to Section 5), the Court noted that the VRA "aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race." In making sure that a fundamental right like voting was not denied to a suspect class like racial minorities, the Court has consistently supported a broad reading of Section 2. *See, e.g., Chisom v. Roemer*, 501 U.S. 380 (1991) (state judicial elections are included within ambit of Section 2); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (Section 2 extends to exclusion of protected groups from a nominating convention); *Lucas v. Townsend* 908 F.2d 851 (11th Cir. 1990) (the form or structure of a referendum is a standard, practice, or procedure within meaning of Section 2); *Mississippi Chapter, Operation Push v. Allain*, 674 F.Supp 1245 (N.D. Miss. 1987) (a requirement that voters register twice, once for municipal and once for state elections, is a voter qualification subject to Section 2).

B. Section 2 of the Fourteenth Amendment, the "clear statement" rule, and the "congruent and proportional" test do not prevent Section 2 of the VRA from being applied to felon disenfranchisement.

The District Court decision in the present case, along with *Muntaqim, Johnson, and Baker*, cites Section 2 of the Fourteenth Amendment as a possible bar to Congressional regulation of felon disenfranchisement statutes, even when such provisions have a

racially discriminatory result. *Coolidge v Maryland State Bd. of Elections* 123 F.Supp. 2d 20, 26 (Md. 2005), *rev'd*, 123 F.3d 29 (2d Cir. 2005); 366 F.3d at 129; 405 F.3d at 1229; 85 F.3d at 922 (opinion of Mahoney, J.). Section 2 of the Fourteenth Amendment states that "when the right to vote at any election... [is] in any way abridged, except for participation in rebellion, or other crime, the basis of representation shall be reduced." U.S. Const. amend. XIV § 2. (emphasis added). However, in finding a conflict between the VRA and the Fourteenth Amendment, these opinions fail to distinguish between felon disenfranchisement laws in general and those that have a racially discriminatory impact. See e.g. *Johnson*, 405 F.3d at 1248 (Barkett, J., dissenting).

Hunter v. Underwood clearly articulated this important distinction when it stated that "[Section 2 of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination [in Alabama's felon disenfranchisement law] which otherwise violates Section 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* ... suggests the contrary." 471 U.S. 222, 233 (1985). In *Farrakhan v. Locke*, the court elaborated upon *Hunter* in holding that if Section 1 of the Fourteenth Amendment prohibits purposeful racial discrimination, "it necessarily follows, then, that Congress also has the power to protect against discriminatory uses of

felon disenfranchisement statutes through the VRA." 987 F.Supp. 1304, 1310 (E.D. Wash. 1997), *aff'd*, 338 F.3d 1009 (9th Cir. 2003), *cert. denied* 543 U.S. 984 (2004). There is a fundamental difference between interpreting Section 2 of the Fourteenth Amendment to be permissive of felon disenfranchisement and interpreting such a construction to allow for discrimination on account of race under the guise of a facially-neutral felon disenfranchisement statute. The present case further reflects this distinction: under the pretense of a facially neutral statute, four times as many black Marylanders as white Marylanders are permanently disenfranchised.

An analysis of the Fifteenth Amendment bolsters the assertion that Section 2 of the Fourteenth Amendment does not prevent Congress from prohibiting felon disenfranchisement statutes that have a racially disparate impact. The VRA was enacted under the enforcement provisions of both Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. *see, e.g., U.S. v. Board of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 126-27 (1978). Importantly, the provision of the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied... on account of race" contains no exceptions for felon disenfranchisement. U.S. Const. amend. XV § 1. The legislative history of this amendment shows that provisions similar to the "other crime" exemption of the

Fourteenth Amendment were considered by both the Senate and the House and were patently rejected by both Chambers. Cong. Globe, 40th Cong., 3d Sess. 1012-13 (1869). Thus, the possibility that the Fourteenth Amendment would have allowed racially discriminatory felon disenfranchisement was precluded when the Fifteenth Amendment was ratified.

