

LET THE SUNSHINE IN: FLORIDIAN FELONS¹ AND THE FRANCHISE

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Abstract

Felon disenfranchisement, like many social justice issues today, is experiencing a sweeping paradigm shift brought on by increased awareness and activism. However, the antiquated practice of depriving felons of their right to vote has proven difficult to reform due to entrenched opposition in state governments. This impasse is best demonstrated by the recent struggle to restore felon voting rights in Florida. In the 2018 midterm elections, the electorate of Florida passed an amendment to the state constitution by a supermajority which attempted to re-enfranchise over a million Floridian felons. The Florida state government then met the reform with resistance by enacting a law that conditions restoration on the payment of prior legal financial obligations. Thus, the law discriminates against indigent felons and excludes them from the franchise. This Article unpacks the history of felon disenfranchisement and tracks the litigation that challenged the constitutionality of Florida's new re-enfranchisement scheme.

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1. This Article uses the term “felon” to mean an individual convicted of a felony in a criminal justice system in the United States. Social movements in the field of criminal justice reform have proposed more humanizing terminology, like “justice-involved individual” or “returning citizen.” See, e.g., Lukas Mikelionis, *San Francisco Board Rebrands ‘Convicted Felon’ as ‘Justice-Involved Person,’ Sanitizes Other Crime Lingo*, FOX NEWS (Aug. 22, 2019), <https://www.foxnews.com/politics/san-francisco-board-adopts-new-language-for-criminals-turning-convicted-felon-into-justice-involved-person>; *About Us*, FLA. RTS. RESTORATION COUNCIL, <https://floridarrc.com/about/> [<https://perma.cc/5FFF-33UE>] (last visited Oct. 29, 2020). “Felon” is a legal term, so it is appropriate for the purpose of this Article.

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INTRODUCTION

Voting is about changing lives and it’s a matter of pride. Being behind bars, you lose everything, but most importantly your freedom. The restoration of voting rights gives someone a chance to restore their voice once they’ve done their time. Freedom without a voice makes one feel like they still don’t count as a person, so I was looking forward to registering to vote. It was a priority for me; I didn’t want to feel any longer like I was an inmate with a number. Instead, I’d replace that number with a button on my shirt that said, “I voted.”²

Florida began disenfranchising felons nearly two centuries ago³ and the state has recently accounted for more than a quarter of the national disenfranchised population: an estimated 1,686,318 disenfranchised felons.⁴ However, a momentous transformation in felon disenfranchisement law occurred in the 2018 Florida midterm elections, when a supermajority of voters passed an amendment to the state constitution, “Amendment 4,” which restored the voting rights of 1.4 million felons.⁵ Shortly afterwards, Republican lawmakers passed an

2. Lee Hoffman, *Military Vet on FL Poll Tax: ‘I Felt the Rug Ripped from Under My Feet’*, CAMPAIGN LEGAL CTR. (July 17, 2019), <https://campaignlegal.org/index.php/story/military-vet-fl-poll-tax-i-felt-rug-ripped-under-my-feet> [<https://perma.cc/ZET8-RGN8>].

3. Allison J. Riggs, *Felony Disenfranchisement in Florida: Past, Present, and Future*, 28 J. CIV. RTS. & ECON. DEV. 107, 108 (2015).

4. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENT’G PROJECT 15 (2016).

5. See Alejandro De La Garza, ‘Our Voice Will Count.’ Former Felon Praises Florida Passing Amendment 4, Which Will Restore Voting Rights to 1.4 Million People, TIME (Nov. 7, 2018, 12:34 AM), <https://time.com/5447051/florida-amendment-4-felon-voting/> [<https://perma.cc/R2RT-BTCR>].

implementation bill, S.B. 7066,⁶ and a newly-elected Republican governor prepared to sign the bill into law to create Florida Statute § 98.0751.⁷ This law severely limits the impact of Amendment 4 by requiring felons to pay all fines, fees, and restitution associated with their criminal sentencing before their voting rights can be restored.⁸

Section 98.0751 operates similarly to a poll tax because the law conditions the right to vote on the ability to pay prior legal financial obligations (LFOs), which were obligations not explicitly mentioned in the text of Amendment 4.⁹ By only restoring voting rights to those who can afford to satisfy these debts, § 98.0751 discriminates against indigent felons.¹⁰ Furthermore, this restoration scheme raises due process concerns because Florida failed to provide felons adequate notice or information on how to satisfy outstanding LFOs.¹¹ The legality of this mandate has already been challenged in the federal judiciary¹² and will likely continue to be litigated in a variety of fora.

This recent statewide fight over the restoration of voting rights to felons sheds light on issues and barriers that exist in democratic battlegrounds across the nation. The current developments in Florida are particularly interesting because they reflect the modern challenges to voting rights reform and the interests that hinder enfranchisement.

This Article discusses how wealth, politics, and constitutional rights are at play within Florida's felon voting rights law. Felon disenfranchisement is rooted in a racist and classist tradition.¹³ But whether any form or level of felon disenfranchisement is an acceptable practice today is beyond the scope of this Article. Rather, this Article argues that conditioning felons' right to vote on payment of LFOs is

6. See Tyler Kendall, *Felons in Florida Won Back Their Right to Vote. Now a New Bill Might Limit Who Can Cast a Ballot*, CBS NEWS (May 23, 2019, 8:13 PM), <https://www.cbsnews.com/news/florida-felons-won-back-right-to-vote-new-bill-might-limit-who-can-cast-ballot-2019-05-23/> [https://perma.cc/5LQR-E5YH].

7. Letter from Ron DeSantis, Governor, Florida, to Chief Justice Canady and Justices of the Supreme Court of Florida (Aug. 9, 2019) (on file with the Supreme Court of Florida).

8. *Id.*

9. *See id.*

10. *See id.*

11. See Gary Fineout, *Florida law disqualifies nearly 775K people with felony convictions from voting*, POLITICO (Mar. 11, 2020, 8:35 AM), <https://www.politico.com/states/florida/story/2020/03/11/florida-law-disqualifies-nearly-775k-people-with-felony-convictions-from-voting-1266365> [https://perma.cc/9LPX-3D8A] ("Florida has yet to begin screening newly registered voters to see whether they in fact owe any outstanding legal financial obligations.").

12. *Jones v. Governor of Florida*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020).

13. See Paul E. Pelletier, Opinion, *Racist Jim Crow era lives on in Florida decision to disenfranchise felons over fines*, USA TODAY (SEPT. 20, 2020, 5:06 PM), <https://www.usatoday.com/story/opinion/2020/09/17/florida-denies-vote-to-felons-jim-crow-era-lives-column/5815752002/> [https://perma.cc/X2ZR-WUH9].

detrimental to civil rights and democratic values. Lastly, this Article attempts to place Florida's story in a national context and against the backdrop of a novel legal issue.

Part I of this Article will provide background information on the history of felon disenfranchisement in the United States. Part II will address Florida's felon voting rights history including its failed reforms and its impact on minority communities. Part III will dissect the modern developments in Florida felon voting rights law. Part IV will analyze the litigation of Florida's new re-enfranchisement scheme. The conclusion will encompass final thoughts and predictions.

I. NATIONAL FELON DISENFRANCHISEMENT CONTEXT

A. *Historical Basis of Injustice*

Early American common law was largely transplanted from England, from which English colonists brought with them the concept of criminal disenfranchisement.¹⁴ Each colony developed unique criminal disenfranchisement laws;¹⁵ some colonial laws adopted theories of civil death, infamy, and attainder.¹⁶ After the American Revolution, civil death survived in states that passed civil death statutes.¹⁷ Generally, this pronouncement suspended the convict's right to bring suit, to collect life insurance, to devise a will, to marry, and to vote.¹⁸

14. See Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 724–25 (1972). Felons in medieval England would suffer a “civil death” and be pronounced “dead in law,” meaning their legal existence ceased. Those “civilly dead” lost their civil rights and could not execute any legal action, including the right to vote. A person pronounced “attainted” after conviction for felony or treason faced “forfeiture corruption of the blood” which passed land owned by the criminal to the king instead of his heirs. Lesser criminals who committed acts declared “infamous” by law encountered a civil degradation similar to second-class citizenship. See Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002).

15. See ALBERT EDWARD MCKINLEY, *THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA* 384–85 (1905).

16. Ewald, *supra* note 14, at 1061. Massachusetts Bay Colony, for example, disenfranchised convicts guilty of “fornication or any ‘shamefull [sic] and vitious crime.’” Colonial Maryland stripped convicts of their suffrage upon their third conviction of drunkenness. Rhode Island permanently banned from voting those convicted of bribing an elected official. Connecticut, interestingly, allowed for restoration of suffrage upon good behavior. *Id.*

17. *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 968–69 (1937). New York was the first state to enact such a law in 1799. Most civil death statutes in American jurisdictions then followed the New York model, which stated: “A person sentenced to imprisonment for life is thereafter deemed civilly dead.” *Id.*

18. *Id.* at 969, 973, 974; see *id.* at 795 n.44 (citing N.Y. Dom. Rel. Law § 11). *But see id.* at 976 n.45 (citing *Caswell v. Caswell*, 64 Vt. 557, 557 (1892)).

Virginia was the first state to pass a law in 1776 to prevent felons from voting.¹⁹ Over the next century, nineteen of the thirty-four antebellum states enacted felon disenfranchisement laws.²⁰ By 1869, the total number of states that disenfranchised felons rose to twenty-nine.²¹ Some attribute this increase to class bias;²² as the use of property tests declined, the landowning upper-class sought to retain political strength.²³

Disenfranchisement in the United States differs enormously from its medieval roots. The European variant was applied by judges on a case-by-case basis and was reserved for the most serious crimes.²⁴ By contrast, disenfranchisement in the U.S. has always been automatic upon conviction by operation of statute or constitutional provision.²⁵

Regarding the effect of these laws on race, it is important to note that only six states allowed Black people to vote in the pre-Civil War era.²⁶ Since most Black people were already denied suffrage, antebellum criminal disenfranchisement was not expressly racially motivated, but rather, focused on discriminating by class. On the other hand, criminal disenfranchisement is intricately connected to denying slaves the right to vote as “[b]oth slaves and convicts had limitations put on their civil rights due to their bondage and captivity.”²⁷ The rights of convicts and slaves stood in stark contrast to the rights of free men. Race and criminal disenfranchisement are inextricably linked.

The Reconstruction amendments worked to distinguish the civil status of newly-freed slaves from criminals by carving out exceptions to the denial of civil rights for convicts.²⁸ The Thirteenth Amendment restricts slavery and involuntary servitude “except as a punishment for crime whereof the party shall have been duly convicted.”²⁹ The Fourteenth

19. ELIZABETH A. HULL, *THE DISENFRANCHISEMENT OF EX-FELONS* 17 (2006).

20. *Id.*

21. *Id.*

22. Ewald, *supra* note 14, at 1062.

23. *Id.* at 1062–63.

24. David J. Zeitlin, *Revisiting Richardson v. Ramirez: The Constitutional Bounds of Ex-Felon Disenfranchisement*, 70 ALA. L. REV. 259, 268 (2018) (citing Ewald, *supra* note 14, at 1061).

25. *Id.*

26. Ewald, *supra* note 14, at 1063 n.73 (citing KIRK HAROLD PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 148 (Greenwood Press 1971) (photo. reprint 1969) (1918)). Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont allowed Black people to vote in 1860. Of these states, only New York and Rhode Island disenfranchised criminals, meaning almost every state that disenfranchised criminals also denied Black people access to the ballot. *Id.*

27. Irene Scharf, *Second Class Citizenship: The Plight of Naturalized Special Immigrant Juveniles*, 40 CARDOZO L. REV. 579, 620 (2018).

28. Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1586–97 (2012).

29. *Id.* at 1600 (quoting U.S. CONST. amend. XIII, § 1).

Amendment, which was designed to strengthen minority voting rights by prohibiting states from denying minorities “equal protection of the laws,”³⁰ actually enhanced the ability of states to disenfranchise criminals through the phrase: “except for participation in rebellion, or other crime.”³¹ Although state constitutions had allowed for criminal disenfranchisement since the founding of the nation, this provision was the first mention of it in the U.S. Constitution.³²

Jim Crow marked a new era of voting laws motivated by a racially discriminatory intent.³³ State governments in the South sought to limit Black freedom and suffrage as a means to preserve white supremacy.³⁴ Conventions met across Southern states to discuss disenfranchisement techniques to adopt and incorporate into rewritten state constitutions.³⁵ Arbitrary registration practices, lengthy residence requirements,³⁶ poll taxes, literacy tests, and grandfather clauses were employed to this end.³⁷

Criminal disenfranchisement had existed before these other discriminatory methods were invented,³⁸ but criminal disenfranchisement laws were also altered during this period to achieve a disparate racial impact.³⁹ Prominent Southern white politicians maintained that African Americans were infamed by slavery;⁴⁰ thus infamy justified denying newly freed slaves traditional citizenship rights. This association between race and citizenship rights continued the prejudicial connection between skin color and criminality.⁴¹ Despite the promulgation by White Southerners, these racist laws were not exclusive to the South. At the end

30. Slaughter-*House Cases*, 83 U.S. 36, 7 71 (1873).

31. U.S. CONST. amend. XIV, § 2; *see Re & Re, supra* note 28, at 1610–11.

32. *See Ewald, supra* note 14, at 1062, 1064.

33. *See Daniel S. Goldman, The Modern-Day Literacy Test: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 616 (2004) (describing the discriminatory intent of states’ constitutional conventions).

34. *Id.*

35. *See HULL, supra* note 19, at 18.

