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ARTICLES

NOTES

PRISONERS AS "QUASI-EMPLOYEES"

Ethan Heben[*]

Abstract

Prison laborers represent a unique class within the workforce of the United States. Prisoners do not meet the definition of "employee" under the Fair Labor Standards Act (FLSA), but the products and services they generate create significant profits for private companies and, in general, the prison industrial complex (PIC). The PIC has seen tremendous growth in recent years, but Congress and courts have been slow to provide the necessary protections required for inmate laborers. The dual problems of prisoners' limited compensation and protections are only compounded by the prison population's disproportionate number of minority inmates. Any potential reform of the PIC must consider these discriminatory effects in light of historical discrimination—including slavery and the convict-labor system—within the United States. Congress, working with key stakeholders, has the rare opportunity to address this issue on a clean slate, as there are no current statutes that adequately address prison laborers' status and rights.

This Article argues that a new statutory regime should classify working prisoners as "quasi-employees" due to the innate pecuniary nature of certain prison labor, especially when the labor is for private companies. This regime should focus on the reality of each employer-prisoner relationship, take into consideration the human dignity of each prisoner, and endorse policies to reduce recidivism and the debilitating effects of incarceration on future employment. In turn, this regime would remove the ambiguity of applying the FLSA to prisoner laborers, address the current pay deficiencies, and mitigate the discriminatory effects of racial disparity in the PIC.

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INTRODUCTION

Prisoners constitute a unique class of laborers in the United States workforce. They do not fit squarely within the definition of "employee" under the Fair Labor Standards Act (FLSA), and at the same time their work—and its fruits—cannot be classified as merely a consequence of their incarceration.[1] The prison industrial complex (PIC), and specifically the private prison industry, have grown considerably in recent years.[2] This growth in private industry indicates that prison labor is not merely penological in nature, but also pecuniary. Despite the proliferation of the PIC, Congress has not addressed inmate labor statutorily, and the courts have consistently held that prisoners do not meet the requirements for protections under the FLSA.[3] Courts, in denying FLSA claims by inmates, have focused on the incompatible nature between the statuses of

1. *See* 29 U.S.C. § 203 (2012 & Supp. V 2017).

2. Faina Milman-Sivan, *Prisoners for Hire: Towards a Normative Justification of the ILO's Prohibition of Private Forced Prisoner Labor*, 36 FORDHAM INT'L L.J. 1619, 1636–37 (2013).

3. *See, e.g.*, Vanskike v. Peters, 974 F.2d 806, 807–08 (7th Cir. 1992).

"prisoner" and "employee," viewing each status as mutually exclusive.[4] This Article argues that a new statutory regime should, instead of focusing on the FLSA, develop a "quasi-employee" status specifically tailored to prison laborers, especially when working for private companies, due to the pecuniary aspects of their labor. This quasi-employee status should focus on the reality of each employer-prisoner relationship, take into consideration the individual dignity of each prisoner, and promote policies that will reduce recidivism and the overall stigma of incarceration.[5]

Part I describes a brief history of prison labor in the United States, the PIC, and other relevant background information.[6] Part II discusses current case law in the United States and how courts have dealt with the dilemma of how to classify prisoners under the FLSA.[7] Part III addresses both the arguments for and against classifying prisoners as "employees" under the FLSA.[8] Part IV explains why a new legal regime and specially tailored classification are necessary, reviewing various international approaches to prison labor and focusing on prison labor's unique racial implications within the United States.[9] Part V advocates for a new quasi-employee status for prison labor with its own comprehensive legal regime.[10] The conclusion underscores the practicality and necessity of the proposed regime.[11]

I. AN INTRODUCTION AND BRIEF HISTORY OF PRISON LABOR IN THE UNITED STATES

Historically, prisoners have been required to perform physical labor as part of their punishment.[12] The Thirteenth Amendment, enacted to ban slavery and involuntary labor, specifically exempted prisoners, providing that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[13] This carve-out, preserving the constitutionality of "involuntary servitude"

4. *See* Eric M. Fink, *Union Organizing & Collective Bargaining for Incarcerated Workers*, 52 IDAHO L. REV. 953, 955 (2016) (citing Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 882 nn.101–02 (2008)).

5. Katherine E. Leung, *Prison Labor as A Lawful Form of Race Discrimination*, 53 HARV. C.R.-C.L. L. REV. 681, 682–83 (2018).

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. *See infra* Part V.

11. *See infra* Conclusion.

12. *Id.* (citing 70 CONG. REC. 656 (1928–1929)).

13. U.S. CONST. amend. XIII, § 1 (emphasis added).

insofar as it is imposed on convicts, has been integral in the development of the modern PIC.

Indeed, prisons and their populations have proliferated in ways the framers of the Thirteenth Amendment likely could not imagine. The United States has 122 federal prisons spread throughout the country,[14] and "[e]ach state also has its own prison system."[15] According to the Bureau of Justice Statistics (BJS), in 2016, the United States had an estimated 1.5 million prisoners, with over 1.3 million under state jurisdiction and over 189,000 under federal jurisdiction.[16] There also were approximately 740,000 jail inmates in city and county jails.[17] Federal prisoners, pursuant to federal law, are required to work unless they pose too high of a security risk or have a limiting medical condition.[18] An estimated one-half of prisoners work full-time—approximately 750,000—and that number rises to over one million if jail inmates working in city and county jails are included.[19] The gradual loosening of restrictions on inmate-produced goods, coupled with this increase in the prison population, has made prisoners an attractive work pool for both government and private-run industries.