Another argument several of the lower courts have relied on is that federalism concerns require a "clear statement" from Congress that Section 2 of the VRA should apply to felon disenfranchisement statutes. *Coolidge* 123 F. Supp. 2d 20; *Johnson*, 405 F.3d 1214; *Muntaqim*, 366 F.3d 102; *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (Kozinski, J., dissenting). While the rule in *Gregory v. Ashcroft* 501 U.S. 452, 460-61 (1991) ("if Congress intends to alter the constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") is well established, there are several reasons why it does not extend to the Voting Rights Act's prohibition of racially discriminatory felon disenfranchisement.

First, as discussed above, there is no presumptive ability of the states to prohibit felons from voting in a manner that results in racial discrimination. Indeed, the opposite is true: the Fifteenth Amendment expressly prohibits denying a citizen's

voting rights on account of race. The Civil War Amendments expressly granted Congress enforcement powers to allow legislation in areas previously held to be within the domain of each state. Thus, the balance between state and federal power in regards to racially discriminatory voting practices was determined through the Civil War Amendments, not through the Voting Rights Act. Indeed, "the [Civil War] Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty." *City of Rome v. United States*, 446 U.S. 156, 179 (1980). Congress, through the Civil War Amendments, thus has the power to prohibit racially discriminatory voting practices; the application of Section 2 of the VRA to racially discriminatory felon disenfranchisement statutes is merely an enactment of this power rather than a seizure of power from the states.

The demand that Congress must make a "clear statement" of its intention for Section 2 of the VRA to apply to discriminatory felon disenfranchisement provisions is also unfounded. Rather than being ambiguous, the intent of Congress was clear: to ban *all* discriminatory practices, not just those apparent at the time of the VRA's enactment. The broad scope of Section 2 was necessary because states were "creatively" twisting old qualifications and establishing new ones to maintain a regime of racial discrimination. The broad scope of

the VRA makes specific statutory language or legislative history directed at every possible instance of racial discrimination unnecessary to clarify its meaning. Indeed, in *Pennsylvania Dep't. of Corrs. v. Yeskey*, (holding that Title II of the Americans with Disabilities Act extended to prisoners in a state prison) the court found that "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." 524 U.S. 206, 212 (1998) (internal quotations and citations omitted). It was not necessary to specifically mention felon disenfranchisement, since Section 2 applied to *all voting qualifications*.

Johnson and *Muntaqim* also question whether applying Section 2 of the VRA to racially discriminatory felon disenfranchisement constitutes "congruent and proportional legislation" pursuant to *City of Boerne v. Flores*, 521 U.S. 507 (1997). In doing so, they question whether prohibiting racially discriminatory felon disenfranchisement statutes is a congruent remedy to protecting a suspect class's (racial minorities) fundamental right (the right to vote). In *Muntaqim*, the court criticized "the prohibition of *any* felon disenfranchisement law enacted at *any* time in *any* state that 'results' in the abridgement of the right to vote on account of race" as "too attenuated" to address the harm of discriminatory voting practices. 366 F.3d at 125.

However, rather than being overbroad, Section 2 of the VRA is actually narrowly tailored to address *only* those practices which result in discrimination. Thus a felon disenfranchisement provision that does not deny the right to vote on account of race is not subject to prohibition under the Voting Rights Act. The implicit logic in *Muntauqim*, that *some* discriminatory voting practices should escape the review of the Voting Rights Act, is entirely contradictory with the well-defined purpose of the Voting Rights Act.

Boerne and its progeny actually support the conclusion that it is congruent and proportional to apply Section 2 of the Voting Rights Act to *all* voting qualifications that result in denying a person from voting on account of race. The Court in *Boerne* repeatedly cites the Voting Rights Act as congressional legislation that it paradigmatic of the congruent and proportional standard. 521 U.S. at 518, at 532, at 536. In *Florida Prepaid Postsecondary Educ. Expense Bd v. College Savings Bank*, (invalidating the Patent Remedy Act) the Court cited the Congressional enactment of the Voting Rights Act in response to a record of racial discrimination as an example of "proper prophylactic §5 legislation." 527 U.S. 627, 645 (1999). In *United States v. Morrison*, (invalidating a section of the Violence Against Women Act (VAWA)), the Court emphasized that the Voting Rights Act was an example of a properly tailored