36. *See also* Elizabeth Anderson & Jeffrey Jones, *Geography of Race in the U.S.: Techniques of Direct Disenfranchisement, 1880-1965*, UNIV. MICH. (Sept. 2002), <http://www.umich.edu/~lawrace/disenfranchise1.htm?promocode=LIPP101AA?promocode=https://perma.cc/9YKM-AFRD> (citing generally J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); SAMUEL ISSACHAROFF, PAMELA KARLAN AND RICHARD PILDES, *THE LAW OF DEMOCRACY* (1998)).

37. *See HULL, supra* note 19, at 18.

38. *See MCKINLEY, supra* note 15.

39. *See Goldman, supra* note 33, at 616.

40. *See Scharf, supra* note 27, at 621; *see also supra* text accompanying note 14 (explaining the origin of “infamy”).

41. Ewald, *supra* note 14, at 1124 n.336 (“[P]oliticians of this period argued that black literacy and black criminality were ‘linked together like Siamese twins’”) (quoting I.A. NEWBY, *JIM CROW’S DEFENSE* 178 (1965)).

of the nineteenth century, almost every Southern state, and many Northern states, permanently disenfranchised felons.⁴²

Two generations later, the implications of criminal disenfranchisement rapidly evolved as felon disenfranchisement began to impact a much larger portion of the population.⁴³ The 1970's saw an incarceration boom brought on by a myriad of factors including the "War on Drugs," mandatory minimum sentences, and severe penalties for recidivism.⁴⁴ This confluence has led to a renewed racial-caste system in what scholars call the New Jim Crow.⁴⁵

There has been a five hundred percent increase in incarceration over the last forty years.⁴⁶ With 2.2 million people currently serving time in the nation's prisons and jails, the United States has become the world's leader in incarceration.⁴⁷ Due to the exponential expansion of the criminal justice system, felon disenfranchisement laws have caused an unprecedented silencing of voices: from 1.18 million felons disenfranchised in 1976 to 6.1 million by 2016.⁴⁸

The racial bias within the criminal justice system demonstrates the disparate impact that felon disenfranchisement has on Black communities. Over sixty percent of imprisoned people are people of color, half of which are Black.⁴⁹ A Black male is six times more likely to be incarcerated than a white male.⁵⁰ More Black people are in correctional control than were enslaved in 1850.⁵¹ The combination of felon disenfranchisement laws and the racially discriminatory criminal justice system disproportionately excludes minorities from political participation.

B. Reform Movement

Previously, felon voting rights commanded little, if any, public interest.⁵² National momentum to restore voting rights to felons began to

42. See HULL, *supra* note 19, at 21–22.

43. See Goldman, *supra* note 33, at 627.

44. Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 12, 17 (2011); John Conyers Jr., *The Incarceration Explosion*, 31 YALE L. & POL'Y Rev. 377, 380 (2013).

45. Alexander, *supra* note 44, at 8–10.

46. *Fact Sheet: Trends in U.S. Corrections*, THE SENT'G PROJECT 2 (updated Aug. 2020), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<https://perma.cc/AN53-K2PX>].

47. *Id.*

48. Jean Chung, *Policy Brief: Felon Disenfranchisement*, THE SENT'G PROJECT, 4 (updated Dec. 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/AW7M-5R29>].

49. *Fact Sheet*, *supra* note 46, at 5.

50. *Id.*

51. See Alexander, *supra* note 44, at 9.

52. See HULL, *supra* note 19, at 55.

take shape at the end of the twentieth century when the Sentencing Project and Human Rights Watch released alarming data of the racial and political impact of felony convictions.⁵³ This former non-issue came to be heralded as the “‘major civil rights struggle’ of the new millennium.”⁵⁴

As a result of this new awareness, since 1997 twenty-three states have modified their felon disenfranchisement laws to expand voter eligibility.⁵⁵ In the last three decades, not including the passing of Amendment 4, approximately 1.4 million convicted felons have regained voting rights.⁵⁶

Despite a seemingly robust reform movement, the nation is still widely restrictive. Just two states, Maine and Vermont, have no criminal disenfranchisement laws, therefore enabling incarcerated people to retain the right to vote while incarcerated.⁵⁷ As of 2018, fifteen states disenfranchise felons while imprisoned but restore their voting rights upon release; four states continue to disenfranchise felons while on probation or parole; eighteen states, the most common method, disenfranchise felons until supervision is completed; and lastly, the twelve most restrictive states disenfranchise felons post-sentence completion.⁵⁸ Florida is still among the twelve most restrictive states⁵⁹ because Amendment 4 did not restore the rights of felons convicted for murder or any felony sexual offenses.⁶⁰

Finally, despite considerable improvement in the last few decades, the state of felon voting rights would be in a better place if progress had not been stymied by multiple failed reform attempts. Studies show that the majority of felon voting right reforms fail.⁶¹ Failed reforms do not just

53. *Id.*

54. *Id.*

55. See Morgan McLeod, *Expanding the Vote: Two Decades of Felon Disenfranchisement Reforms*, THE SENT'G PROJECT 3 (Oct. 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms> [<https://perma.cc/6ZDW-L5XT>].

56. *Id.* Seven states either repealed or amended lifetime disenfranchisement policies; six states broadened voting rights to some or all persons under supervision (probation or parole); and seventeen states improved the restoration processes. *Id.*

57. *Id.* at 14 tbl.1.

58. *Id.* Typically, this last method involves permanent disenfranchisement with the possibility of restoration through application to a clemency board. See Marc Mauer and Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States 1*, SENT'G PROJ. (Feb. 2005), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Barred-for-Life-Voting-Rights-Restoration-in-Permanent-Disenfranchisement-States.pdf> [<https://perma.cc/X799-NLLG>].

59. *Felon Voting Rights*, NCSL (Oct. 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/Y3QJ-3AY3>].

60. FLA CONST. art. VI, § 4(b) (2018).

61. See generally Kate Peifer & Rose Velazquez, *Attempts to Let Felons Vote Typically Fail*, POST CRESCENT (Oct. 9, 2016, 7:59 AM), <https://www.postcrescent.com/story/news/investigations/2016/10/09/attempts-let-felons-vote-typically-fail/91611052/> [<https://perma.cc/4FHR-L4RJ>].

involve bills that flounder on Congressional floors⁶² or governors who veto bills,⁶³ but interestingly, include executive orders that are undone by the succeeding gubernatorial administration.⁶⁴ This pattern—which has been seen in the recent history of Kentucky, Iowa, and Florida⁶⁵—causes would-be voters to revert from a condition of potential restoration back to one of civil degradation.

II. FLORIDA WAS RIPE FOR REFORM

Stringent felon disenfranchisement laws have existed in Florida since the state's creation.⁶⁶ Article VI, section 4 of Florida's first constitution in 1838, in relevant part, reads: "The General Assembly shall have the power to exclude from . . . suffrage, all persons convicted of bribery, perjury, forgery, or other high crime, or misdemeanor."⁶⁷

After the Civil War a provisional governor of Florida, William Marvin, proclaimed his belief to an 1865 convention that freedom from slavery did not include suffrage.⁶⁸ Transcripts from the convention display a clear interest to deny the franchise to African Americans.⁶⁹ The convention, in tandem with the state legislature, then instituted rampant disenfranchising efforts including penal codes that inflicted the punishment of hard labor on vagrants.⁷⁰ This "black-code" practice gifted free labor back to former slaveholders and transparently perpetuated

62. *Id.*

63. See, e.g., Joe Duggan, *Ricketts Vetoes Bill to Restore Rights to Felons Sooner*, OMAHA WORLD-HERALD (Apr. 28, 2017), https://www.omaha.com/news/state_and_regional/ricketts-vetoes-bill-to-restore-voting-rights-to-felons-sooner/article_52c7c01e-2b98-11e7-aff9-c7d692ed2e0b.html [https://perma.cc/Y2DU-FZKJ]; Zachary Roth, *Maryland Governor Vetoes Felon Voting Rights Bill*, MSNBC, <http://www.msnbc.com/msnbc/maryland-governor-vetoes-felon-voting-rights-bill> [https://perma.cc/NGY3-7VNW] (May 22, 2015, 5:09 PM); *Gov. Christie Vetoes Groundbreaking Voting Reform in New Jersey*, BRENNAN CTR. FOR JUSTICE (Nov. 9, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/gov-christie-vetoes-groundbreaking-voting-reform-new-jersey> [https://perma.cc/WRK5-2Q4U].

64. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 74 (2019).

65. *Id.*; see Stephen Gruber-Miller & Ian Richardson, *Gov. Kim Reynolds Signs Executive Order Restoring Felon Voting Rights, Removing Iowa's Last-in-the-Nation Status*, DES MOINES REGISTER (Aug. 5, 2020), <https://www.desmoinesregister.com/story/news/politics/2020/08/05/iowa-governor-kim-reynolds-signs-felon-voting-rights-executive-order-before-november-election/5573994002/> [https://perma.cc/5VH8-NN76].

66. See Riggs, *supra* note 3, at 108.

67. *Id.* (alteration in original).

68. Carlos M. Portugal, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIA. L. REV. 1317, 1334 (2003).

69. See *id.* at 1335.

70. *Id.* at 1334. From 1872 to 1888, Black men constituted 77–88% of persons in Florida prisons.

slavery.⁷¹ A search into the foundation of Florida's felon disenfranchisement laws indicates blatant racism.⁷²

A constitutional convention in 1868 upped the ante by adding language that broadly excluded all felons from franchise: "nor shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights."⁷³ Florida voters approved a constitution in 1885 that added a poll tax precondition to voting.⁷⁴ Over time Florida has used poll taxes, educational tests, and criminal disqualifications to target African Americans.⁷⁵

Article VI, section 4 remained unaltered for nearly a century.⁷⁶ However, a 1968 convention added executive clemency and mental incompetence language: "[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability."⁷⁷ This provision, which held felon voting rights to the same restrictions as mentally disabled people, endured for fifty years⁷⁸—until the election in November 2018.⁷⁹

A. Florida's Failed Reforms

There have been multiple failed attempts to reform Florida's strict felon disenfranchisement laws. The State legislature in 1974 passed an act entitled the Florida Correctional Reform Act (FCRA) which automatically reinstated the civil rights of felons upon completion of custody and supervision.⁸⁰ The FCRA undermined the executive clemency powers to restore civil rights granted to the governor in Article IV, Section 8 of Florida's Constitution.⁸¹ Although Governor Askew signed the bill into law, he requested a written opinion from the Florida Supreme Court interpreting the constitution and advising him on the

71. *Id.*

72. *See id.* The provisional governor after Marvin promised to "never accede to the demand of Negro suffrage." *Id.* In 1866, the Fourteenth Amendment was rejected by the Florida legislature. *Id.* A year later, due to the conditions imposed for re-admittance into the Union while under congressional military control, Florida ratified the Fourteenth Amendment. *Id.*

73. *See Riggs, supra* note 3, at 108.

74. *See Portugal, supra* note 68, at 1335.

75. *Id.*

76. *See Riggs, supra* note 3, at 108.

77. *Id.*

78. *Id.*

79. German Lopez, *Florida votes to restore ex-felon voting rights with Amendment 4*, VOX, (Nov. 7, 2018, 1:15 PM), <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results>.

80. In re Advisory Opinion of the Governor Civil Rights, 306 So. 2d 520, 520–21 (Fla. 1975).

81. *Id.* at 521–22.

constitutionality of the FCRA.⁸² The Florida Supreme Court responded that the FRCRA constituted a clear infringement on the Governor's constitutional power to restore civil rights and invalidated the law.⁸³

Although the first attempt to expand felon voter eligibility in Florida's modern age failed, it was not a total loss. Askew then established the Rules of Executive Clemency, which allowed for restoration of civil rights for felons convicted of certain crimes if the felon applied and proved eligibility.⁸⁴ The year 1991 added another obstacle to restoration: beyond an application, a hearing was also required.⁸⁵ By the end of the century, roughly two hundred types of crimes required a hearing in Florida before voting rights could be restored.⁸⁶

These requisite hearings resulted in enormous delays in the restoration of voting rights. A backlog of tens of thousands of applicants had amassed by 2004.⁸⁷ *The Miami Herald* interviewed felons who had been waiting years for a hearing.⁸⁸ A lawyer working for the Brennan Center for Justice quoted in the article stated, “[t]he system is highly unmanageable, demands tremendous government resources and creates gigantic space for errors.”⁸⁹ This prophecy came to fruition when two Florida government clemency lists were revealed to contain massive discrepancies; over twenty-five thousand restored felons were wrongly left on a “purge list” which would have kept them from voting.⁹⁰

Former Governor Charlie Crist, who served as a member of the Executive Clemency Board while working as the Attorney General in Former Governor Jeb Bush's administration,⁹¹ witnessed firsthand the unmanageable backlog of hearings. Crist campaigned on streamlining the

82. *Id.*

83. *Id.*

84. *See* Riggs, *supra* note 3, at 109.

85. *Id.*

86. *Id.*

87. Nicole D. Porter, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010*, THE SENT'G PROJECT 9 (Oct. 2010), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Expanding-the-Vote-State-Felony-Disenfranchisement-Reform-1997-2010.pdf> [<https://perma.cc/4EUG-E6FH>].

88. Debbie Cenziper & Jason Grotto, *Violent Felons' Rights Restored While Lesser Offenders Waited*, MIA. HERALD, Nov. 21, 2004.

89. *Id.*

90. *See Here We Go Again? Thousands Who Had Their Voting Rights Restored May Remain on Florida Purge Lists*, BRENNAN CTR. FOR JUST. (June 8, 2004), <https://www.brennan-center.org/our-work/analysis-opinion/here-we-go-again-thousands-who-had-their-voting-rights-restored-may> [<https://perma.cc/5KU4-2A8L>]; *Brennan Center Praises Florida for Scrapping "Potential Felon" Purge List*, BRENNAN CTR. FOR JUST. (July 10, 2004), <https://www.brennan-center.org/our-work/analysis-opinion/brennan-center-praises-florida-scrapping-potential-felon-purge-list> [<https://perma.cc/4L65-PPYB>].