Even early prison reform legislation contained major exceptions permitting trade in prisoner-made goods, and such restrictions on the use of prison labor and goods have only decreased over time.[20] During the New Deal era, Congress passed the Ashurst-Sumners Act, which restricted the transportation of inmate-produced goods in interstate

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14. *About Our Facilities*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/federal_prisons.jsp [https://perma.cc/GE99-N5X9] (last visited Aug. 16, 2019).

15. Kara Goad, *Columbia University and Incarcerated Worker Labor Unions Under the National Labor Relations Act*, 103 CORNELL L. REV. 177, 180 (2017) (citing BUREAU OF INT'L NARCOTICS & LAW ENF'T AFFS. ET AL., U.S. DEP'T OF STATE, A PRACTICAL GUIDE TO UNDERSTANDING AND EVALUATING PRISON SYSTEMS 9 (2012)).

16. E. Ann Carson, *Prisoners in 2016*, BUREAU OF JUST. STAT., https://www.bjs.gov/content/pub/pdf/p16.pdf [https://perma.cc/6JJT-5RVT] (last updated Aug. 7, 2018) (showing a slow, steady decline in the U.S. prison population since hitting a peak in 2009). The statistics in the January 2018 Bulletin were updated in August 7, 2018 to reflect revised numbers for Oklahoma.

17. Zhen Zeng, *Jail Inmates in 2016*, BUREAU OF JUST. STAT. (Feb. 2018), https://www.bjs.gov/content/pub/pdf/ji16.pdf [https://perma.cc/R58L-DF2H].

18. Alfred C. Aman, Jr. & Carol J. Greenhouse, *Prison Privatization and Inmate Labor in the Global Economy: Reframing the Debate over Private Prisons*, 42 FORDHAM URB. L.J. 355, 394–95 (2014) (citing Crime Control Act of 1990, Pub. L. No. 101–647, § 2905, 104 Stat. 4789, 4914).

19. *See* Zatz, *supra* note 4, at 868 n.30 (citing CRIMINAL JUSTICE INST., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118, 124–25 (Camille Graham Camp ed., 2002); PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 215092, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2005, at 2 (Nov. 2006), *available at* https://www.bjs.gov/content/pub/pdf/p05.pdf; ROD MILLER ET AL., DEVELOPING A JAIL INDUSTRY: A WORKBOOK 1 (2002)).

20. *Id.* at 869.

commerce.[21] However, the Act exempted government purchasers, which is to say, it permitted "state use" of prisoner-made goods.[22] Over the past forty years—possibly due to prison overcrowding and the war on drugs[23]—increasingly more exceptions have been made to this restriction.[24] Due to the continual relaxation of such restrictions, the PIC now employs inmates for a wide variety of labor tasks.

Inmates are typically commissioned for various duties, ranging from unskilled to skilled labor. Most of the prisoners working full-time either perform "prison housework," a subset of the "state use" exception that includes "cooking meals, doing laundry, or cleaning the facilities,"[25] or produce low-value items such as license plates and road signs.[26] Inmates reportedly make $0.12 to $0.40 per hour for these types of jobs.[27] An additional 80,000 inmates work for what are known as the "prison industries"—although they produce goods mostly for "state use," they also provide goods for the private sector.[28]

The PIC has developed two dominant systems to facilitate the production of goods and the doling out of inmates as a labor force. Typically, prisoner laborers fall either under a "state account" system or a "contract" system.[29] The former is a government agency that "wholly manages the facility and work process, sells the products, and receives the revenue."[30] The latter, as the name suggests, consists of a contract between a private firm and the prison, in which the firm performs those same managerial functions.[31] "Leasing systems" have historically been prevalent in the South, where the contractor pays the state "per capita per prisoner and is responsible for managing the prison, in exchange for all the labor the contractor can derive from the prisoner for the duration of the contract."[32] Under "contract systems," the contractor pays for each prisoner and is responsible for providing "food, work equipment, and materials" in exchange for "the fruits of the prisoners' labor to the contractor," but the state maintains control of the prison and its

21. *Id.* at 869; *see* 18 U.S.C. § 1761 (2012 & Supp. V 2017).

22. Zatz, *supra* note 4, at 869 (citing 18 U.S.C. § 1761(b) (Supp. II 2002)).

23. James K. Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 BYU L. REV. 369, 369 (1994) (citing Michael Tonry, *The Ballooning Prison Population*, *in* THE 1993 WORLD BOOK YEAR BOOK 392, 394 (1993)).

24. Zatz, *supra* note 4, at 869.

25. *Id.* at 870 n.43 (stating around 550,000 inmates perform this type of work) (citing CRIMINAL JUSTICE INST., *supra* note 19, at 118).

26. Aman & Greenhouse, *supra* note 18, at 394.

27. *Work Programs*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp [https://perma.cc/6TTD-WZL9] (last visited Aug. 16, 2019).

28. *See* Fink, *supra* note 4, at 953 (citing Zatz, *supra* note 4, at 869).

29. Zatz, *supra* note 4, at 869–70.

30. *Id.* at 870.

31. *Id.*

32. Milman-Sivan, *supra* note 2, at 1629.

management.[33] There are also "special contract systems" where the "contractor pays no fee to the state for the prisoners," "but the prisoners are under the full responsibility of the private contractor, which manages the labor, pays the wages, and collects the profits for itself."[34] In addition, the federal government has spearheaded its own programs, namely Federal Prison Industries, Inc. (which does business as "UNICOR") and the Private Industry Enhancement (PIE) initiative, to provide more advanced labor opportunities for inmates and to reduce recidivism.