remedy. 529 U.S. 598, 627 (2000). Directly addressing Section 2 of the Voting Rights Act, the Ninth Circuit recently stated that the *Boerne* line of cases "strengthens the case for section 2's constitutionality." It continued, "in the Supreme Court's congruence-and-proportionality opinions, the VRA stands out as the prime example of a congruent and proportionate response." *United States v. Blaine County, Mont.*, 363 F.3d 897, 904 (9th Cir. 2004). It is clear that the courts have treated the VRA as a congruent and proportional response to the foreseeable and unforeseeable methods states use to prevent persons from voting on account of race. The application of Section 2 to discriminatory felon disenfranchisement provisions do not alter this determination.

II. JEFFREY COOLIDGE'S PERMANENT DISENFRANCHISEMENT CONSTITUTES A CRUEL AND UNUSUAL PUNISHMENT WHICH VIOLATES THE EIGHTH AMENDMENT.

Mr. Coolidge's Eighth Amendment claim is valid because permanent disenfranchisement is a disproportionately severe punishment in relationship to his crime. In analyzing Eighth Amendment claims, this Court has articulated two lines of inquiry. The first is whether a regulation constitutes a punishment. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). This Court has held that a regulation is a punishment if it causes a disability and if it is not reasonably related to a legitimate, non-punitive government interest. *Bell v. Wolfish*, 441 U.S. 520

(1979). Permanent disenfranchisement restricts the rights of the individual and does not achieve a legitimate, non-punitive governmental interest. In the absence of such an interest, the Court can infer that disenfranchisement serves a punitive interest and constitutes punishment. The second line of inquiry is whether the punishment is cruel and unusual. The Court examines the proportionality of the punishment to the crime, relying on objective factors such as interjurisdictional comparisons and consulting subjective factors such as the Court's own determination of proportionality. See *Penry v. Lynaugh*, 492 U.S. 302, 331(1989); *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Applying these factors to the present case shows that permanent disenfranchisement is a disproportionate punishment for any crime: trends in American public opinion, state legislation amendments and international opinion all lead to this consensus. Mr. Coolidge's permanent disenfranchisement thus constitutes cruel and unusual punishment and is prohibited by the Eighth Amendment.

A. Mr. Coolidge's permanent disenfranchisement is subject to review under the Eighth Amendment because it is a punishment.

The *Bell* Court articulated the process for determining if a regulation is a punishment. 441 U.S. 520 (1979). The Court first determines if the regulation causes a disability to the

petitioner. If the regulation causes a disability, the Court then determines if the regulation serves a punitive or a non-punitive purpose. A disability that serves a punitive purpose is a punishment and is subject to review under the Eighth Amendment. A disability that serves a non-punitive purpose is not subject to review under the Eighth Amendment. If a declared statement of punitive purpose exists, the court determines that the disability is a punishment. Without such a statement of intent, the Court examines other possible purposes for the legislation. If no legitimate, non-punitive, governmental purpose is rationally related to the disability, then a punitive purpose is inferred from the disability. *Id.* at 537-538. *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

Under the standard articulated by this Court in *Bell*, Jeffrey Coolidge's disenfranchisement constitutes a punishment. Denial of the right to vote, one of the primary political rights in a democracy, causes a disability. This disability is not reasonably related to any legitimate, non-punitive government interest. In the absence of a legitimate, non-punitive governmental objective, the disability suffered by Jeffrey Coolidge through his disenfranchisement implies a punitive motive, which makes this regulation a punishment subject to Eighth Amendment review.