91. *Charlie Crist*, FLA. DEP'T OF STATE, <https://dos.myflorida.com/florida-facts/florida-history/florida-governors/charlie-crist/> [<https://perma.cc/E65L-FLJL>] (last visited Oct. 29, 2020).

restoration process, was elected in part on that promise, and then worked to successfully revise the restoration procedures.⁹² While the process was not fully automatic, in 2007, Crist removed the need for any affirmative act on behalf of a felon who was convicted of a nonviolent crime,⁹³ which under the new process were deemed Level I.⁹⁴ Applications were still necessary for more serious offenses (Level II), but the review period was limited to thirty days.⁹⁵ Lastly, Level III offenses carried rigorous obstacles: an investigation and hearing was required for what were considered the most serious offenses.⁹⁶ At the time, this was the biggest felon voting rights reform in Florida's history.⁹⁷ More than 150,000 Floridians had their voting rights restored during Crist's four-year term.⁹⁸

Unfortunately, this progress was short-lived and easily reversed by the next governor, Rick Scott. At the first possible opportunity after his election in 2011, Scott and his board unanimously voted to remove all automatic restoration processes effective immediately.⁹⁹ Scott replaced Crist's three-level policy with one that was riddled with institutional delays and barriers to democracy. Now a five-year minimum waiting period after the completion of sentence became standard for applicants.¹⁰⁰ A second level of felons convicted of certain severe crimes was required to wait seven years before applying for a hearing.¹⁰¹ Applicants who are

92. See Riggs, *supra* note 3, at 110.

93. *Id.*

94. *Status Update: Restoration of Civil Rights' (RCR) Cases Granted 2009 and 2010*, FLA. PAROLE COMM'N 6 (June 30, 2011), <https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf> [<https://perma.cc/FAS3-B5X7>]. People convicted of offenses such as the following were eligible for Level I review: "Grand Theft, Burglary of a Dwelling, Possession of Firearm by Convicted Felon, Robbery (No Deadly Weapon), Felony DUI, and Sale of a Controlled Substance."

95. *Id.* People convicted of offenses such as the following (or who were designated as a Three-Time Violent Felony Offender) were eligible for Level II review: "Aggravated Battery/Assault, Trafficking in Cocaine, Aggravated Stalking, [or] Kidnapping/False Imprisonment."

96. *Id.* People convicted of offenses such as the following (or persons designated as "Sexual Predators") were eligible for Level III review: "Murder/Manslaughter, Sexual Battery, [or] Aggravated Child Abuse."

97. *Cf.* Charlie Crist, Opinion, *Change Florida's Absurd Clemency Rules Now*, TALLAHASSEE DEMOCRAT (Dec. 7, 2019, 9 PM), <https://www.tallahassee.com/story/opinion/2019/12/08/change-floridas-absurd-clemency-rules-now-charlie-crist/4356670002/> [<https://perma.cc/WH2N-8TV3>] (stating Crist's predecessor Jeb Bush saw over 76,000 people having their rights restored).

98. Greg Allen, *Felons in Florida Want Their Voting Rights Back Without A Hassle*, WLRN (July 5, 2018, 7:23 AM), <https://www.npr.org/2018/07/05/625671186/felons-in-florida-want-their-voting-rights-back-without-a-hassle> [<https://perma.cc/QZZ7-LGQB>].

99. See FLA. PAROLE COMM'N, *supra* note 94, at 4–5.

100. *Id.* at 5.

101. *Id.*

rejected must wait an additional two years before reapplying.¹⁰² These clemency rules were still in place until just recently.¹⁰³

In comparison with restoration rates under Crist's single term, scarcely any felons were enfranchised in the eight years Scott served as Governor—only 3,332.¹⁰⁴ Even more problematic, Scott exacerbated the racial impact of the criminal justice system by directing his restoration powers towards whites and Republicans. Scott restored rights to a higher percentage of Republicans and a lower percentage of Democrats than any of his predecessors since 1971.¹⁰⁵ In fact, Scott franchised twice as many whites as Blacks and three times as many white males as Black males.¹⁰⁶ These numbers alone demonstrate that the Scott Administration discriminated against Black people when choosing whose rights to restore.¹⁰⁷

Under this model, enormous power is granted to the executive branch because the Clemency Board retains absolute discretion in the restoration process. The concentration of power to authorize suffrage in the executive branch jeopardizes the democratic electoral process because whoever is currently wielding this power can easily dictate the electoral power of marginalized groups. Voting rights should not be held hostage by changes in gubernatorial administration; greater issues of equity should prevail.

102. See Lulu Ramadan et al., *Florida Felon Voting Rights: Who Got Theirs Back Under Scott?*, SARASOTA HERALD-TRIBUNE (Oct. 27, 2018, 12:01 AM), <https://www.heraldtribune.com/news/20181027/florida-felon-voting-rights-who-got-theirs-back-under-scott> [<https://perma.cc/KPY9-SDVQ>].

103. Blaise Gainey, *Florida's Clemency Process Is Complicated But It Hasn't Always Been*, WFSU (Dec. 6, 2019, 5:28 PM), <https://news.wfsu.org/state-news/2019-12-06/floridas-clemency-process-is-complicated-but-it-hasnt-always-been> [<https://perma.cc/53DB-CLKS>].

104. See Tena M. Pate, *Annual Report 2010–2011*, FLA. PAROLE COMM'N (2011); Tena M. Pate, *Annual Report 2011–2012*, FLA. PAROLE COMM'N (2012); Tena M. Pate, *Annual Report 2013*, FLA. PAROLE COMM'N (2013); Tena M. Pate, *Annual Report 2014*, FLA. COMM'N ON OFFENDER REV. (2014); Tena M. Pate, *Annual Report 2015*, FLA. COMM'N ON OFFENDER REV. (2015); Richard D. Davison, *Annual Report 2016*, FLA. COMM'N ON OFFENDER REV. (2016); Richard D. Davison, *Annual Report 2016–17*, FLA. COMM'N ON OFFENDER REV. (2017); Richard D. Davison, *Annual Report 2018*, FLA. COMM'N ON OFFENDER REV.; Richard D. Davison, *Annual Report 2019*, FLA. COMM'N ON OFFENDER REV. (2019); see also Matthew S. Schwartz, *Old Florida Clemency System Was Unconstitutional, Racially Biased*, NPR (Jan. 8, 2019, 7:30 AM), <https://www.npr.org/2019/01/08/683141728/old-florida-clemency-system-was-unconstitutional-racially-biased> [<https://perma.cc/N6V5-YTPX>].

105. See Ramadan et al., *supra* note 102.

106. *Id.*

107. See Allen, *supra* note 98 (quoting Governor Rick Scott in a hearing denying a felon restoration: “[T]here’s no standard. . . . We can do whatever we want.”).

B. Racial Impact in Florida, National Impact on Elections

In 1998, 9% of voting age African Americans in Florida were disenfranchised due to a felony conviction.¹⁰⁸ African Americans composed just 15% of Florida's general population but constituted about 30% of the State's disenfranchised felons.¹⁰⁹ Statistics show that not much improved in Florida in the intervening eighteen years. In 2016, 21% of Black voters in Florida were denied suffrage due to felony disenfranchisement.¹¹⁰ Amendment 4 and the developments that ensued are clearly critical to the voting rights of Black communities. Furthermore, a strong argument can be made that modern disenfranchisement determines the outcome of presidential elections.¹¹¹ Florida is a true purple state: the state may swing Republican or Democratic in a given election because both parties may receive strong support without an overwhelming majority.¹¹² In three of the last six presidential elections, the candidate who won Florida did so by 1.2% or less.¹¹³ With twenty-nine electoral votes,¹¹⁴ how Florida oscillates is of the utmost importance to those aspiring to the Oval Office. Presidential campaigns famously pay close attention to Florida and expend substantial resources in the state.¹¹⁵

The 2000 presidential election serves as a prime example of Florida's influence in determining election outcomes.¹¹⁶ Specifically, numerous renowned political scientists and journalists have claimed that Florida's

108. Complaint at 22, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2000) (No. 00-3542-CIV-KING).

109. *Id.* at 23.

110. See Chung, *supra* note 48.

111. See generally SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE (2006).

112. See, e.g., Martin Savidge, *Florida: The Swingiest Swing State*, CNN (Aug. 9, 2016, 3:58 PM), <https://www.cnn.com/2016/08/09/politics/election-2016-donald-trump-hillary-clinton-florida/index.html>; Denise Royal, *George Will: 'Florida Is Incomparably The Most Important Swing State'*, WUSF PUB. MEDIA (Nov. 2, 2019, 5:31 PM), <https://wusfnews.wusf.usf.edu/post/george-will-florida-incomparably-most-important-swing-state> [<https://perma.cc/PP9D-95BC>].

113. Emily Bazelon, *Will Florida's Ex-Felons Finally Regain the Right to Vote?*, N.Y. TIMES MAG. (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/magazine/ex-felons-voting-rights-florida.html> [<https://perma.cc/UBG5-9N3Z>].

114. *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/federal-register/electoral-college/allocation.html> [<https://perma.cc/X8NR-BJQZ>] (last visited Oct. 25, 2020). Florida is the state with the third-highest number of electoral votes.

115. See Darryl Paulson, Opinion, *A quick history of Florida's presidential politics, from Whigs to wiggled out*, TAMPA BAY TIMES (Nov. 4, 2016), tampabay.com/news/perspective/a-quick-history-of-floridas-presidential-politics-from-whigs-to-wiggled-out/2301426/ [<https://perma.cc/FX5K-BB7R>].

116. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 192 (2006).

felon disenfranchisement laws cost candidate Al Gore the hotly contested and closely fought race.¹¹⁷ Jeff Manza and Christopher Uggen, preeminent researchers in this field,¹¹⁸ wrote, “[h]ad disenfranchised felons been permitted to vote, we estimate that Gore’s national margin of victory in the popular vote would have surpassed 1 million votes Regardless of the popular vote, however, the outcome in Florida determined the electoral college winner.”¹¹⁹ A legal columnist claimed that a “relative handful” of disenfranchised felons in Florida could have tipped the election for Al Gore.¹²⁰ Disenfranchisement is not just racist and classist, but politically impactful and determinative of which party holds office.

III. FLORIDA’S MODERN VOTING RIGHTS BATTLEGROUND

Amendment 4, officially known as Voting Rights Restoration for Felons Initiative, reads in full:

This amendment restores the voting rights of Floridians with felony convictions after they complete all terms of their sentence including parole or probation. The amendment would not apply to those convicted of murder or sexual offenses, who would continue to be permanently barred from voting unless the Governor and Cabinet vote to restore their voting rights on a case by case basis.¹²¹

117. See, e.g., *id.*; Reynolds Holding, *Why Can’t Felons Vote?*, TIME (Nov. 1, 2006), <http://content.time.com/time/nation/article/0,8599,1553510,00.html> [<https://perma.cc/8WVH-H37R>].

118. Jeff Manza: *Professor of Sociology*, N.Y.U., <https://as.nyu.edu/content/nyu-as/as/faculty/jeffrey-manza.html> [<https://perma.cc/CY8L-MQVS>] (last visited Oct. 29, 2020) (describing LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY as “the standard work on the topic” of “the causes and consequences of felon disenfranchisement in the United States”).

119. Jeff Manza: *Professor of Sociology*, N.Y.U., <https://as.nyu.edu/content/nyu-as/as/faculty/jeffrey-manza.html> [<https://perma.cc/J38J-GG37>] (last visited Oct. 29, 2020).

120. Holding, *supra* note 117.

121. FLA. DIV. OF ELECTIONS, FLA. DEP’T OF STATE, PROPOSED CONSTITUTIONAL AMENDMENTS AND REVISIONS FOR THE 2018 GENERAL ELECTION, <https://fldoswebumbracoprod.blob.core.windows.net/media/699824/constitutional-amendments-2018-general-election-english.pdf> [<https://perma.cc/JQ4C-TVYK>] (last visited Mar. 24, 2021). The amendment was co-authored by Former Democratic Speaker of the Florida House, Jon Mills, and Howard Simon, the now retired Executive Director of the American Civil Liberties Union of Florida; see Daniel Rivero, *Co-Author And Attorney For Florida’s Amendment 4 Helped Create Statewide Fines And Fees Policy*, WLRN (May 27, 2019, 5:40 PM) <https://www.wlrn.org/post/co-author-and-attorney-floridas-amendment-4-helped-create-statewide-fines-and-fees-policy> [<https://perma.cc/J6P5-JV79>]; see also Daniel Rivero, *Amendment 4 Co-Author Says Courts Will Have To ‘Straighten Out’ Legislature’s Bill*, WUSF PUB. MEDIA (May 16, 2019, 6:55 PM), <https://wusfnews.wusf.usf.edu/post/amendment-4-co-author-says-courts-will-have-straighten-out-legislatures-bill> [<https://perma.cc/Y37G-8YVX>].