While UNICOR and PIE create opportunities for inmates to engage in skilled labor, they entrench the profound disparity between prisoners' wages and their labor's true market worth, simultaneously enhancing these enterprises' profitability. Prisoners working for UNICOR engage in many different types of labor practices, including call centers, vehicle repairs, and furniture production.[35] Most of these products are sold to the federal government.[36] According to its website, 7% of eligible prisoners—around 12,000—are employed by UNICOR.[37] Though a government-owned corporation that controls the production of prison goods and services, UNICOR has long been compelled to act as a private company.[38] Congress designated it a self-supporting agency in 1988, and it regularly receives scrutiny of its finances from both the public and Congress.[39] With no federal appropriations, the main source of its revenue is its sales.[40] UNICOR puts 72% of its revenue toward the purchase of materials and supplies and 23% toward staff salaries, while only the remaining 5% goes toward the inmates' pay.[41] The pay from UNICOR is more financially rewarding for inmates than "prison housework," as most wages from that housework are charged back to the prison for upkeep.[42] Yet the program only pays inmates between $0.23 to

33. *Id.* at 1629–30.

34. *Id.* at 1630.

35. Goad, *supra* note 15, at 182–83 (citing *UNICOR Schedule of Products and Services*, UNICOR, https://www.unicor.gov/SOPalphalist.aspx [https://perma.cc/XFN4-MZ3G] [http://perma.cc/7ZZF-CVDM]).

36. *Id.* at 185 (stating most products are sold to the government due to the Amhurst-Sumners Act) (citing *Customers and Private Sector FAQs*, UNICOR, https://www.unicor.gov/FAQ_Market_Share.aspx [http://perma.ce/7Z69-VQWL]).

37. *FPI General Overview: Frequently Asked Questions*, UNICOR, https://www.unicor.gov/FAQ_General.aspx# [https://perma.cc/276Z-P9SC] (Aug. 16, 2019).

38. Aman & Greenhouse, *supra* note 18, at 386–87.

39. *Id.* at 386–87, 396.

40. *Id.* at 396.

41. UNICOR, *supra* note 37.

42. Aman & Greenhouse, *supra* note 18, at 396 (citing Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison Real Work Programs Work?*, NAT'L INST. OF JUST. (June 1, 2007), https://nij.ojp.gov/topics/articles/factories-behind-fences-do-prison-real-work-programs-work [https://perma.cc/3ZJS-8LFP]; THOMAS W. PETERSIK ET AL., IDENTIFYING BENEFICIARIES OF PIE INMATE INCOMES: WHO BENEFITS FROM WAGE EARNINGS OF INMATES WORKING IN THE PRISON

$1.15 per hour,[43] well below the federal minimum wage of $7.25 per hour.[44] Some states have their own similar programs—which sell primarily to state and local governments—but in some of these state systems, the workers do not even receive wages.[45]

PIE, on the other hand, relies on the open market by bringing private companies into prisons and giving them access to prisoners as a work force.[46] The Justice System Improvement Act of 1979 created the Prison Industry Enhancement Certification Program (PIECP) as an exemption to the Ashurst-Sumners Act.[47] The PIECP allows prison-made goods to be sold in the open market and not solely to state entities.[48] The PIECP allows "state and local corrections agencies to contract with private sector firms for purposes of running those firms' operations within prisons."[49] Currently, forty-five out of a possible fifty PIECP certifications have been granted, with 5,063 inmates employed.[50] A stated goal of PIE is to avoid the displacement of local workers.[51] According to the statute, the prisoners working under these programs must:

> [H]ave, in connection with such work, received wages at a rate which is not less than that paid for work of a similar nature in the locality in which the work was performed, except that such wages *may be subject to deductions* which

INDUSTRY ENHANCEMENT (PIE) PROGRAM 19 (2003), *available at* https://www.criminallegalnews.org/media/publications/gwu_center_for_economic_research_re_identifying_beneficiaries_of_pie_inmate_incomes_jul_31_2003.pdf.

43. *Id.*; NATHAN JAMES, CONG. RESEARCH SERV., RL32380, FEDERAL PRISON INDUSTRIES 10 (2007).

44. 29 U.S.C. § 206 (2012).

45. Goad, *supra* note 15, at 183, 185.

46. Aman & Greenhouse, *supra* note 18, at 387 (citing U.S. DEP'T OF JUSTICE, PROGRAM BRIEF: PRISON INDUSTRY ENHANCEMENT CERTIFICASTION PROGRAM (2004), https://www.ojp.gov/pdffiles1/bja/203483.pdf [https://perma.cc/88X4-GY7H]).

47. *See also* Barbara Auerbach, NAT'L CORR. INDUS. ASS'N, *The Prison Industries Enhancement Certification Program: A Program History* 3 (2012), https://essaydocs.org/the-prison-industry-enhancement-certification-program-a-progra.html (last visited Feb. 1, 2020); Aman & Greenhouse, *supra* note 18, at 387.

48. Goad, *supra* note 15, at 185.

49. Aman & Greenhouse, *supra* note 18, at 388.

50. *PIECP: Certification & Cost Accounting Center Listing* 1, NAT'L CORR. INDUS. ASS'N, https://static.wixstatic.com/ugd/435bd2_073657b108e2415b81fd86642431e312.pdf [https://perma.cc/Q88Z-DP7C] (last visited Feb. 1, 2020).

51. Aman & Greenhouse, *supra* note 18, at 388 (citing MARIE FAJARDO RAGGHIANTI, PRISON INDUSTRIES IN SOUTH CAROLINA 128–232 (2008), https://drum.lib.umd.edu/bitstream/handle/1903/8178/umi-umd-?sequence=1 [https://perma.cc/WQG5-P26W]).