1. By denying Mr. Coolidge the right to vote, Maryland places a disability on him.

This Court has frequently asserted that the right to vote is a Constitutionally-protected right. In *United States v. Classic*, 313 U.S. 299, 314 (1941), this Court emphasized that “[t]he right of the people to choose... is a right established and guaranteed by the Constitution and hence is one secured by it.” This Court further emphasized the importance of the right to vote in *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), by stating that “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights.” Following this analysis, Maryland’s permanent disenfranchisement of Jeffrey Coolidge is a disability. Under Maryland law, Jeffrey Coolidge will never be allowed to register to vote. Md. Code Ann., Elec. Law § 3-102 (2005). This causes him to suffer a permanent disability that cannot be remedied without a gubernatorial pardon.² Further evidence that the Jeffrey Coolidge’s disenfranchisement is a disability can be found in the Maryland’s definition of

²The Maryland gubernatorial pardon process begins with a review of the pardon application by the Maryland Parole Commission. Ex-violent offenders can apply for pardons twenty years after their conviction. The commission makes recommendations to the governor, who is free to accept or reject those recommendations. Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction*, Table 4 (2005), http://www.sentencingproject.org/rights_restoration/table4.html. Of the estimated 78,206 disenfranchised ex-felons in Maryland, 147 received pardons restoring their right to vote from 1996 to 2003. Marc Mauer and Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States* (2005), <http://www.sentencingproject.org/pdfs/barredforlife.pdf>. This represents an annual restoration of the franchise to approximately 0.02% of the total number of disenfranchised individuals in Maryland.

"pardon": a "[p]ardon' means an act of clemency in which the Governor... exempts the grantee from any *penalties* imposed by law for those criminal acts." Md. Code Ann., Corr. Servs. § 7-101 (2004) (emphasis added). As the pardon is the only mechanism to regain the franchise, the exclusion of the franchise is thus one of those penalties.

2. Because the disability suffered by Mr. Coolidge is not reasonably related to a legitimate non-punitive government objective, this disability constitutes a punishment.

Under the *Bell* standard, if a legitimate, non-punitive government objective can be determined for the imposition of a disability, the disability should be viewed as a regulation rather than a punishment. If no legitimate, non-punitive objective has a reasonable relation to the imposition, then the imposition is viewed as a punishment and is subject to the requirements of the Eighth Amendment. Mark E. Thompson, *Don't Do the Crime if You Ever Intend to Vote Again: Challenging the Disenfranchisement of Felons as Cruel and Unusual Punishment*, 33 Seton Hall L. Rev. 167, 188 (2002). Maryland's election law does not state a purpose and the Petitioner has not asserted a purpose for the law. Among other states that disenfranchise individuals with criminal records, two rationales are offered: preventing election fraud and preventing anti-social individuals from enacting their behavioral tendencies into law. Neither of

these rationales support disenfranchisement legislation as a non-punitive regulation. The first rationale is not reasonably related to the disenfranchisement legislation. The second rationale amounts to excluding voters based on a belief about how they will vote, which is an illegitimate state action.

The most common justification for felon disenfranchisement is the state's interest in protecting the "purity of the ballot box" by preventing election fraud. In *Washington v. State*, 75 Ala. 582, 585 (1884), where the court stated that "The manifest purpose [of disenfranchisement laws] is to preserve the purity of the ballot box... which needs protection against the invasion of corruption." But Maryland's disenfranchisement law cannot be supported by this interest because it is not reasonably designed to prevent election fraud, being both under- and over-inclusive. It is under-inclusive because it does not permanently disenfranchise individuals convicted of all forms of election fraud. At the same time, it is over-inclusive because it disenfranchises many individuals who have committed crimes completely unrelated to election law. Because Maryland's disenfranchisement law is not targeted towards individuals who have committed election fraud in the past, it reflects the unsustainable premise that individuals with criminal records are more likely to commit election fraud than other individuals: "Previous commission of a felony does not logically lead to

future commission of electoral fraud... one has no bearing on the other." Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 Minn. L. Rev. 231, 261 (2004).

There is no rational relationship between the crimes committed by Mr. Coolidge and electoral fraud. Especially in the area of electoral fraud, where incentives for criminal action are very different from many other crimes, it is unlikely that the commission of other crimes would predispose an individual to electoral fraud. Scott M. Bennett, Note, *Giving Ex-Felons the Right to Vote*, 6 Cal. Crim. L. Rev. 1 ¶19 (2004).