The amendment only reforms the process by which felons who have not been convicted of murder or a felony sexual offense receive voting rights.¹²² Those with convictions for murder or a felony sexual offense could only have their rights restored by the clemency board.¹²³ A 60% supermajority vote in favor of the amendment was required to pass it.¹²⁴

A. *Passing Amendment 4*

On November 6, 2018, 64.55% of Floridians who cast a ballot in the election voted to pass Amendment 4.¹²⁵ The Amendment went into effect on January 8, 2019, which restored the rights of approximately 1.4 million felons.¹²⁶ Amendment 4 was crafted to take effect immediately without further lawmaking.¹²⁷ This reform had a tremendous result—roughly as many rights were restored by Amendment 4 as during the previous twenty years of reforms nationwide.¹²⁸ The amendment enfranchised the greatest number of people in a single initiative since the Nineteenth Amendment was enacted in 1920.¹²⁹

Amendment 4's passage was particularly triumphant for Desmond Meade, a former Army mechanic and a previously convicted felon.¹³⁰ After release, Meade battled poverty and addiction while living in a homeless shelter.¹³¹ At thirty-eight, he enrolled in Miami Dade College where he graduated summa cum laude with a Bachelor's degree in criminal justice.¹³² Meade went on to attend Florida International University College of Law in pursuit of a Juris Doctorate degree, despite state law forbidding him from taking the state bar exam due to his felon status.¹³³

122. See PROPOSED CONSTITUTIONAL AMENDMENTS, *supra* note 121.

123. *Id.*

124. FLA. CONST. art. XI, § 5.

125. On the Felon Voting Rights Amendment, 5,148,926 voters voted yes. *Florida Amendment 4*, CNN (Dec. 21, 2018, 2:06 PM), <https://www.cnn.com/election/2018/results/florida/ballot-measures/1> [<https://perma.cc/BZ33-PUHU>].

126. *Florida ex-felons can begin registering to vote as amendment takes effect*, CBS NEWS (Jan. 8, 2019, 3:26 PM), <https://www.cbsnews.com/news/florida-ex-felons-begin-registering-to-vote-as-amendment-4-takes-effect/> [<https://perma.cc/5CEE-39DZ>].

127. *Id.*

128. See discussion *supra* Part I.B.

129. See Emma Sarappo, *Over a Million Felons Could Regain the Right to Vote in Florida*, PAC. STANDARD (Nov. 6, 2018), <https://psmag.com/news/over-a-million-felons-could-regain-the-right-to-vote-in-florida> [<https://perma.cc/839M-KPN2>].

130. See Bazelon, *supra* note 113.

131. *Id.*

132. *Id.*

133. See Corbin Bolies, *Desmond Meade Spent Three Years in Prison—Now He Wants His Voting Rights Back*, THE REP. (Oct. 19, 2018), <https://www.mdcthereporter.com/desmond-meade-spent-three-years-in-prison-now-he-wants-his-voting-rights-back> [<https://perma.cc/JE3E-UG9M>].

While in law school Meade began working pro bono for the Florida Rights Restoration Council (FRRRC), a grassroots organization.¹³⁴ Formerly convicted persons operate the FRRRC with the goal of eradicating disenfranchisement and discrimination against convicted persons.¹³⁵ Meade eventually became president and executive director of the FRRRC, where his legal literacy mobilized the organization's mission to reform Florida's felon disenfranchisement law.¹³⁶

The FRRRC sponsored the campaign to pass Amendment 4 by ballot initiative and Meade was pivotal in its success.¹³⁷ Meade spent two years on speaking tours throughout Florida to garner support and signatures to qualify the amendment for the ballot.¹³⁸ The Meade-led signature drive collected over 799,000 signatures from Floridians, well above the threshold requirement.¹³⁹

While felon voting rights in Florida has been treated as a partisan issue for decades,¹⁴⁰ Meade strategically attacked this issue from both sides of the partisan divide. He made a point to speak with everyday people, regardless of race or political affiliation.¹⁴¹ Meade said, "I'm fighting just as hard, if not more, for that guy that wanted to vote for Donald Trump than a guy who wishes to vote for Hillary Clinton or Barack Obama."¹⁴² The campaign successfully focused on targeting Republican voters in lower-income areas.¹⁴³

Amendment 4's passage can be attributed largely to this approach. A supermajority could not be attained by just appealing to Democrats. A study based on public information requests for millions of ballots revealed that 40% of Floridians who voted for the Republican gubernatorial candidate in the November 2018 election also voted for Amendment 4, even though that candidate did not support Amendment 4.¹⁴⁴ For the electorate, felon voting rights is transitioning into a

134. *About Us*, FLA. RTS. RESTORATION COAL., <https://floridarrc.com/about/> [<https://perma.cc/JZ5J-UDHV>].

135. *Id.*

136. *About Desmond Meade*, FLA. RTS. RESTORATION COAL., <https://floridarrc.com/desmond-meade/> [<https://perma.cc/2ANV-B4PG>].

137. *See id.*

138. *Most Creative People 2019: Desmond Meade*, FAST CO., <https://www.fastcompany.com/person/desmond-meade> [<https://perma.cc/ZT4H-W2QB>].

139. Steven Lemongello, *Floridians Will Vote This Fall on Restoring Voting Rights to Former Felons*, SUN SENTINEL (Jan. 23, 2018, 4:40 PM), <https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html>.

140. *See discussion supra* Section II.A.

141. *See* Bazelon, *supra* note 113.

142. *Id.*

143. Michael Morse, *Amendment 4 Requires Addressing the Criminalization of Poverty*, SUN SENTINEL (Apr. 25, 2019, 1 PM), <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-amendment-4-florida-passage-20190424-story.html>.

144. *Id.*

nonpartisan issue.¹⁴⁵ However, the partisan framing of felon voting rights is a chief feature of the barriers that prevent nationwide reform. This issue should not rest on political ideology but must instead focus on democratic rights.

Meade embodies the “American Dream,”¹⁴⁶ but he is by no measurement the exception to the intransigence against restoration. Rather, he encapsulates the millions of felons across the nation who are deserving of a voice.

B. Retaliation in Senate Bill 7066

Amendment 4 was not the only noteworthy aspect of the November 2018 political race in Florida. The gubernatorial election was a confirmation of the partisanship that exists within the felon voting rights discourse and the racial tensions that persist in Florida. Two candidates of different races, political ideology, and stance on felon voting rights faced off against each other in the general gubernatorial election: Republican Ron DeSantis, U.S. Representative for the 6th District of Florida, and Democrat Andrew Gillum, Mayor of Tallahassee, Florida’s capital.¹⁴⁷ The campaigns received added national media attention because of an incident involving a racial pejorative used by DeSantis in reference to his opponent, known as the “monkey this up” controversy.¹⁴⁸ Critics heard a racist dog-whistle in that remark, but the DeSantis campaign doubled-down by calling that characterization “absurd.”¹⁴⁹

145. *Id.*

146. The colossal success of the campaign and Meade’s notoriety landed him on TIME magazine’s list of 100 Most Influential People of 2019. See Stacey Abrams, *Desmond Meade*, TIME, <https://time.com/collection/100-most-influential-people-2019/5567673/desmond-meade/> [https://perma.cc/UW2E-DSH8] (last visited Oct. 11, 2020).

147. See John Whitesides, *GOP congressman Ron DeSantis easily wins primary for Florida governor after Trump’s endorsement*, BUS. INSIDER (Aug. 28, 2018, 9:49 PM), <https://www.businessinsider.com/ron-desantis-wins-republican-primary-florida-trump-2018-8> [https://perma.cc/P4UZ-NCSA]; Patricia Mazzei, *Andrew Gillum Shocked Florida With a Primary Win. But an F.B.I. Inquiry Clouds His Campaign.*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/us/gillum-florida-governor-tallahassee.html> [https://perma.cc/BZ2F-E8XJ].

148. See, e.g., Julia Jacobs, *DeSantis Warns Florida Not to ‘Monkey This Up,’ and Many Hear a Racist Dog Whistle*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/desantis-monkey-up-gillum.html> [https://perma.cc/77YT-TUUG]; Caroline Kenny, *Florida’s GOP gubernatorial nominee says a vote for his black opponent would ‘monkey this up’*, CNN POL. (Aug. 30, 2018, 12:39 AM), <https://www.cnn.com/2018/08/29/politics/ron-desantis-andrew-gillum-attack/index.html> [https://perma.cc/67Q7-SXQ8].

149. Joanna Walters, *Ron DeSantis tells Florida voters not to ‘monkey this up’ by choosing Gillum*, GUARDIAN (Aug. 29, 2018, 1:03 PM), <https://www.theguardian.com/us-news/2018/aug/29/ron-desantis-racism-monkey-up-andrew-gillum-florida-governor-election> [https://perma.cc/3MWA-SYPU].

DeSantis was opposed to Amendment 4 while Gillum was in favor of the ballot proposition.¹⁵⁰ Gillum was quoted saying: “Our current system for rights restoration is a relic of Jim Crow that we should end for good.”¹⁵¹

Early election night results predicted DeSantis winning, which prompted Gillum to concede the election.¹⁵² Later-counted ballots brought down the margin to a 34,000-vote victory for DeSantis, which automatically triggered a recount by state law.¹⁵³ Gillum accordingly withdrew his concession to DeSantis.¹⁵⁴ After the dust of the recount settled, DeSantis was certified the victor, defeating Gillum by less than 1%.¹⁵⁵ As Florida is a swing state, recounts and narrow victories such as these are commonplace.¹⁵⁶

Although Amendment 4 was written to be self-executing, and the President of the Florida Senate—Bill Galvano—believed that it was,¹⁵⁷ Governor-elect DeSantis made clear that he wanted the state legislature to pass an implementation bill to instruct the Florida Division of Elections on the process for verifying felon voters.¹⁵⁸ What resulted was the drafting, passing, and signing of Senate Bill 7066: Election Administration (SB7066) to create Florida Statute § 98.0751.¹⁵⁹

Senate Bill 7066 critically minimizes the impact of Amendment 4 by expanding the term “all terms of their sentence” to include fines, fees,

150. Andrew Pantazi, *Gillum, DeSantis present contrasting views on criminal justice*, GAINESVILLE SUN (OCT. 19, 2018, 5:03 PM), <https://www.gainesville.com/news/20181019/gillum-desantis-present-contrasting-views-on-criminal-justice> [<https://perma.cc/Q763-SAA2>].

151. *Id.*

152. Glenn Thrush & Liam Stack, *Andrew Gillum Concedes to Ron DeSantis in Florida Governor’s Race*, N.Y. TIMES (Nov. 17, 2018), <https://www.nytimes.com/2018/11/17/us/politics/desantis-wins-florida.html> [<https://perma.cc/YYL8-DTL3>].

153. FLA. STAT. § 102.166 (2019). 34,000 votes are less than a 0.5 percent victory margin.

154. *See Gillum Reverses Course on Conceding Florida Governor Race*, CNBC (Nov. 10, 2018), <https://www.cnbc.com/2018/11/10/gillum-reverses-course-on-conceding-florida-governor-race.html> [<https://perma.cc/B5N2-5RFR>].

155. *See Sharon Wright Austin, Andrew Gillum lost Florida by just 1 per cent of the vote – but Obama could have reversed that result*, INDEP. (Nov. 7, 2018, 9:42 AM), <https://www.independent.co.uk/voices/trump-midterm-elections-2018-results-florida-governor-ron-de-santis-andrew-gillum-republicans-a8621566.html>.

156. *See Patricia Mazzei & Frances Robles, It’s Déjà Vu in Florida, Land of Recounts and Contested Elections*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/us/florida-ballots-recount-scott-nelson-gillum-desantis.html> [<https://perma.cc/73TY-Y6MH>]; *see supra* Part II.B.

157. *See Ursula Perano, Former Felons Freed to Vote in March Mayoral Races*, POLITICO (Feb. 13, 2019, 11:44 AM), <https://www.politico.com/states/florida/story/2019/02/13/former-felons-freed-to-vote-in-march-mayoral-races-851993> [<https://perma.cc/8M6S-R84Y>].

158. *See David Smiley, For New Voters Affected by Amendment 4, It’s Register and Wait as State Debates*, MIAMI HERALD (Jan. 8, 2019, 9:08 AM), <https://www.miamiherald.com/news/politics-government/state-politics/article223944515.html>.

159. FLA. STAT. § 98.0751 (2019).

and victim's restitution.¹⁶⁰ The bill made its way through the Senate Ethics and Elections Committee, which summarized the bill: “[p]rovides that voting rights are restored upon [‘]completion of all terms of sentence,[’] meaning completion of any portion of a sentence within the four corners of the sentencing document: . . . Monetary (victim's restitution, court-ordered fines/fees, any other term).”¹⁶¹ Another modification is the inclusion of civil liens in the LFOs that must be paid for restoration.¹⁶² Civil lien conversion is a longstanding procedure in Florida and across the nation that courts use at sentencing when criminal defendants are indigent.¹⁶³ The LFOs are converted by the presiding judge out of the criminal justice system and into the civil justice system through a civil lien.¹⁶⁴ This criminal case thereby ends once custody or supervision is completed even though the monetary sums are still outstanding.¹⁶⁵ The plain language of Amendment 4 suggests that a felon who has completed “all terms of [their] sentence”¹⁶⁶ but has a civil lien would be able to vote since a judge purposefully removed the LFOs from the criminal justice system. Unfortunately, Florida Senate members went out of their way to include a civil lien satisfaction requirement in the implementation bill,¹⁶⁷ which further disenfranchised otherwise eligible citizens.¹⁶⁸

Under Florida law, someone can be convicted for illegally voting and for a false affirmation in connection to voting.¹⁶⁹ Senate Bill 7066 only

160. S.B. 7066, Election Admin., Rules Comm. and Ethics and Elections Comm. 2019 Reg. Leg. Sess. (Fla. 2019).

161. *Id.*

162. SB 7066, 2019 Leg. § 1380–85 (Fla. 2019).

163. See Olivia C. Jerjian, *The Debtors' Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color*, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 253 (2017) (citing FLA. STAT. § 938.30).

164. Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, BRENNAN CTR. FOR JUST. 22–23 (2010), <https://www.brennancenter.org/our-work/research-reports/hidden-costs-floridas-criminal-justice-fees>

165. *See id.*

166. *Proposed Constitutional Amendments and Revisions for the 2018 General Election*, FLA. DEP'T OF STATE 10 (2018), <https://dos.myflorida.com/media/699824/constitutional-amendments-2018-general-election-english.pdf> [<https://perma.cc/YA67-4HSC>].