> shall not, in the aggregate, exceed *80 per centum of gross wages*[.][52]

These deductions drastically reduce the net wages for prisoners. For example, during the quarter ending December 31, 2020, the gross wages for all PIECP programs totaled $11 million, while net wages totaled only $6 million.[53] Since 1979, the program has deducted nearly 60% of all wages from prisoners.[54] Therefore, even with the statutory wage requirement, inmates working under PIE make significantly less per hour than civilians performing the same labor, and in most cases make significantly below minimum wage.[55] While the low hourly wages provided by UNICOR and PIE are concerning, a trend that may be of even greater concern, to those interested in a system that recognizes human dignity for inmates, is the growth of privately run prisons.

Indeed, over 6% of prisoners under state jurisdiction and 18% of prisoners under federal jurisdiction are inmates of private prisons, an industry with revenues estimated to exceed $2.9 billion.[56] The private prison industry's size has increased steadily, from 90,815 prisoner occupants in 2000 to 130,941 prisoner occupants in 2011.[57] Looking at prison privatization on a global scale, "the number of inmates in fully privatized prisons remains relatively low, but the prison industry is, nonetheless, growing steadily, controlled primarily by a limited number of international corporations."[58] The two biggest prison corporations in the United States are CoreCivic (formerly Corrections Corporation of America) and The GEO Group.[59] Each fully operates prisons under contracts with either the federal or state governments.[60] While neither CoreCivic nor GEO Group provide easily accessible salary information,

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52. 18 U.S.C. § 1761(c)(2) (2012) (emphasis added) (stating deductions shall be limited to taxes, reasonable room and board, familial support, and victim compensation (the latter's being limited to 5–20% gross wages)).

53. *PIECP: Q4 2020 Statistical Data Report*, NAT'L CORR. INDUS. ASS'N, *available at* https://www.nationalcia.org/statistical-reports [https://perma.cc/F3UA-R7PT] (rounded to the nearest million).

54. *PIECP: Q4 2020 Cumulative Data Report*, NAT'L CORR. INDUS. ASS'N, (showing that from 1979 through December 2020 the program amassed total gross wages of $990 million, but total net wages were only $408.2 million), *available at* https://www.nationalcia.org/statistical-reports [https://perma.cc/33FL-KDX7].

55. Fink, *supra* note 4, at 960 ("Moreover, in several jurisdictions, incarcerated workers receive even lower wages during a "training period," ranging from two months to over a year.").

56. Milman-Sivan, *supra* note 2, at 1621.

57. *Id.* at 1636.

58. *Id.* at 1636–37.

59. Goad, *supra* note 15, at 181.

60. *Id.*; *see Management & Operations*, THE GEO GROUP, INC., https://www.geogroup.com/Management_and_Operations [https://perma.cc/HM27-CWTX] (last visited Aug. 16, 2019); *About CoreCivic*, CORECIVIC, http://www.corecivic.com/about (last visited Aug. 16, 2019).

some sources have stated that workers earn around $0.17 to $0.50 per hour—even for high-skilled positions.[61] Such paltry wages for even skilled labor, which directly enhances the profitability of privately run prisons, indicates the need for comprehensive reform.

Ultimately, the combination of these systems has formed the modern "prison labor system."[62] While these programs may reduce recidivism and idleness in prisons, they also use prisoners to produce profit-making goods—such as retail items for the garment industry—while paying below-average salaries.[63] Prisoners not only earn relatively little income, but the training that they receive through these programs serves little use in removing the barriers ex-convicts face when attempting to find employment in post-prison life, such as automatic disqualification after a background check.[64] While incarcerated, these inmates are earning—in many cases—well below $1.00 per hour, whereas the participating corporations generate profits from the cheap substitute labor.[65] To date, the question of how to classify prisoners and whether they should receive a minimum wage or other protective rights for their labor has turned on the definition of "employee" under the FLSA.[66] Though prisoners are not specifically excluded from the "employee" category in the FLSA or any other major employment statute,[67] case law interpreting prisoners' employment status is fractured and uncertain.[68] Surprisingly, Congress has not expressly addressed this issue under the federal labor laws.[69]

II. THE CURRENT STATE OF CASE LAW UNDER THE FLSA

The dispositive legal question governing whether a class, such as prisoners, is recognized as an "employee" under the FLSA is "whether an employment relationship exists."[70] Courts typically answer this question by looking to the economic nature of the relationship at issue.[71] The Thirteenth Amendment[72] appears to have influence over inmates'

61. Goad, *supra* note 15, at 184 (citing Vicky Peláez, *The Prison Industry in the United States: Big Business or a New Form of Slavery?*, GLOB. RESEARCH (Mar. 10, 2008), http://www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289 [https://perma.cc/76C4-8GN3].

62. Leung, *supra* note 5, at 682.

63. *Id.* at 682–83.

64. *Id.* at 683–84.

65. *See supra* Part I.

66. Leung, *supra* note 5, at 694; *see* Haslam, *supra* note 23, at 371; *see also* James J. Maiwurm & Wendy S. Maiwurm, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms*, 7 U. MICH. J.L. REFORM 193, 209–10 (1973). *See generally* 29 U.S.C. § 203(e) (2018).

67. Zatz, *supra* note 4, at 875.

68. *See infra* Parts II, III, and IV.