Even if Maryland's disenfranchisement law were properly tailored, it is not a proper remedy for electoral fraud as there are many other devices available to the state which do not impinge upon the rights of individual voters. In his dissent in *Richardson v. Ramirez*, 418 U.S. 24, 80 (1974) (Marshall, J., dissenting), Justice Marshall stated that election reform and technological advances had greatly reduced the possibility of election fraud, leading one to believe that election fraud is even less of a concern over thirty years later. Thompson, *supra*, at 191-192. Similarly, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court rejected the idea that a one-year residency requirement was necessary to prevent election fraud because the state has a number of other laws at its disposal to

achieve that purpose which did not deny the vote to citizens. As in *Dunn*, in the present case, Maryland has a number of options to prevent electoral fraud other than disenfranchisement that do not limit an individual's right to vote.

Washington v. State, 75 Ala. at 585 also expresses the other frequently cited rationale for denying the right to vote to individuals with criminal records: the state's fear of how these individuals will vote. The state fears that the ex-felon will be more likely to express anti-social tendencies through voting which would threaten the criminal justice system and the state itself. "It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself." *Id.* But excluding individuals from voting based on a belief about how they will vote is not a legitimate state practice. *Carrington v. Rash*, 380 U.S. 89, 94 (1965). Rather, the exercise of a right so vital to the maintenance of democratic institutions "cannot constitutionally be obliterated because of a fear of the political views of a particular group" *Id.* Even if a felony conviction were reflective of political views, it would not be legitimate for the state to limit an individual's access to the franchise based on those political views. Since permanent disenfranchisement of ex-felons is not reasonably related to a legitimate, non-punitive governmental interest, and

since it is a restriction of the rights of an individual, it constitutes a punishment and is subject to the Eighth Amendment's prohibition on cruel and unusual punishment.

B. Punishing Mr. Coolidge through permanent disenfranchisement is cruel and unusual under the evolving standard of the Eighth Amendment.

American courts have never truly addressed the question of whether disenfranchisement is an appropriate sentence under the Eighth Amendment for a felony conviction. Pamela S. Karlan, *Ballots and Bullets: The Exception History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1368 (2003). In the light of the standards developed through other Eighth Amendment jurisprudence, it is clear that disenfranchisement is a cruel and unusual punishment.

In *Trop v. Dulles*, 356 U.S. 86, 100 (1958), this Court noted that “[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” The *Trop* Court asserted that the meaning of the Eighth Amendment would continually be redefined by a maturing society. *Id.* at 101. In *Weems v. United States*, 217 U.S. 349, 367 (1910), this Court articulated the standard used to determine the meaning of the Eighth Amendment prohibition: “it is a precept of justice that punishment for

crime should be graduated and proportioned to the offense." *Atkins v. Virginia*, 536 U.S. 304 (2002), offers an excellent overview of the factors considered by this Court in defining the evolving standard of proportionality. Proportionality is objectively determined through examining trends in state legislation. Yet the determination of proportionality also involves a subjective element, which is illuminated through American public opinion and the opinion of the world community. Eighth Amendment challenges to punishments are "judged not by the standards that prevailed in 1685... or when the Bill of Rights was adopted, but rather by those that currently prevail." *Id.*, at 311. Using the criteria of the evolving standard of the Eighth Amendment, it is clear that permanent felon disenfranchisement constitutes cruel and unusual punishment: public opinion surveys have shown that an increasing number of Americans are opposed to these laws; the number of states that permanently disenfranchise felons has markedly decreased; and the U.S. is the only developed democracy in the world in which felons are disenfranchised after completing their incarceration. Karlan, *supra*, at 1369.

1. Trends in state legislation indicate a growing consensus that permanent disenfranchisement is a cruel and unusual punishment.