167. Senator Amendment to SB 7066, 704217, 2019 Leg. § 1380-85 (Fl. 2019), <https://www.flsenate.gov/Session/Bill/2019/7066/Amendment/766844/PDF> [<https://perma.cc/S2RW-8Q7K>].

168. Lawrence Mower & Langston Taylor, *Florida Ruled Felons Must Pay to Vote. Now, It Doesn't Know How Many Can*, TAMPA BAY TIMES (Oct. 11, 2020), <https://www.tampabay.com/news/florida-politics/elections/2020/10/07/florida-ruled-felons-must-pay-to-vote-now-it-doesnt-know-how-many-can/> [<https://perma.cc/2UHJ-PN6Y>].

169. See FLA. STAT. §§ 104.011, 104.041. Although willfulness and a showing of fraud are required, respectively, for conviction, see *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1307 (N.D. Fla. 2019), *aff'd sub nom. Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020), not everyone is legally literate enough to understand that.

provides immunity from prosecution for illegal voting to those who registered to vote in good faith from January 8, 2019 (the date Amendment 4 took effect) to July 1, 2019 (SB 7066's effective date)¹⁷⁰— a six-month window to navigate public records to make certain voter eligibility or risk prosecution. The brevity of this period undoubtedly deterred would-be felon voters, a class of individuals that is understandably afraid of re-entering the criminal justice system.

The bill was passed with voting completely along party lines, with twenty-three years from twenty-three Republican Senators and seventeen nays from seventeen Democratic Senators.¹⁷¹ The next day, the House similarly voted by party, with not a single Democratic House member voting to pass SB7066.¹⁷² Governor DeSantis then signed the bill into law.¹⁷³ Republican lawmakers are undeniably and solely responsible for diminishing the force of Amendment 4.

The exact words of the Amendment do not mention fines, fees, or restitution but instead explicitly list “parole or probation.”¹⁷⁴ Florida voters did not vote for a restoration process that excludes felons who have not paid LFOs. The Republican-controlled legislature,¹⁷⁵ in cooperation with the Governor’s Office,¹⁷⁶ was able to counteract the will of state-wide voters and deny voting rights to felons in Florida.

C. *The New Jim Crow Poll Tax*

People in the criminal justice system are already disproportionately indigent as compared to the general population.¹⁷⁷ A civil, collateral

170. See SB 7066, *supra* note 162, at § 1446-50; CBS NEWS, *supra* note 126; CS/SB 7066: *Election Administration*, FLA. SENATE (July 1, 2018), <https://www.flsenate.gov/Session/Bill/2019/7066> [<https://perma.cc/HQ26-CU6Y>].

171. Fla. S. Vote Count, CS/SB 7066, 2019 Reg. Sess. (Fla. 2019), https://www.flsenate.gov/Session/Bill/2019/7066/Vote/SenateVote_s07066c1005.PDF [<https://perma.cc/XYN2-JEFH>]; Florida State Senate elections 2018, BALLOTPEdia, https://ballotpedia.org/Florida_State_Senate_elections_2018 [<https://perma.cc/JCQ4-BUGL>].

172. *Bill: SB7066: Roll call for: House: Third Reading RCS#372*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/1089873> [<https://perma.cc/W8Z9-7PW4>] (last visited Oct. 5, 2020).

173. Staff, *News Releases: Governor Ron DeSantis Signs Seven Bills and Vetoes One Bill*, FL GOV (June 28, 2019), <https://www.flgov.com/2019/06/28/governor-ron-desantis-signs-seven-bills-and-vetoes-one-bill/> [<https://perma.cc/GB3B-3W7B>].

174. FLA. CONST. art. VI., § 4 (2018).

175. See BILL TRACK 50, *supra* note 172.

176. See Jones, *supra* note 169.

177. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 369 (2012) (citing *Re-Entry And Reintegration: The Road To Public Safety, Report And Recommendations of the Special Committee on Collateral Consequences of Criminal Proceedings*, N.Y. STATE BAR ASS’N (2006)), <https://nysba.org/app/uploads/2020/02/CollateralConsequencesReport.pdf> [<https://perma.cc/2ZUM-54NK>]. More than 80% of prisoners qualify for indigent legal services. *Id.*

consequence of a felony includes considerable limitations on employment.¹⁷⁸ Few can afford to pay the government a portion of their income that they need when living paycheck to paycheck.¹⁷⁹ Few ever pay the debt that Senate Bill 7066 requires for re-enfranchisement because of these financial constraints.¹⁸⁰

As stated earlier, LFOs consist of victim restitution,¹⁸¹ criminal fines,¹⁸² and court fees.¹⁸³ Defendants may be court-ordered to pay restitution to compensate a victim or fined a penalty for a specific crime as punishment.¹⁸⁴ While fines and restitution are connected to the underlying crime, “user fees” are aimed at recouping the operational costs of the criminal justice system;¹⁸⁵ this surcharge is imposed on the least able to pay in our society and creates a system that generates cyclical recidivism for indigent felons.¹⁸⁶

Between 2013 and 2018, Florida courts levied one billion dollars in felony fines and only 19% has been paid back.¹⁸⁷ A political scientist at the University of Florida, Dr. Daniel Smith, published data which shows more than 80% of people with felony records in Florida have outstanding LFOs.¹⁸⁸ Therefore about 1.1 million of the 1.4 million felons will now need to “pay up” before gaining voting rights because of Senate Bill

178. *Id.* at 371.

179. See Daniel Rivero, *Felons Might Have To Pay Hundreds Of Millions Before Being Able To Vote In Florida*, WLRN (Jan. 20, 2019), <https://www.wlrn.org/post/felons-might-have-pay-hundreds-millions-being-able-vote-florida> [<https://perma.cc/WUY7-Y26F>]; March Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD., 309, 314 (2017) (citing one study that revealed that the median ex-felon owes roughly 75% of their annual income to the state).

180. See Rivero, *supra* note 179.

181. See Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 94 (2014). A Colorado defendant was ordered to pay \$22,509 in restitution to the police department because an officer crashed her vehicle while pursuing the eluding defendant. *Id.* at 95. The defendant was not responsible for the patrolwoman’s accident and was nowhere near when it happened. *Id.* Restitution is not afforded the constitutional checks that are normally provided for punishment, so courts have plenty of leeway when assessing restitution for a crime. *Id.*

182. Cammett, *supra* note 177, at 356. As an example of a fine, drug trafficking carries a mandatory fine of \$25,000 to \$500,000 per count in Florida. See Rivero, *supra* note 179.

183. Meredith & Morse, *supra* note 179, at 312 (citing R. Barry Ruback & Valerie Clark, *Economic Sanctions in Pennsylvania: Complex and Inconsistent*, 49 DUQ. L. REV. 751 (2011)).

184. See Meredith & Morse, *supra* note 179.

185. Cammett, *supra* note 178, at 353.

186. *Id.* at 354. Often the fees are used to fund state budgets that are unrelated to the criminal justice system. See Meredith & Morse, *supra* note 179, at 313. A 2016 report showed that Alabama counties use defendant fees for pay raises for law enforcement and county employees, among other things. *Id.*

187. Rivero, *supra* note 179.

188. See John Kennedy, *Florida law that critics call ‘poll tax’ faces federal court test*, FLA. TIMES-UNION (Oct. 4, 2019, 7:06 PM), <https://www.jacksonville.com/news/20191004/florida-law-that-critics-call-poll-tax-faces-federal-court-test> [<https://perma.cc/V7MP-KHBH>].

7066.¹⁸⁹ Collection agencies have spent hundreds of thousands of dollars lobbying to keep “cash register justice” practices in place.¹⁹⁰

The inability to pay economic sanctions prevents people of limited means from voting.¹⁹¹ This impediment is what some scholars have called the wealth-based penal disenfranchisement system.¹⁹² Including Florida, eight states require full payment of restitution, fines, fees, or a combination to qualify for re-enfranchisement by state law.¹⁹³

In addition to independent payment requirements, payment requirements as conditions for parole or probation are widespread across jurisdictions and further exacerbate the wealth-based penal disenfranchisement system.¹⁹⁴ In this common scenario, those who are unable to afford any fees associated with parole or probation and who live in a state that restores voting rights only after completion of supervision are excluded from the franchise because of their indigency. Besides Maine and Vermont, where felon disenfranchisement is eradicated, some form of the wealth-based penal disenfranchisement system exists or is authorized in every state.¹⁹⁵

The wealth-based penal disenfranchisement system is the modern-day poll tax. Both achieve the same result: preventing people of limited financial means from access to the ballot box. This classist, segregationist practice finds a familiar home in Florida jurisprudence.

IV. CONSTITUTIONALITY OF FLORIDA’S PAY-TO-VOTE SCHEME

Governor DeSantis’ request for an advisory opinion from the Florida Supreme Court in August 2019 asked the court to determine whether “completion of all terms of sentence” in article VI, section 4 of the Florida Constitution encompasses the completion of all court-ordered LFOs as part of a felony sentence.¹⁹⁶ Notably, the Governor made clear he did not

189. *See id.*

190. Mark Joseph Stern, *Florida Republicans Are Sabotaging a Constitutional Amendment That Gave Felons the Right to Vote*, SLATE (Mar. 20, 2019, 4:33 PM), <https://slate.com/news-and-politics/2019/03/florida-republicans-felon-voting-rights-amendment-4.html> [<https://perma.cc/UM24-NTKV>].

191. *See* Colgan, *supra* note 64, at 74–76.

192. *See, e.g., id.* at 74.

193. *Id.* at 71–72, 71 n.1. Four more states require full payment of economic sanctions dictated by state clemency procedures in order to file for a restoration application. *Id.* at 72. Several jurisdictions mandate provisional restoration through ongoing payments to clear criminal debt and thereby maintain voter eligibility. *Id.* at 74.

194. *See id.* at 77.

195. *Id.* at 84 (citing ME. STAT. tit. 21-A, § 111 (2017); VT. STAT. ANN. tit. 17, § 2121 (2018)).

196. Letter from Ron DeSantis, Governor of Fla. to Charles T. Cannady, C.J. of Fla. Sup. Ct. 1, No. SC19-1341 (Aug. 9, 2019); FLA. CONST. art. IV., § 1(c) (stating the Governor may request an advisory opinion from the Florida Supreme Court to clarify legal issues). Governor Askew requested an advisory opinion in 1975 regarding the Florida Correctional Reform Act. *See supra*

ask the Court to address any issues regarding § 98.0751 or its constitutionality.¹⁹⁷

In this context, it is worth recalling that DeSantis appointed three justices to the Florida Supreme Court soon after taking office, creating a six-to-one conservative majority that was likely reluctant to enforce the new amendment earnestly.¹⁹⁸ On January 16, 2020, the expected outcome was announced in the Supreme Court's *per curiam* decision, which stated that "completion of all terms of sentence" does encompass restitution, fines, and fees.¹⁹⁹ The justices relied on a textualist approach that read "all terms" to include all obligations of sentencing, not just the obligations listed in article XI, section 4: probation and parole.²⁰⁰

The purview of the advisory opinion is only to clarify the language of one phrase in the 2018 Amendment 4 text.²⁰¹ But because the Florida Supreme Court is the final arbiter of the state constitution, it is no longer relevant that the implementation bill attempted to redefine the scope of the amendment to article XI, section 4.²⁰² Now, the state constitution itself had been interpreted to mean what § 98.0751 dictates: felons are required to pay all LFOs before being allowed to vote.²⁰³

As Justice Robert Luck noted during oral arguments, an advisory opinion is not legally binding on issues of constitutionality.²⁰⁴ As the state's legislature, executive, and judicial branch each appears hostile to broadening felon voting rights, the federal judiciary was the best option for a resolution favorable to hopeful-felon voters.

note 60; *see also* Initial Brief of Secretary of State, Laurel M. Lee, Advisory Op. to the Governor, No. SC19-1341 (2019) 2019 Fl. S. Ct. Briefs LEXIS 1289.

197. Letter from Ron DeSantis to Charles T. Cannady, *supra* note 196, at 4 (referencing 2019 Fla. Laws c. 2019-162, later codified as § 98.0751).

198. *See* Stern, *supra* note 190.

199. Advisory Op. to Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, 288 So. 3d 1070, 1072, 1075 (Fla. 2020), *aff'd*, Jones v. Governor of Fla., 28 Fla. L. Weekly 1823 (11th Cir. 2020).

200. *Id.* at 1078, 1082; FLA. CONST. art. XI, § 4.

201. *Id.* at 1070, 1084.

202. *See* Letter from Ron DeSantis, Governor of Fla. to Charles T. Cannady, C.J. of Fla. Sup. Ct. at 1, No. SC19-1341 (Aug. 9, 2019) (describing how "[o]n November 6, 2018, Florida voters approved a constitutional amendment, known as Amendment 4, to automatically restore voting rights for some convicted felons—namely, felons who have been convicted of offenses other than murder or a 'felony sexual offense' upon 'completion of all terms of sentence including parole or probation.' See Art. VI, § 4, Fla. Const. (2018)").

203. Advisory Op. to Governor, 288 So. 3d at 1075.

204. Lloyd Dunkelberger, *DeSantis Asks Florida Supreme Court to Clarify Whether Felons Must Pay Legal Costs Before Having Their Voting Rights Restored*, FLA. PHOENIX (Nov. 6, 2019), <https://www.floridaphoenix.com/2019/11/06/desantis-asks-florida-supreme-court-to-clarify-whether-felons-must-pay-legal-costs-before-having-their-voting-rights-restored/> [https://perma.cc/FT8U-P2SZ].