69. Fink, *supra* note 4, at 966.

70. Zatz, *supra* note 4, at 862.

71. *Id.*

72. *See* U.S. CONST. amend. XIII, § 1; *see also supra* p. 2.

employment status,[73] and the Eleventh Circuit, in *Villarreal v. Woodham*,[74] held that "the FLSA presupposes a free-labor situation constrained by the Thirteenth Amendment, which does not apply to convicted inmates."[75] However, courts have consistently confirmed that "prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners."[76] Instead, the coverage normally turns case-by-case on the question whether inmates satisfy the statutory definition of "employee," which then courts consistently answer in the negative.[77]

Typically, outside the prisoner context, courts rely on the four factors in *Bonnette v. California Health & Welfare Agency*,[78] to determine if an employment relationship exists: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[79] Courts have recognized since the 1980s that prison labor usually satisfies these tests,[80] but nevertheless "have consistently held that the FLSA employment relationship is much narrower for prisoners than for individuals in the private market."[81] In *Vanskike v. Peters*,[82] the Seventh Circuit expressly rejected the *Bonnette* test for prisoners[83] and held that "inmates could not demand the minimum wage for their work as janitors, kitchen aides, and garment workers in an Illinois prison."[84] *Vanskike*—followed by a majority of the jurisdictions to address the issue—held that inmates lack an "economic relationship" to the prison

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73. Zatz, *supra* note 4, at 886.

74. 113 F.3d 202 (11th Cir. 1997).

75. *Id.* at 206; *see also* Maiwurm & Maiwurm, *supra* note 66, at 212 ("Perhaps more important was the conclusion that Congress had not intended the Fair Labor Standards Act to cover prisoners. This conclusion is probably correct, and, when combined with the exception clause of the thirteenth amendment, will probably prove fatal to inmate claims, even in cases where an employment relation exists in economic reality.").

76. Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992); *see* Watson v. Graves, 909 F.2d 1549, 1554 (5th Cir. 1990); *see also* Carter v. Dutchess Cmty. Coll., 735 F.2d 8, 13 (2d Cir. 1984).

77. Zatz, *supra* note 4, at 876–77; *see Vanskike*, 974 F.2d at 807–08.

78. 704 F.2d 1465, 1470 (9th Cir. 1983).

79. *See, e.g.*, *Vanskike*, 974 F.2d at 808 (citing *Bonnette*, 704 F.2d at 1470).

80. Zatz, *supra* note 4, at 867–68.

81. Leung, *supra* note 5, at 694.

82. 974 F.2d 806 (7th Cir. 1992).

83. *Id.* at 808.

84. Zatz, *supra* note 419, at 861 (citing *Vanskike*, 974 F.2d at 811–12); *see id.* at 872 n.55 (stating that in Alden v. Maine, 527 U.S. 706 (1999), the Supreme Court's immunity ruling "sharply limits suits against public prisons under the FLSA and other employment statutes," although private prisons are still susceptible to lawsuits and instead rely on the unique characteristics of prison labor "to avoid liability") (citing Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005)).

and therefore cannot be employees or guaranteed laborer rights.[85] These courts—recognizing that there is a difference between ordinary employment and prison labor—held that there can be no employment relationship even in the face of "sufficient control and no applicable statutory exception."[86] Rather than apply *Bonnette*, the courts have developed two overriding approaches when evaluating prison laborers' employment status.

The two leading approaches courts use when determining "employee" status for prisoners are (1) the "exclusive market" approach and (2) the "productive work" approach.[87] The "exclusive market" approach—used in the majority of cases—focuses on "employment's economic character."[88] Courts generally classify inmate work as noneconomic due to its penological nature and deny employee status.[89] The "productive work" approach—a minority method—finds an economic relationship when "the putative employer benefits economically from inmate's labor, either by selling the resulting goods and services or by avoiding the hiring of other workers."[90] This second approach is much easier to satisfy, but rarely applied.[91] Even with this traditional reluctance to recognize prisoners as employees, there are some circumstances where "employee" status is, in fact, recognized.

Indeed, courts have recognized prisoners as "employees" when they are working for private firms as part of certain work release programs.[92] In *Watson v. Graves*,[93] the Fifth Circuit held that an employment relationship existed "where a Louisiana sheriff farmed out jail inmates to his son-in-law's construction company at a rate of $20 a day [and] when not at work they returned to the prison."[94] In the work release program setting, "prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison."[95] However, even in the work release program context, courts have not extended the employment relationship to the prison, but only to the contracting company.[96] A few courts look at "whether the goods or services in question are for the prison's use," and avoid dependence on geographic

85. Zatz, *supra* note 4, at 861 (citing *Vanskike*, 974 F.2d at 812).
86. *Id.* at 868.
87. *Id.* at 882–83.
88. *Id.* at 882.
89. *Id.*
90. *Id.* at 883.
91. *See generally* Zatz, *supra* note 4.
92. Leung, *supra* note 5, at 694; *see, e.g.*, Watson v. Graves, 909 F.2d 1549, 1550 (5th Cir. 1990).
93. 909 F.2d 1549 (5th Cir. 1990).
94. Zatz, *supra* note 4, at 874 (909 F.2d at 1554–55).
95. Bennett v. Frank, 395 F.3d 409, 410 (7th Cir. 2005).
96. Leung, *supra* note 5, at 695 (citing for example *Watson*, 909 F.2d at 1553–54).

location or managerial arrangement.[97] The National Labor Relations Board (NLRB) has repeatedly—with similar reasoning to the courts—indicated that inmates in work release programs are "employees." The NLRB's test distinguishes prisoners' status while on work release and in an "employment relationship" from the "ultimate control [they] may be subjected to at other times," such as in a prison.[98] However, the NLRB does not apply this test in other prison labor contexts. The narrow scope of these present rules' coverage suggests the need for a comprehensive reevaluation of prison laborers' employment status.