As Justice Rehnquist pointed out in his dissent in *Atkins*, legislation enacted by the States is the "clearest and most

reliable objective evidence of contemporary values" because of "the constitutional role legislatures play in expressing policy of a State." *Atkins*, 536 U.S. 304 at 322-323 (Rehnquist, C.J., dissenting). In 1974, when *Richardson v. Ramirez* was decided, twenty-eight states disenfranchised felons for life; as of 2003, only eight states disenfranchised felons permanently. Karlan, *supra*, at 1363. The trend in the state legislatures is towards lessening restrictions on felon and ex-felon voting rights. Recently, Connecticut, Delaware, and New Mexico have all made significant changes to their felon disenfranchisement laws to make it easier to regain the right to vote. Martine J. Price, Note and Comment, *Addressing Ex-Felon Disenfranchisement: Legislation v. Litigation*, 11 Journal of Law and Policy 369, 401 (2002). In Connecticut, voting rights were restored to ex-felons on probation. In Delaware, the State Constitution was amended to restore voting rights to certain felons five years after the completion of their sentence. In New Mexico, the lifetime disenfranchisement of felons was repealed. *Id* at 401-402. Importantly, this trend towards restoring the franchise to felons indicates a growing consensus among the states that disenfranchisement is cruel and unusual punishment. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), this Court determination that the execution of juveniles was cruel and unusual was largely based on the trend in state legislatures towards outlawing the

execution of juveniles: "it is not so much the number of these States that is significant, but the consistency of the direction of change." *Id.* at 1193. Similarly, the trend in felon disenfranchisement laws is towards expanding the franchise to individuals who have completed their sentences. Among the states that have amended their felon disenfranchisement statutes, all have restored the right to vote to a previously disenfranchised sector, rather than further restricting voting rights. Behrens, *supra*, at 270-271. As in *Roper*, this trend "carries special force in the light of the general popularity of anticrime legislation." *Roper*, 125 S. Ct. at 1193.

2. Domestic and international public opinion reject permanent felon disenfranchisement as a cruel and unusual punishment.

Public opinion, both among Americans and internationally, points to a growing consensus that permanent disenfranchisement is cruel and unusual. In 2003, nearly 82 percent of Americans believed that felons should not be disenfranchised permanently. Symposium, *Contemporary Urban Challenges: Barred from the Vote: Public Attitudes Towards the Disenfranchisement of Felons*, 30 *Fordham Urb. L.J.* 1519, 1540 (2003). This supermajority of American public opinion thus strongly indicates a growing consensus against permanent disenfranchisement.

Although international opinion is not dispositive of the Eighth Amendment considerations, the *Roper* court pointed to

global trends as one factor in determining what constituted cruel and unusual punishment. *Roper*, 125 S. Ct. at 1198 (2005). An examination of current global practices reveals a common belief that permanent disenfranchisement is an inappropriate punishment. The courts and legislatures of other nations have declared that the disenfranchisement of individuals with criminal records violates civil rights, leaving the United States as the only developed democracy where permanent disenfranchisement is a punishment. Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998) <http://www.hrw.org/reports98/vote>. Countries as dissimilar as the Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden and Zimbabwe all allow individuals to vote while incarcerated. *Id.* The International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, provides that all citizens shall have the "right and the opportunity" to vote "without unreasonable restrictions." International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. In clarification of the ICCPR, the United Nations Human Rights Committee has stated that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the

sentence." Fellner, *supra*. The Committee "has consistently frowned on and tried to limit the reach of criminal disenfranchisement laws that it has reviewed." Fellner, *supra*. The ICCPR and its interpretation by the U.N. Human Rights Committee thus reflect an international consensus that permanent felon disenfranchisement statutes violate civil rights.