A. Felon Disenfranchisement Precedent

The U.S. Supreme Court has ruled on the legality of felon disenfranchisement only twice. The first time was in *Richardson v. Ramirez*²⁰⁵ in 1974. In *Richardson*, a class action brought by felons challenged California state constitutional provisions that disenfranchised anyone convicted of an “infamous crime.”²⁰⁶ The Court held that felons could be barred from voting without violating the Fourteenth Amendment because of an apportionment provision in section 2 of the amendment.²⁰⁷

The section allows states to disenfranchise persons convicted of “participation in rebellion, or other crime” without affecting congressional representation.²⁰⁸ The Court read this as an “affirmative sanction” for felon disenfranchisement, and lower courts have consistently construed the *Richardson* decision broadly to hold that felons lack a fundamental right to vote.²⁰⁹

The second time a felon disenfranchisement law was reviewed by the highest court in the nation was in *Hunter v. Underwood*²¹⁰ in 1985.²¹¹ The *Hunter* plaintiffs asserted that a provision in the Alabama Constitution that disenfranchised those convicted of any crime involving moral turpitude was enacted to perpetuate racial discrimination and bar a majority of Black voters from the franchise.²¹² The Court held that the provision violated the Equal Protection Clause because proof of a blatant and overt intent to discriminate on the basis of race was met.²¹³ Justice Rehnquist indicated that, even though on its face it was racially neutral, original enactment was motivated by desire to discriminate against Blacks and the provision had a racially discriminatory impact since its adoption.²¹⁴

Felon disenfranchisement, by itself, is constitutionally sound: states have authority to disenfranchise felons because *Richardson* is good law.²¹⁵ However, the precedent in *Hunter* made a race-based challenge achievable, if proof of a blatant and overt intent to discriminate on the

205. 418 U.S. 24 (1974).

206. *Id.* at 26–27.

207. *Id.* at 25.

208. U.S. CONST. amend. XIV, § 2. See Abigail M. Hinchcliff, *The “Other” Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L.J. 194, 196 (2011).

209. Hinchcliff, *supra* note 208, at 196–98.

210. 471 U.S. 222 (1985).

211. Hinchcliff, *supra* note 208, at 211.

212. *Hunter*, 471 U.S. at 223–24 (1985).

213. *Id.* at 233.

214. *Id.* at 227. Justice Rehnquist emphasized that “zeal for white supremacy ran rampant at the [constitutional] convention.” *Id.* at 229.

215. An October 5, 2020, Shepard’s search for opinions overruling *Richardson v. Ramirez*, 418 U.S. 24, yielded no such opinions.

basis of race can be found in the law's original enactment.²¹⁶ *Hunter* was cited to support a challenge against Florida's disenfranchisement practice in *Johnson v. Bush*,²¹⁷ a 2002 suit which alleged the law "arbitrarily and irrationally denies them the right to vote because of race, discriminates against them on account of race, and imposes an improper poll tax and wealth qualification on voting."²¹⁸ The district court dismissed the case with prejudice, holding that the law did not violate the U.S. Constitution and the Voting Rights Act nor was it enacted for racially discriminatory motives.²¹⁹ Regarding restoration, the Court held that it was not the plaintiffs' right to vote but the restoration of civil rights on which payment of the fee was being conditioned.²²⁰ We continue to see this distinction being made even though the right to vote is a natural extension of civil rights, and in practice, the two are equivalent.²²¹

Johnson appealed to the Eleventh Circuit, which confirmed on rehearing *en banc* that Florida's practice of excluding otherwise-qualified voters from the ballot does not violate the Equal Protection Clause because a later amended version of the felon disenfranchisement law removed the racist "taint" from the original enactment.²²² Furthermore, the Court held that the Voting Rights Act's prohibition of voting qualifications that result in abridgement of the right to vote with respect to race is not applicable to felon disenfranchisement laws due to congressional statements reflecting legislators' intention to exempt felons from coverage.²²³

As disenfranchisement reform has taken shape nationwide in the past two decades,²²⁴ felon voting rights litigation focused away from challenging existing disenfranchisement laws and toward challenging re-enfranchisement schemes. Shortly before the passage of Amendment 4,²²⁵ the Eleventh Circuit ruled on a challenge to Florida's now outdated

216. *Hunter*, 471 U.S. at 233.

217. 214 F. Supp. 2d 1333 (S.D. Fla. 2002)

218. *Id.* at 1335, 1338 (citing *Hunter v. Underwood*, 471 U.S. 222 (1985)), *aff'd in part, rev'd in part and remanded sub nom. Johnson v. Governor of State of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *vacated en banc*, 377 F.3d 1163 (11th Cir. 2004).

219. *Id.* at 1342–44.

220. *Id.* at 1343.

221. This jurisprudence was first foreshadowed in an unpublished Fourth Circuit case, *Howard v. Gilmore*, in which a pro se litigant challenged a Virginia law that required a payment of ten dollars to apply for restoration on the grounds that it was a poll tax in violation of the Twenty-fourth Amendment. No. 99-2285, slip op. at 1–2 (4th Cir. Feb. 23, 2000).

222. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217, 1224 (11th Cir. 2005). Florida's original enactment of the disenfranchisement law in the constitutional convention of 1865 was blatantly racist and aimed at barring Black people from voting. *See supra* Part II. It is unclear how later amendments can remove a racist "taint" if a racial impact is still prevalent.

223. *Id.* at 1233.

224. *See supra* Part I.B.

225. *See De La Garza, supra* note 5.

re-enfranchisement scheme in *Hand v. Scott*.²²⁶ The plaintiffs alleged the State Executive Clemency Board’s “unbounded discretion will yield an unacceptable ‘risk’ of unlawful discrimination” in re-enfranchisement.²²⁷ The trial court enjoined the Board from enforcing the restoration process holding the Board’s restoration process did not have “a discriminatory purpose or effect” with respect to race.²²⁸

Race discrimination is difficult to prove within disenfranchisement laws, and Florida litigants have not been successful.²²⁹ But § 98.0751 is more indicative of wealth discrimination which requires further analysis. With little binding case law on the subject of restoration qualified by a payment mandate,²³⁰ it is imperative to look to other jurisdictions to see how appellate courts have ruled on this subject.

B. Appellate Court Treatment of Restoration Laws with LFO Requirements

The Supreme Court has held multiple times that wealth is not a suspect classification;²³¹ therefore, equal protection claims based on indigency are only subject to rational-basis review, instead of the heightened scrutiny applied in a race-based discrimination challenge, unless the two exceptions from *M.L.B. v. S.L.J.*²³² apply.²³³ The *M.L.B.* exceptions are claims relating to either voting or criminal and quasi-criminal processes.²³⁴

Despite both *M.L.B.* exceptions seeming applicable, the approach taken by appellate courts in both the federal and state judiciaries reflects a jurisprudence that rejects the rigorous analysis applied to the constitutionally protected right to vote and instead reviews a state’s restoration law with the highly deferential rational-basis review. Each appellate court that reviewed a re-enfranchisement scheme similar to Florida’s did so under rational-basis review and did not find any constitutional violation.²³⁵ In this line of cases, the state’s interest in

226. *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018).

227. *Id.* at 1208.

228. *Id.* at 1207, 1208.

229. *See, e.g.*, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002).

230. *See Hinchcliff, supra* note 208, at 197.

231. *See Papasan v. Allain*, 478 U.S. 265, 283–84 (1986); *Maher v. Roe*, 432 U.S. 464, 470–71 (1977).

232. 519 U.S. 102 (1996).

233. *See id.* at 105.

234. *Id.* at 104–05 (holding that “[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license”). *Id.* at 105. The second exception also seems applicable when considering that many financial obligations in a criminal sentence are a punitive measure meant to punish the convicted person. *See id.*

235. To survive rational basis scrutiny, a statute need only be rationally related to legitimate government interests and “must be upheld against equal protection challenge if there is any

collecting LFOs and requiring felons to complete their entire criminal sentence is deemed rationally related to a legitimate government interest and pass constitutional muster.²³⁶

The Supreme Court of Washington, sitting *en banc* in *Madison v. State*,²³⁷ reviewed the constitutionality of Washington's disenfranchisement scheme which, similar to SB7066, requires full payment of LFOs before restoration of voting rights.²³⁸ Three respondent felons alleged that the scheme violated the Equal Protection Clause because it denied them the right to vote based on their wealth and violated the Twenty-fourth Amendment's prohibition of a state conditioning the right to vote on the payment of a tax.²³⁹

Referencing *Richardson*, the court held that since the plaintiffs had no fundamental right to vote and were not in a suspect class, strict scrutiny did not apply to the statutory scheme.²⁴⁰ The court recognized that Washington's LFO requirement "may impact felons disparately based on their differing income statuses, [but] this alone does not establish an equal protection violation."²⁴¹ Lastly, the court distinguished the case from *Harper v. Virginia State Board of Elections*,²⁴² by noting that Virginia citizens have a fundamental right to vote but felons do not.²⁴³

Justice O'Connor, sitting by designation for the Ninth Circuit in *Harvey v. Brewer*,²⁴⁴ employed similar reasoning when upholding Arizona's statutory scheme that automatically restored the right to vote to one-time felons who completed their sentence and paid all fines and restitution.²⁴⁵ Justice O'Connor wrote that rational-basis review was the proper standard because statutory re-enfranchisement was not a

reasonably conceivable state of facts that could provide a rational basis for the classification" between persons. *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). *See, e.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010); *Madison v. State*, 163 P.3d 757, 769 (Wash. 2007).

236. *See, e.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 753 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010); *Madison v. State*, 163 P.3d 757, 769 (Wash. 2007).

237. 163 P.3d 757 (Wash 2007).

238. *Madison*, 163 P.3d at 761–62 (citing WASH. REV. CODE ANN. § 9.94A.030 (West 2020)).

239. *Id.* at 761.

240. *Id.* at 768–69.

241. *Id.* at 769.

242. 383 U.S. 663 (1966). The *Harper* Court invalidated section 173 of the Virginia Constitution in ruling that poll taxes in all elections are unconstitutional as a denial of equal protection of the laws. *Id.* at 666. The Court called it an "invidious discrimination" prohibited by the Constitution for any electoral standard to be tied to voters' income and compared wealth discrimination to denying the right to vote based on race. *Id.* at 668. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*

243. *Madison*, 163 P.3d at 670.

244. 605 F.3d 1067 (9th Cir. 2010). *Id.* at 1070 n.*.

245. *Harvey*, 605 F.3d at 1078.

fundamental right, but a benefit that Arizona could choose to withhold entirely.²⁴⁶ Justice O'Connor had "little trouble concluding" that Arizona has a rational basis for only restoring the rights of felons who have fully completed all terms of their sentence, including payment of LFOs.²⁴⁷

Shortly afterward, the Sixth Circuit followed suit in *Johnson v. Bredesen*,²⁴⁸ finding that Tennessee had a rational basis for the state's re-enfranchisement scheme, which conditioned restoration on payment of court-ordered victim restitution and child support obligations.²⁴⁹ Tennessee's re-enfranchisement scheme was found to not have abridged any fundamental right nor have targeted a suspect class.²⁵⁰ Based on this trend, one would have expected for the Amendment 4 litigation to yield a result similar to *Madison, Harvey, and Bredesen*.

C. Amendment 4 Litigation

The litigation was initiated in the U.S. District Court for the Northern District of Florida by seventeen individual felons, in a consolidated suit, who had completed their custody and supervision but were unable to pay the LFOs associated with their criminal sentence.²⁵¹ Long before trial, in October 2019, District Judge Hinkle granted a preliminary injunction to stop the DeSantis Administration from preventing the plaintiffs from applying or registering to vote based only on a failure to pay a financial obligation that the plaintiffs asserted they genuinely could not pay.²⁵² The preliminary injunction in *Jones v. DeSantis*²⁵³ only applied to the named plaintiffs.²⁵⁴

The preliminary injunction was granted because the court concluded that the plaintiffs were likely to show that Florida's re-enfranchisement scheme constitutes wealth discrimination in violation of the Equal Protection Clause.²⁵⁵ The court found that felons would suffer irreparable injury if they were precluded from voting; the injury to felons caused by the state's refusal to re-enfranchise them outweighed damage to the state;

246. *Id.* at 1079.

247. *Id.* However, Justice O'Connor warned that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass the rational basis test" but did not address that issue since no plaintiff alleged indigency. *Id.* at 1080.

248. 624 F.3d 742 (6th Cir. 2010).

249. *Id.* at 747.

250. *Id.* at 746.

251. *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1289 (N.D. Fla. 2019), *aff'd sub nom. Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020). This was before the Advisory Opinion from the Florida Supreme Court was issued, so at this point, SB7066 alone was still being challenged.

252. *Id.* at 1284, 1309–10.

253. 410 F. Supp. 3d 1284 (N.D. Fla. 2019).

254. *See id.* at 1310. Class certification had not occurred this early on in the litigation.

255. *See id.* at 1309.

and that public interest favored a preliminary injunction.²⁵⁶

Citing a footnote in *Johnson*,²⁵⁷ the court stated that the right to vote cannot be made to depend on an individual's financial resources.²⁵⁸ The preliminary injunction made clear that Florida can meet its constitutional obligation if a lack of resources can be addressed as part of the same overall process by which other felons may obtain the right to vote.²⁵⁹ Broad discretion was left to the State to devise a system for complying.²⁶⁰

Governor DeSantis filed an interlocutory appeal in the Eleventh Circuit, and the court affirmed the preliminary injunction.²⁶¹ Writing for the Eleventh Circuit in *Jones I*,²⁶² Circuit Judges R. Lanier Anderson and Stanley Marcus, along with District Judge Barbara J. Rothstein sitting by designation, agreed that the plaintiffs were likely to succeed on their Equal Protection claims of wealth discrimination.²⁶³ The panel explained that "settled Supreme Court precedent instructs us to employ heightened scrutiny where the State has chosen to 'open the door' to alleviate punishment for some, but mandates that punishment continue for others, solely on account of wealth."²⁶⁴ This decision marked the first time an appellate court applied heightened scrutiny instead of a rational-basis review to a restoration process.²⁶⁵ Once Florida "opened the door" to felon re-enfranchisement by passing Amendment 4, the law became subject to a heightened level of scrutiny.²⁶⁶

Furthermore, the panel indicated that if a "substantial enough

256. *Id.* at 1310.