III. SHOULD INMATES BE CLASSIFIED AS "EMPLOYEES"?

A. *Arguments in Favor of Classifying Prisoners as "Employees" Under FLSA*

Most courts agree that prisoners qualify as employees under some circumstances, such as when they are in work release programs.[99] However, the two tests currently used by courts to determine "employee" status for inmates are either under- or over-inclusive.[100] First, the "exclusive market" test can never truly be satisfied.[101] For instance, a work release program should not qualify as employment under this test due to the inseparable penological—and therefore noneconomic—status of the prisoner and his or her work performed in such program. The "productive work" test is insufficient because it ignores important—and sometimes nuanced—characteristics of affiliations, sweeping in too many relationships that would widely be rejected as employment.[102] For example, a child's chores around the house for an allowance or even gratuitous familial favors could qualify under this test as work that benefits a supervisor in a pecuniary manner. This begs the question whether inmate workers should therefore be recognized as employees under the FLSA.

Some would argue—and with solid reasoning—that prisoners should have the same rights as employees under the FLSA.[103] Looking at the most basic functions of employment, for instance, prison industries regularly use "wage differentials and other perquisites to motivate inmate

97. Zatz, *supra* note 4, at 894.
98. Fink, *supra* note 4, at 966.
99. Zatz, *supra* note 4, at 893.
100. *See id.* at 912, 915.
101. *Id.* at 912.
102. *Id.* at 923–24.
103. *See* 29 U.S.C. § 203 (2012 & Supp. V 2017); *see also* Steven A. Weiler, *A Time for Recognition: Extending Workmen's Compensation Coverage to Inmates*, 61 N.D. L. REV. 403, 415–16 (1985); Maiwurm & Maiwurm, *supra* note 66, at 200–01 (discussing rights to minimum wage and to unionize, among others).

workers," specifically to mimic the civilian labor market environment.[104] Looking on a larger scale, employers can substitute inmates as cheap labor, which in turn leads consumers to substitute more expensive products for cheaper prisoner-made products, changing the nature of the market and displacing civilian competitors.[105] Also, if prisoners were not providing the services or products they currently produce, outside firms could step-in and generate more revenue for themselves.[106] For example, "[t]o the extent that prison laundry is cleaned by prisoners, either the prison or its contractor need not hire employees out of the ordinary labor market."[107] Therefore, regardless of whether the prisoners are working for a private firm or government agency—including the prison—that entity "produces widgets with fewer [non-prisoner] workers and . . . competes with other widget makers who lack a [cheap prison] labor supply."[108] For example, Colorado provides its farmers with state prisoners "as a substitute for the customary agricultural workforce of undocumented migrant workers from Mexico."[109]

UNICOR advertises its call centers with the catch phrase "Imagine . . . [a]ll the benefits of domestic outsourcing at offshore prices. It's the best kept secret in outsourcing!"[110] Theoretically, UNICOR can be classified as an "outsourcing provider" because "it draws on labor segregated from the domestic labor force by a state border (i.e., prison walls) that demarcates a legal differential of wages and hours, among other things."[111] The discriminant treatment of prisoners under federal law—for the same work that can be provided by a civilian laborer—provides strong ammunition for those who would classify prison laborers as employees.

Likewise, under PIE, prisoners earn wages comparable to, but lower than, local competition for similar work.[112] These prisoners are more compliant than civilian competition and are unable to rely on the protections of FLSA.[113] Therefore PIE, like UNICOR, allows private

104. Zatz, *supra* note 4, at 912.

105. *Id.* at 893.

106. *Id.* at 895.

107. *Id.*

108. *Id.* at 894.

109. *Id.* at 865.

110. UNICOR, INBOUND/OUTBOUND CALL CENTER SOLUTIONS, https://www.unicor.gov/Category.aspx?idCategory=1429 [https://perma.cc/9UJV-88JU] (last visited Aug. 16, 2019).

111. Aman & Greenhouse, *supra* note 18, at 386–87.

112. *See id* at 387; Bob Sloan, *The Prison Industries Enhancement Certification Program: Why Everyone Should Be Concerned*, PRISON LEGAL NEWS (Mar. 15, 2010), https://www.prisonlegalnews.org/news/2010/mar/15/the-prison-industries-enhancement-certification-program-why-everyone-should-be-concerned/ [https://perma.cc/4MDP-FN3W].

113. *See* Aman & Greenhouse, *supra* note 18, at 388–89; *see also* Leung *supra* note 5, at 702.

companies to directly benefit from the cheaper or "outsourced" labor within prison walls. The outsourcing decision is made without regard to the penological nature of a prisoner's punishment. Furthermore, prison laborers as a class have little, if any, negotiating power.

Indeed, the coercive nature of imprisonment and weak bargaining power of inmates should elicit moral concerns that are core to a liberal society and the purpose of FLSA, especially where there is no union representation to offset the power discrepancy.[114] Experts agree that "restor[ing] dignity, integrity, and self-confidence" is critical to successful rehabilitation.[115] Subpar wages have the opposite effect by demeaning prisoners and lowering their self-worth.[116] On these grounds, among others, some scholars claim that "any violation of a right outside the prison walls is also a violation within the prison walls, and prisoners have the right not to be offered any work that is *not legal* outside of the prison walls," or under conditions worse than the legal minimum.[117]

Advocates of applying FLSA to prison laborers also point to the fact that patient-workers at mental hospitals have been deemed, in *Souder v. Brennan*,[118] to have an employment relationship with the mental institution.[119] In many instances, these workers perform tasks similar to those performed by prison laborers.[120] Therefore, it is arguable that the reasoning in *Souder*—refusing to imply an exception to the FLSA where none existed—could naturally be extended to the prison labor context.[121] This extension, however, is unlikely because it ignores the penological nature of prisoner status—absent in the case of a mental patient and clearly recognized by the courts as the primary reason for exclusion under the FLSA.[122]

A less ambitious approach to the "employee" question is to differentiate between the status of prisoners based on whether they are managed by state-run industries or private prison industries. This argument starts with the premise that a state's profits can be seen as "minimizing [the public's] expenses," while private prison industry profits can be seen as "pure benefit from the misfortune of others."[123] The International Labor Organization (ILO) denounced forced prison labor for private profit, while recognizing the "state use" exception, in the

114. *See* Leung, *supra* note 5, at 698.