In *Roper*, this Court stated that the experience of the United Kingdom held particular weight in an Eighth Amendment analysis because of the historic ties between our countries and because of the history of the Eighth Amendment. *Roper*, 125 S. Ct. at 1200. As the Court pointed out, the Eighth Amendment's derivation from a provision of the English Declaration of Rights of 1689 makes the British conception of "cruel and unusual punishment" particularly informative. *Id.* Recently, the European Court of Human Rights (ECHR) held that universal felon disenfranchisement violates the European Convention on Human Rights, to which the U.K. is a party. *Hirst v. United Kingdom*, 74025/01 Eur. Ct. H.R. (2005). In *Hirst*, an inmate brought suit against the U.K. and the ECHR invalidated the prisoner disenfranchisement statute because it was too arbitrary to be proportionate punishment. *Id.* The court further held that "[t]he severe measure of disenfranchisement must, however, not be undertaken lightly" *Id.* ¶ 71. On October 13, 2005, the British Minister of State for Constitutional Affairs stated that

the government was "giving urgent consideration to the judgment of the European Court of Human Rights." Rt. Hon. Harriet Harman, U.K. Minister of State, Department of Constitutional Affairs, House of Commons Written Answers (13 October 2005). By implementing the decision of the ECHR, the U.K. joins the trend of world opinion in turning away from arbitrary felon disenfranchisement.

Other countries have witnessed this trend, expressed in the decisions of their highest courts. *See, e.g., August v. Electoral Commission* 1999 (4) BCLR 363 (CC) (S. Afr.) (holding that incarcerated individuals have the right to vote); *Sauve v. Canada*, [2002] D.L.R. (4th) 577 (holding that incarcerated individuals have the right to vote). These decisions further reflect the trend that other developed nations reject felon disenfranchisement as an appropriate punishment.

As in *Roper*, where this Court's "determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," the present case concerns a punishment that is internationally viewed as being wantonly disproportionate to the crime. *Roper*, 125 S. Ct. at 1198. The U.S. is the only remaining developed democracy where permanent disenfranchisement is used as a punishment.

Especially in the present case, where permanent disenfranchisement is levied as a punishment for a robbery of 150 dollars, objective and subjective considerations converge to show that such a punishment is no longer within the bounds of acceptable punishments. Trends in state legislation, American public opinion and international opinion all indicate that this punishment is excessively disproportionate to the crime. As such, the Eighth Amendment protects Mr. Coolidge from the actions of the Petitioners to permanently disenfranchise him.

Conclusion

As Mr. Coolidge has properly stated a cause of action under the Voting Rights Act and the Eighth Amendment of the United States Constitution, we respectfully request that this Court affirm the decision of the United States Court of Appeals for the Fourth Circuit and remand this matter for proceedings consistent with this decision.

Appendix: Constitutional and Statutory Provisions

U.S. Const. Amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. But when the right to vote at any election...is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Voting Rights Act of 1965, 42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Md. Const. Art. I, § 4.

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability.

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

(b) Exceptions.- An individual is not qualified to be a registered voter if the individual:

(1) has been convicted of theft or other infamous crime, unless the individual:

(i) has been pardoned; or

(ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or

2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction,

including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;

(2) is under guardianship for mental disability;

or

(3) has been convicted of buying or selling votes.

(c) Same-Second or subsequent crime of violence- Notwithstanding subsection (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., Criminal Law § 14-101(a) (Bender 2005)

"Crime of violence" defined. ---- In this section, "crime of violence" means:

(1) abduction; (2) arson in the first degree; (3) kidnapping; (4) manslaughter, except involuntary manslaughter; (5) mayhem; (6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code; (7) murder; (8) rape; (9) robbery under § 3-402 or § 3--403 of this article; (10) carjacking; (11) armed carjacking; (12) sexual offense in the first degree; (13) sexual offense in the second degree; (14) use of a handgun in the commission of a felony or other crime of violence; (15) an attempt to commit any of the crimes described in items (1) through (14) of this subsection; (16) assault in the first degree; (17) assault with intent to murder; (18) assault with intent to rape; (19) assault with intent to rob; (20) assault with intent to commit a sexual offense in the first degree; and (21) assault with intent to commit a sexual offense in the second degree.

Md. Code Ann., Correctional Services § 7-101 (h) (Bender 2005)

(h) Pardon. -- "Pardon" means an act of clemency in which the Governor, by order, absolves the grantee from the guilt of the grantee's criminal acts and

exempts the grantee from any penalties imposed by law for those criminal acts.

International Covenant on Civil and Political Rights, Art.
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Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.