257. 405 F.3d 1214 (11th Cir. 2005).

258. *Id.* at 1300–01. The court insisted that the footnote was not dictum because it was necessary for the decision in *Johnson* and therefore binding. *Id.* In relevant part, the footnote simply states, "Access to the franchise cannot be made to depend on an individual's financial resources." See *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005).

259. *Id.* at 1301.

260. *Id.* at 1300.

261. *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020) [hereinafter *Jones I*].

262. 950 F.3d 795 (11th Cir. 2020).

263. *Jones*, 950 F.3d at 827–28. Subsequent court documents refer to this opinion as *Jones I*; for clarity and brevity, this Article will too.

264. *Id.* at 817. The Eleventh Circuit supports this with an in-depth analysis of the *Griffin-Bearden* line of cases. See *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (holding that a state may not revoke probation based on the failure to pay a fine the defendant is unable, through no fault of his own, to pay); *Zablocki v. Redhail*, 434 U.S. 374, 377 (1978) (holding that a statute may not require an individual to show he had satisfied court-ordered child support before being able to marry); *Tate v. Short*, 401 U.S. 395, 399 (1971) (holding that a state cannot imprison under a fine-only statute on the basis that an indigent defendant cannot pay a fine); *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (holding that a period of imprisonment cannot be extended beyond the statutory maximum on the basis that an indigent cannot pay a fine); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that a state may not require criminal defendants to purchase a certified copy of the trial record to appeal their sentences without factoring in indigency).

265. See *Jones I*, 950 F.3d at 808–09.

266. *Id.* at 820.

proportion” of the Floridian felon population is genuinely unable to pay the LFOs associated with their criminal sentence, then the restoration scheme is unlikely to even pass rational-basis review.²⁶⁷ The court reasoned that no revenue collection interest can exist for the state if the *mine-run*, or overwhelming majority, of felons is unable to pay LFOs.²⁶⁸ The same panel composition then denied petitions for rehearing and rehearing *en banc*,²⁶⁹ seemingly signaling that the entire Eleventh Circuit bench approved of the holding.²⁷⁰

In April of 2020, an eight-day bench trial for *Jones v. DeSantis*²⁷¹ occurred.²⁷² Three plaintiffs of the consolidated cases represented a class for their Twenty-Fourth Amendment claim, consisting of all persons who would be eligible to vote in Florida but for unpaid financial obligations.²⁷³ The same plaintiffs also represented a subclass for their Equal Protection Clause claim, consisting of all persons who would be eligible to vote in Florida but for unpaid financial obligations that they assert they are genuinely unable to pay.²⁷⁴ In late May, Judge Hinkle entered a permanent injunction, *Jones II*, finding the pay-to-vote scheme unconstitutional and that it failed even rational-basis scrutiny.²⁷⁵

Judge Hinkle closely followed the Eleventh Circuit’s holding in *Jones I*, but *Jones II* differs greatly because the trial allowed for the full development of a factual record.²⁷⁶ This record showed that the mine-run of felons impacted by the LFO requirement are genuinely unable to pay the required amount.²⁷⁷ Further, the court found that “[t]he State ha[d]

267. *Id.* at 814.

268. *Id.* at 812, 814. The court also shot down the State’s claimed interest in deterrence and “punishment for punishment’s sake.” *Id.* at 827.

269. On Petition(s) for Rehearing and Petition(s) for Rehearing En Banc at 1, *Jones I*, 950 F.3d 795 (11th Cir. 2020) (No. 19-14551).

270. Alabama, Arizona, Arkansas, Georgia, Kentucky, Louisiana, Nebraska, South Carolina, Texas, and Utah all joined as amici curiae in support of the petition to rehear the case. Brief of Alabama et. al., as Amici Curiae Supporting Defendants-Appellants, *Jones I*, 950 F.3d 795 (No. 19-14551).

271. No. 19CV300, 2020 WL 2618062 (N.D. Fla. May 24, 2020) [hereinafter *Jones II*].

272. See Carolina Bolado, *Fla. Judge Preps For Video Trial In Ex-Felon Voting Rights Suit*, LAW360 (Apr. 2, 2020, 9:38 PM), <https://www.law360.com/articles/1259694/fla-judge-preps-for-video-trial-in-ex-felon-voting-rights-suit> [<https://perma.cc/BFA6-LJGR>]; *Case: Voting With A Felony Conviction In FL*, NAACP LEGAL DEF. & EDU. FUND, INC. (JULY 1, 2020), <https://www.naacpldf.org/case-issue/voting-with-a-felony-conviction-in-fl/> [<https://perma.cc/AAQ3-59UB>].

273. *Jones v. DeSantis*, No. 19CV300, 2020 WL 2618062, at *1–2 (N.D. Fla. May 24, 2020), *vacated*, *Jones v. Governor of Fla.*, No. 20-12003, 2020 WL 5493770 (11th Cir. Sept. 11, 2020).

274. *Id.*; Order Certifying a Class and Subclass, *Jones I*, 19-cv-00300 at 7, 2020 WL 2618062 (N.D. Fla. filed Apr. 7, 2020).

275. See *Jones*, No. 19CV300, 2020 WL 2618062 at *47.

276. *Id.* at *15–16.

277. *Id.*

shown a staggering inability to administer the pay-to-vote system.”²⁷⁸ Due to a number of administrative difficulties—including an absence of records, a lack of access to records, and inconsistent records—“determining the amount of a felon’s LFOs is sometimes easy, sometimes hard, sometimes impossible.”²⁷⁹

The Secretary of State’s Division of Elections was not allocated any funds by the Legislature to hire new employees to screen and process the influx of felon voter registrations.²⁸⁰ The Court found that at the current processing rate of the Division, it would likely take until the 2030s to complete the voter registration of the felon population re-enfranchised by Amendment 4.²⁸¹ These factual records emphasized the irrationality of Florida’s restoration scheme and led the court to hold that the scheme also violates due process.²⁸²

The court also analyzed LFOs as exactions to address the plaintiffs’ Twenty-fourth Amendment claim.²⁸³ Relying on the Supreme Court’s “functional approach” articulated in *National Federation of Independent Business v. Sebelius*,²⁸⁴ the court determined that LFOs do not constitute a poll tax, but the “other tax” of the Twenty-Fourth Amendment, since the LFOs’ “primary purpose [is] [to] rais[e] revenue to pay for government operations.”²⁸⁵ Therefore, the court held that this tax interfered with the right to vote and abridged the Twenty-Fourth Amendment.²⁸⁶

The remedies in the permanent injunction were sensible and realistic. Felons that the State previously determined to be indigent would benefit from a rebuttable presumption of inability to pay their LFOs.²⁸⁷ Felons who are unsure of their eligibility to vote can seek an advisory opinion from the Division of Elections by filing a form online or in-person.²⁸⁸ If there is no timely response from the Division, the voter is granted

278. *Id.* at *16.

279. *Jones I*, 2020 WL 2618062, at *17, *18, *20. An example of the named plaintiff, Clifford Tyson, is given by the Court to show how unmanageable the task of determining eligibility is: “[a]n extraordinarily competent and diligent financial manager in the office of the Hillsborough County Clerk of Court, with the assistance of several long-serving assistants, bulldogged Mr. Tyson’s case for perhaps 12 to 15 hours. The group had combined experience of over 100 years. They came up with what they believed to be the amount owed. But even with all that work, they were unable to explain discrepancies in the records.” *Id.* at *20.

280. *Id.* at *24.

281. *Id.*

282. *Id.* at *36–37.

283. *Id.* at *27.

284. 567 U.S. 519 (2012).

285. *Id.* at *28–29 (citing *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 565–66 (2012)).

286. *Jones I*, 2020 WL 2618062, at *29.

287. *Id.* at *42–43.

288. *Id.*

immunity from prosecution for voting illegally.²⁸⁹

The State's severability argument is worth exploring. The defense argued that Amendment 4 was not severable, meaning if the pay-to-vote scheme was found unconstitutional, the entire amendment should fail, disenfranchising 1.4 million people.²⁹⁰ The State preferred to strip 1.4 million felons of their right to vote rather than allow them to vote without paying. Because the LFO payment is not explicitly mentioned anywhere in the amendment and most Floridians likely had no idea it would later be read into its text, the court found it severable.²⁹¹ Not only was this severability argument completely unnecessary, but it is also extraordinarily telling of the State's interests: voting rights are simply not a priority to Governor DeSantis.

DeSantis and his legal team filed an appeal a few days after the *Jones II* judgment was released.²⁹² On July 1st, the Eleventh Circuit granted the State's petition for initial hearing *en banc* and granted the State's motion to stay the permanent injunction pending appeal.²⁹³ This order puts on pause everything that was decided in *Jones II* and allowed Florida's pay-to-vote scheme to continue in the months immediately preceding the November 2020 presidential election. This was a curious, if not suspicious, judicial maneuver for a few reasons.

First, the Eleventh Circuit provided no reasons for their decision in the order.²⁹⁴ Second, this judgment was announced just nineteen days before the voter registration deadline for Florida's primary election in August.²⁹⁵ Third, Circuit Judges Luck and Lagoa sat as Justices of the Florida Supreme Court during Governor DeSantis' Advisory Opinion on Amendment 4.²⁹⁶ President Trump appointed them both to the Eleventh Circuit after the advisory opinion was issued; their appointment helped

289. *Id.* at *43.

290. *Id.* at *40; De La Garza, *supra* note 5.

291. *Jones I*, 2020 WL 2618062, at *42. Even conceding that some voters may have also adopted the textualist approach utilized by the Florida Supreme Court to read "all terms" to include LFOs, no voter could have guessed that indigent felons would be barred by the amendment. *Id.* at *41.

292. Brief of Defendants-Appellants at 11, *Jones I*, No. 20-12003, 2020 WL 2618062.

293. *Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020) (No. 20-12003), 2020 WL 4012843, at *42.

294. *See id.*

295. *Id.*; *Election Dates for 2020*, FLA. DIV. OF ELECTIONS, <https://dos.myflorida.com/elections/for-voters/election-dates/> [<https://perma.cc/8E3X-FV44>] (last visited Oct. 18, 2020).

296. Michael Moline, *U.S. Senate Dems ask Lagoa, Luck why they didn't recuse from Amendment 4 appeal, as promised*, FLA. PHOENIX (July 22, 2020), <https://www.floridaphoenix.com/2020/07/22/u-s-senate-dems-ask-lagoa-luck-why-they-didnt-recuse-from-amendment-4-appeal-as-promised/> [<https://perma.cc/GUL4-XT2H>]. Both judges had promised the U.S. Senate Judiciary Committee that they would recuse themselves from all cases in which they had participated as Florida Supreme Court Justices. *Id.*

flip the court into a conservative majority.²⁹⁷ Lastly, there was a decision to by-pass the customary first step and grant an initial hearing *en banc*,²⁹⁸ which ensured the hearing was heard by a conservative majority. This course of conduct marked a departure from standard operating procedure; a three-judge panel will almost always preside over initial hearings at the circuit level.²⁹⁹ In this case, a three-judge panel might have included the two more-liberal Circuit Judges that presided over *Jones I*.³⁰⁰

The *Jones* plaintiffs applied to the U.S. Supreme Court to vacate the stay; that application was denied with another reason-barren order.³⁰¹ Justice Sonia Sotomayor, joined by Justices Ruth Bader Ginsburg and Elena Kagan, wrote a scathing dissent.³⁰² Justice Sotomayor believes the Court erred in refusing to vacate the stay because all three *Coleman* prongs were met.³⁰³ Most importantly, the third prong, the lower court being “demonstrably wrong in its application of accepted standards in deciding to issue the stay,” was met by the Eleventh Circuit’s failure to defer to the factual findings from the *Jones II* trial; the circuit court owed deference to that record under *Purcell v. Gonzalez*.³⁰⁴

Justice Sotomayor concludes her dissent by identifying the irony of the Court having recently granted a stay in *Republican National*

297. See Tim Ryan, *Trump Flips Another Circuit to Majority GOP Appointees*, COURTHOUSE NEWS SERV. (Nov. 20, 2019), <https://www.courthousenews.com/trump-flips-another-circuit-to-majority-gop-appointees/> [<https://perma.cc/MKJ6-WBQG>].

298. See Fed. R. App. P. 35.

299. *Id.* at 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered”); see Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 66 (2017) (citing Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009)).

300. See Tom Johnson, *Judicial Profile: Hon. R. Lanier Anderson III U.S. Circuit Judge, Eleventh Circuit Court of Appeals*, ATLANTA: THEN & NOW, 2007 FBA ANNUAL MEETING AND CONVENTION (2007), <https://www.fedbar.org/wp-content/uploads/2019/10/AndersonAugust2007-pdf-3.pdf> [<https://perma.cc/4DJD-9ZJ5>]; David Oscar Markus, *Stanley Marcus to take senior status*, SDFLA BLOG (Sept. 15, 2019), <http://sdfla.blogspot.com/2019/09/stanley-marcus-to-take-senior-status.html> [<https://perma.cc/4QMG-N9SQ>].

301. *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868, at *1 (U.S. July 16, 2020).

302. *Id.* at *1–2 (Sotomayor, J., dissenting). This dissent is one of the last to be joined by the late Justice Ginsburg, who passed away just months later. Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion Of Gender Equality, Dies At 87*, NPR (Sept. 18, 2020, 7:28 PM), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87> [<https://perma.cc/7VYB-9KVG>].