115. Maiwurm & Maiwurm, *supra* note 66, at 199–200.

116. Milman-Sivan, *supra* note 2, at 1674.

117. *See id.* (emphasis added).

118. 367 F. Supp. 808 (D.D.C. 1973).

119. *Souder* 367 F. Supp. At 813; *see also* Zatz, *supra* note 4, at 880 (citing *Souder*, 367 F. Supp. at 813).

120. *Zatz*, *supra* note 4, at 936.

121. *Id.* at 881.

122. *Id.* at 861.

123. Milman-Sivan, *supra* note 2, at 1679.

Forced Labor Convention of 1930 ("Convention No. 29").[124] Convention No. 29 supports an argument that unfair competition and abuse of power justifies a "deep suspicion" of private entity involvement with the control and use of prison labor for profit.[125] Article 2, Section 2 states that the definition of "forced or compulsory labor" does not include:

> (c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and *that the said person is not hired to or placed at the disposal of private individuals, companies or associations*[.][126]

This provision highlights the difference between governmental and private use of prison labor. There is a strong international consensus that a state can force prisoners to work,[127] and only "involvement of private entities in prisoner employment will generally, unless under voluntary terms, constitute a violation of the Convention."[128] Convention No. 29's impact on actual practices is questionable, though, because states—even ones who have ratified Convention No. 29—"allow private involvement in forced prison labor without insisting on the safeguards set in Convention No. 29."[129] For example, in Germany, a 2009 report to the ILO stated that "almost twelve percent of its prison population had been employed with the participation of private companies due to job shortages in public prisons."[130] Similarly, as of 2007, Israel had private companies involved with the employment of about 1,000 prisoners per year, including work in "trades, such as apparel, printing, and woodworking."[131] Regardless, the United States is not a party to Convention No. 29 and the use of prisoners by private companies has been on the rise.[132]

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124. Convention Concerning Forced or Compulsory Labour, 1930, No. 29, *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) [hereinafter Convention No. 29].

125. Milman-Sivan, *supra* note 2, at 1630.

126. Convention No. 29, *supra* note 124 (emphasis added).

127. Milman-Sivan, *supra* note 2, at 1630–31.

128. *Id.* at 1630.

129. *Id.* at 1639 ("The ILO has noted this with regard to the United Kingdom, Austria, and Australia, and other states, such as New Zealand, Germany, and Israel, demonstrate a similar approach.").

130. *Id.*

131. *Id.*

132. *See supra* Part I.

B. *Arguments Against Classifying Prisoners as "Employees" Under FLSA*

Any view that would outright give prisoners full rights under the FLSA necessarily ignores certain key stakeholders outside of prisoners themselves, including correctional officers, prison administrators, lawmakers, victims of crimes, the government, and the public-at-large. First, "[p]rison administrators and correctional officers have a legitimate interest in maintaining order within the prison."[133] This order necessitates "limiting the number of prisoners who can gather at a given time, where they can gather, and at what times they can gather," which in turn severely limits the practicality of traditional union organizing and negotiation methods.[134] For example, the power of labor strikes in the prison setting "cannot be hermetically sealed off from other aspects of imprisonment, in particular considerations of authority and discipline."[135] Instead of striking for fair wages, inmates, if granted the power to strike, may do so over prison conditions unrelated to their work, causing administrability and disciplinary problems within these facilities.[136]

Second, opening the door to FLSA employment status would not only allow prisoners to demand the minimum wage—which itself raises sustainability concerns—but also would open the door for prisoners to sue for worker's compensation, unemployment benefits, vacations, overtime, and incentive pay.[137] These additional costs could end up burdening the state—in a severely negative manner—which would adversely affect taxpayers.[138] There are other serious economic restraints preventing the United States from recognizing prisoners under the FLSA. To do so would take away from the internationally and constitutionally recognized power of the State to force prisoners to work. Also, private companies may be less willing to hire prison laborers if forced to pay market rates or even minimum wages due to the regulatory hurdles required to initiate and maintain a prison laborer program. Therefore, to keep the incentivization for hiring prison laborers at the appropriate levels needed to meet objectives such as reduced recidivism, there naturally needs to be a correlating discount built into the prison labor force.

Third, the payment of these benefits could have other unintended consequences, such as reducing the deterrent effects of incarceration in general and increasing the frequency of crime in communities—making

133. Leung, *supra* note 5, at 699.

134. *Id.*

135. Zatz, *supra* note 4, at 923–24.

136. *Id.* at 924.

137. *Id.* at 948; *see also* Haslam, *supra* note 23, at 390.