303. *Raysor*, 2020 WL 4006868, at *3 (Sotomayor, J., dissenting) (quoting *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers)). The *Coleman* prongs are: “(1) the case ‘could and very likely would be reviewed here upon final disposition in the court of appeals,’ (2) ‘the rights of the parties . . . may be seriously and irreparably injured by the stay,’ and (3) ‘the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.’” *Id.* (alteration in original).

304. *Id.* (citing *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam)).

*Committee v. Democratic National Committee*³⁰⁵ by brushing aside voter safety during a pandemic to maintain the status quo and allegedly avoid pre-election confusion.³⁰⁶ The permanent injunction in *Jones II* offered remedies that mitigated the uncertainty of the impossibly complicated administrative hurdles of Florida's existing pay-to-vote scheme.³⁰⁷ If avoiding pre-election mayhem was a concern in *R.N.C.*, why did the Court refuse to vacate the stay ordered for the DeSantis Administration right before an election in Florida?³⁰⁸

Fifty-three days before Election Day,³⁰⁹ in *Jones III*,³¹⁰ the Eleventh Circuit in a six-to-four split,³¹¹ reversed the district court's judgment and vacated its injunction.³¹² In a lengthy two-hundred-page opinion, the court held that § 98.0751 does not violate the Equal Protection Clause, does not impose a tax in violation of the Twenty-fourth Amendment, is not void for vagueness, and does not deny due process.³¹³ Although the circuit court in *Jones I* established precedent on this subject,³¹⁴ it was not shocking that now sitting *en banc*,³¹⁵ the court wanted to revisit their earlier holdings.

Writing for the majority was Chief Judge William Pryor, who overruled the previous panel's holding that a heightened scrutiny applies for the Equal Protection claim, and instead utilized the government-friendly, deferential jurisprudence from *Madison*, *Harvey*, and *Bredesen*.³¹⁶ The court agreed with those decisions, holding that felons do not possess a fundamental right to vote,³¹⁷ and even if they did, wealth

305. 140 S. Ct. 1205 (2020).

306. *Raysor*, 2020 WL 4006868, at *3 (Sotomayor, J., dissenting). (citing *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 206 L. Ed. 2d 452 (2020) (per curiam)).

307. *See id.* at *2601.

308. *See* Mark Joseph Stern, *The Supreme Court Just Stopped 1 Million Floridians From Voting in November*, SLATE (July 16, 2020, 3:27 PM), <https://slate.com/news-and-politics/2020/07/supreme-court-florida-felons-poll-tax.html> [<https://perma.cc/E5NE-WNYU>].

309. *See Election Dates for 2020*, FLA. DIV. OF ELECTIONS, <https://dos.myflorida.com/elections/for-voters/election-dates/> [<https://perma.cc/WK5D-Y4RY>] (last visited Oct. 18, 2020).

310. No. 19-cv-00300; No. 19-cv-00304, at *1 (11th Cir. Sept. 11, 2020) [hereinafter *Jones III*].

311. *Jones v. Governor*, No. 19-cv-00300; No. 19-cv-00304, at *1, *81 (11th Cir. Sept. 11, 2020).

312. *Id.* at *60.

313. *Id.* at *10.

314. *Id.* at *6.

315. *Id.* at *9.

316. *Id.* at *69 (citing *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.); *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Madison v. State*, 163 P.3d 757, 767 (Wash. 2007)). Since the Florida law does not extend a term of imprisonment, the court found the earlier panel's analysis of the *Griffin-Bearden* line of cases to be overbroad and unpersuasive. *Id.* at *15, *19–22 (citing *Bearden v. Georgia*, 461 U.S. 660 (1983); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

317. *Jones III* (No. 19-cv-00300; No. 19-cv-00304), at *12 (citing *Harvey*, 605 F.3d at 1079).

is not a suspect classification.³¹⁸ From there, the majority “readily conclude[d]” that the law survives scrutiny because “[t]he people of Florida could rationally conclude that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not.”³¹⁹

Regarding the felons’ Twenty-Fourth Amendment claim, the court held that court costs and fees cannot be a tax because they are legitimate parts of a criminal sentence.³²⁰ Further, the majority differentiated between denials of the right to vote motivated by a person’s failure to pay a tax, which the amendment prohibits, and a voting requirement with a “causal relationship” to the payment of a tax, which is constitutional.³²¹ Based on this reasoning, the justification of the voting qualification in § 98.0751 must have been a failure to pay a tax to prevail on their claim; however, instead, the court finds that the qualification is just a by-product of a legitimate interest in “restoring to the electorate only fully rehabilitated felons who have satisfied the demands of justice.”³²² It seems from this holding that a legitimate interest is able to legitimize a pay-to-vote scheme.

Lastly, the majority found that Florida had not violated the Due Process Clause.³²³ Despite the district court’s acknowledgement that Florida has failed to create a system that allows felons to determine their potential outstanding LFOs, the Eleventh Circuit held that it was not unconstitutionally vague to punish felons for voting illegally, mainly because of the scienter requirement of “knowingly” and because there is no ambiguity in the statute regarding what conduct is incriminating.³²⁴ Putting the final nail in the coffin, the court held that the *Mathews v. Eldridge*³²⁵ due process framework does not apply because the felons were not deprived of the right to vote through adjudicative action, but through legislation.³²⁶

After the majority opinion concluded, Chief Judge Pryor wrote again in a separate one-page concurrence, joined only by Judge Lagoa, to respond to a particular attack from his dissenting colleagues.³²⁷ Judge Jordan, joined by the three other dissenting Circuit Judges, concluded his

318. *Id.* at *14 (citing *Maher v. Roe*, 432 U.S. 464, 470–71 (1977)).

319. *Id.* at *25.

320. *Id.* at *36.

321. *Id.* at *49.

322. *Id.* at *50.

323. *Jones III* (No. 19-cv-00300; No. 19-cv-00304), at *52.

324. *Id.* at *54–55.

325. 424 U.S. 319 (1976)

326. *Jones III* (No. 19-cv-00300; No. 19-cv-00304), at *58–59 (citing 424 U.S. 319, 333–35 (1976)).

327. *Id.* at *61–62 (Pryor, C.J., concurring).

powerful dissent with the following line: “Our predecessor, the former Fifth Circuit, has been rightly praised for its landmark decisions on voting rights in the 1950s and 1960s. I doubt that today’s decision—which blesses Florida’s neutering of Amendment 4—will be viewed as kindly by history.”³²⁸ This concept of being on the wrong side of history must have struck a chord with Chief Judge Pryor: “I write separately to explain a difficult truth about the nature of the judicial role. . . . Our duty is not to reach the outcomes we think will please whoever comes to sit on the court of human history.”³²⁹ The Chief Judge goes on to explain, almost apologetically, that the role of the judiciary is to uphold a devotion to the rule of law and respect political decisions regardless of whether they agree with them.³³⁰ In dramatic fashion, the Chief Judge ends by recognizing that he only answers to “the Judge who sits outside of human history,” presumably his god.³³¹

The *Jones* litigation has been fascinating throughout, but nothing encapsulates the current state of felon voting rights quite like this final exchange between the Chief Judge and the dissenters on his court.³³² In sum: people are growing increasingly supportive of felon voting rights reform; Republican-controlled state governments combat that interest; a minority of liberal judges desire to use the law to fix what they see as moral wrongs; but a majority of conservative judges strictly enforce precedent. I do not foresee any of those four realities changing anytime soon.

CONCLUDING THOUGHTS AND PREDICTIONS

Felon disenfranchisement is an antiquated practice that disproportionately harms indigent communities and communities of color. This scheme has been utilized and reinvented for centuries to silence particularly vulnerable and potentially vocal demographics. What occurred in Florida will happen again in other states if more is not done to push against laws like § 98.0751.³³³ The issue is partisan only to the extent that felons’ civil rights have been suppressed by a particular party. Reform movements and voters need to learn lessons from Florida to ensure the progress of felon voting rights.

It is difficult to predict what is coming down the pike nationally for felon voting rights law. We can be certain that the *Jones* felons will appeal the latest Eleventh Circuit ruling to the U.S. Supreme Court, but based on the Court’s previous refusal to vacate the stay, it is unlikely that

328. *Id.* at *189 (Jordan, J., dissenting) (citations omitted).

329. *Id.* at *61 (Pryor, C.J., concurring).

330. *Id.*

331. *See Jones III* (No. 19-cv-00300; No. 19-cv-00304), at 62.

332. *See id.*

333. FLA. STAT. § 98.0751 (2019).

it will grant certiorari. As the federal judiciary has shifted along the continuum, adopting a more conservative orientation during the Trump Administration,³³⁴ we can expect the jurisprudence in *Jones III* to continue to permeate among sister courts.

An analysis of the political participation of re-enfranchised felons restored from 2007 to 2011 reveals that re-enfranchised felons vote at low rates and without a strong partisan lean.³³⁵ Sixteen percent of Black and twelve percent of non-Black felons voted in the 2016 election in Florida.³³⁶ A smaller percentage registered but failed to vote while the largest percentage of felons did not register at all.³³⁷ One possible explanation for this low participation is misinformation and confusion about the process.³³⁸ In conjunction with this dilemma is an understandable fear of prosecution for illegally voting or for falsely affirming in connection with voting. There is certainly a lack of trust in the government that imprisoned and disenfranchised them in the first place.³³⁹ However, all of the data from 2007 to 2011 discussed above regarding restored felon-voter turnout could be an inaccurate basis for future electoral predictions.

At the point of *Jones II*, just 85,000 of the 1.4 million felons had registered to vote.³⁴⁰ For a felon to successfully register, they must figure out how much they owe and then pay that amount.³⁴¹ Since both are doubtful, the last and most probable option is for a felon to make their best guess under threat of felony prosecution.³⁴² These factors surely discourage voter turnout among recently re-enfranchised felons. However, charitable individuals have stepped up to the plate to ameliorate these issues. Former New York City Mayor and presidential candidate, Michael Bloomberg, has reportedly raised sixteen million

334. Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html> [<https://perma.cc/3KD9-4LFG>].

335. Marc Meredith & Michael Morse, *Why Letting Ex-Felons Vote Probably Won't Swing Florida*, VOX (Nov. 2, 2018, 8 AM), <https://www.vox.com/the-big-idea/2018/11/2/18049510/felon-voting-rights-amendment-4-florida>.

336. *Id.*

337. *Id.*

338. MANZA & UGGEN, *supra* note 116, at 200 (“[T]here is a considerable amount of misinformation among election officials, criminal justice system officials, and former offenders about who is eligible to register to vote. Anecdotal reports from voter registration campaigns around the country during the 2004 election confirm this confusion.”).

339. *Id.* at 116 (“Our survey data reveal very low levels of trust in government on the part of criminal offenders . . .”).

340. *See Jones v. Governor of Fla.*, No. 20-12003-AA, 2020 WL 4012843, at *9 (11th Cir. July 1, 2020).

341. *Jones I*, 2020 WL 2618062, at *17, *18, *20.

342. *Id.* at *42–43.

dollars for the FRRC to pay felons' outstanding LFOs.³⁴³ Interestingly, this prompted the Republican Attorney General of Florida, Ashley Moody, to request the FBI and the Florida Department of Law Enforcement to investigate Bloomberg, for allegedly violating election law by paying off felons' fees.³⁴⁴ Truly, never a dull moment in Florida.

Subsequent campaigns will be using the FRRC model as a template. The most advantageous reform is a ballot initiative because a constitutional amendment cannot be overturned by a governor, as opposed to previous bills and executive orders that have been overturned or vacated through vetoes and changes of administration.³⁴⁵ Law that originates directly from the people is a powerful approach to reform.

The best chance of getting a ballot initiative passed is by appealing to all people regardless of race or political affiliation—a highlight of the FRRC campaign. Felon voting rights should not be a partisan issue but rather an ethical and social issue. Without a doubt, there are millions of Republican felons who are unable to vote across the nation because of the same laws that are opposed by Republican lawmakers. A successful campaign should transcend the divisions among and within racial groups, socioeconomic classes, and political parties in order to garner a broad understanding of the stakes involved in this social movement.

Lastly, the most impactful ballot initiative is an amendment that clearly states that felons do not need to pay LFOs to receive the right to vote. The only misstep made by the FRRC was not explicitly stating in the Amendment that “completion of all terms of sentence” means nothing beyond custody and supervision.³⁴⁶ Future reforms should take notes from Florida by crafting a more detailed and precise amendment, which anticipates any creative interpretations. The pending legal battles could have been avoided by careful drafting and deeper forethought.

The Sunshine State will shine brighter when all of its citizens can participate in electoral politics and choose its leaders. Only then will the electorate be representative of the population of the state. For us to settle

343. Greg Allen, *Bloomberg Adds \$16 Million To A Fund That Helps Florida Felons Get Chance To Vote*, NPR (Sept. 24, 2020, 4:01 PM), <https://www.npr.org/2020/09/24/916625348/bloomberg-adds-16-million-to-a-fund-that-helps-florida-felons-get-chance-to-vote> [https://perma.cc/BWZ9-7AFP]. Many other celebrities joined the fray to help the FRRC raise funds. See, e.g., Veronica Stracqualursi, *LeBron James' voting rights group to help Florida's ex-felons who owe fines and fees register to vote*, CNN (July 25, 2020, 5:32 PM), <https://www.cnn.com/2020/07/25/politics/lebron-james-florida-voting-rights-felons/index.html> [https://perma.cc/XEH4-9DAE].

344. Dan Merica & Devon M. Sayers, *Florida attorney general asks for investigation of Bloomberg's efforts to reinstate felon voting rights*, CNN (Sept. 23, 2020, 9:25 PM), <https://www.cnn.com/2020/09/23/politics/florida-michael-bloomberg-investigate-felon-voting-rights/index.html> [https://perma.cc/7LAQ-AYTA].

345. See *supra* Part I.B.

346. See FLA. DEP'T OF STATE, *supra* note 121.

for anything less is neither democratic nor equitable. Until then, justice delayed is justice denied.