138. *See* Haslam, *supra* note 23, at 395 (claiming that prison may not have the same deterrent effect on crime if the inmate knows they can sue the state, for example, for workers compensation, among other reasons).

it more profitable for some citizens to spend time in prison than out in the civilian population.[139] Studies have shown that "crimes are more likely to be committed by unemployed persons who would stand to benefit economically from either perpetrating crime or prison employment."[140]

Finally, Congress's silence on the treatment of prisoners in the language of the statute and subsequent inaction strongly suggests that it was not Congress's intent for the FLSA—in its current form—to extend to prisoners.[141] Some proponents of the prison industry go even further, arguing that "managing wages and barring union activity" should not only be allowed but also encouraged as necessary to "maintain competitive advantage over the off-shore alternatives."[142]

The treatment of prison labor under the FLSA is currently ambiguous[143] and therefore is ready for new legislation. Arguments on each side of the current dichotomy are strong, and many are valid.[144] This Article advocates that a new legal regime should step away from the definition of "employee" under FLSA and craft specific legislation around the quasi-employee nature of prisoners.[145] This new legal regime needs to take into account all the key stakeholders, including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public.[146] It must acknowledge the unique nature of prisoners and their need for human dignity and abandon the unnecessary debate about the word "employee."

IV. THE STATUS QUO MUST CHANGE

A. *Racial Implications of Forced Prison Labor in the United States*

In the United States, one significant issue that must be addressed when it comes to forced labor is race.[147] Due to the history of slavery and race discrimination in the United States, policymakers should account for the impact of racial discrimination on forced prison labor. Some scholars argue that prison labor at sub-minimum wages is a form of legalized race discrimination.[148] For example, according to the BJS, black males between the ages of eighteen and nineteen are 11.8 times more likely to

139. *Id.* at 394.
140. *Id.* at 395.
141. *Id.* at 398.
142. Aman & Greenhouse, *supra* note 18, at 404.
143. *See supra* Parts I & II.
144. *See supra* Part III.
145. *See* Zatz, *supra* note 4, at 878–79; Leung, *supra* note 5, at 696.
146. *See supra* Part III.B.
147. *See, e.g.*, Leung, *supra* note 5, at 685 (arguing that "the use of prison labor functionally creates a second-class labor market, largely made up of people of color").
148. *See* Leung, *supra* note 5, at 707-08.

be imprisoned than white males of the same age.[149] This statistical disparity becomes even more problematic when coupled with the fact that there is currently a federal prison mandate for labor substantially below the federal minimum wage, with prisoners typically compensated at rates below $1.00 per hour.[150]

Proponents of the modern prison labor system argue that prisoners' labor allows them to gain skills and training essential for reentry into society.[151] However, the reality is the majority of prisoners are performing low-skill labor that will not translate into marketable skills.[152] The very idea of "[c]haracterizing inmates as in need of rehabilitation into disciplined workers" suggests longstanding racist ideas that demean people of color,[153] including the eighteen- to nineteen-year-old black males incarcerated at such disparate rates.[154] Angola, the Louisiana State Penitentiary, is located on a former slave plantation and—when medically cleared—can force prisoners to work on these same plantation fields for as little as $0.02 per hour.[155] This treatment is morally unacceptable under any legal regime, and the proper protections against this type of symbolic discrimination must be in place when regulating quasi-employees such as prisoners.

Programs like UNICOR, which may offer higher-skill positions and have some evidence of reducing recidivism,[156] provide jobs for only a small percentage of eligible inmates[157] and are not currently funded at a level that allows training for a significant number of inmates.[158] The PIC has "evolved into a creature of corporate profit" rather than one of purely penological necessity to enforce societal norms.[159] The insistence of courts to define a prisoner's rights purely in the context of whether they qualify as "employees" under the FLSA is a "stagnant" and unsatisfactory approach to a more complicated matter.[160] The current standard does not take into account the reality that, for many private companies, a prisoner is a profit-producing laborer.

These private companies have taken advantage of the outsourcing nature of prison labor, preferring, when convenient, the greater compliance and reduced rights of prison laborers over civilian employees

149. Carson, *supra* note 16, at 13.
150. *See supra* Part I.
151. Leung, *supra* note 5, at 682.
152. *See id.* at 682–83.
153. Zatz, *supra* note 4, at 933.
154. Carson, *supra* note 16, at 13; *see* Leung, *supra* note 5, at 684.
155. Goad, *supra* note 15, at 179.
156. Leung, *supra* note 5, at 690.
157. *Id.* at 682–83.
158. *Id.* at 683.
159. *Id.* at 703.
160. *Id.*

who might perform the same manufacturing jobs.[161] For example, companies such as Victoria's Secret have not only had prisoners stitch together clothing for wages far below minimum wage, but also required criminal background checks when considering these same individuals for employment outside of prison.[162] These types of hiring discrepancies disproportionately affect black males and their ability to find work using any skills obtained from such PIC systems.[163] This exacerbates the racial discrimination innate within the prison system and shifts the same ability to discriminate, whether purposeful or not, to private companies.

When the power to deny individual liberty is given to a private company, "the legitimacy of the sanction of imprisonment is undermined [as public sanctions are shifted from the power of the state to a party that is motivated primarily by] economic considerations—considerations which are irrelevant to the realization of the purposes of the sentence, which are public purposes."[164] A certain lack of respect for the status of prisoners as human beings is reflected in "the very existence of a prison that operates on profitmaking business."[165] Prisoners and their advocates in the United States have not been blind to this discrepancy. On September 9, 2016, approximately 24,000 prisoners in at least twenty-nine prisons across the country coordinated a labor strike and refused to work.[166] Some claim that this was "the largest prison strike in U.S. history."[167] The Incarcerated Workers Organizing Committee (IWOC), a subgroup of the Industrial Workers of the World labor union, organized the strike by using mail, conference calls to prisoners and their families, and by partnering with both lawyers and activists.[168] The rallying cry for the strike was "This is a Call to Action Against Slavery in America."[169] Clearly, there is a need for reform in the United States.[170]

B. *International Treatment of the PIC*

Convention No. 29, although not ratified by the United States, provides persuasive normative principles for regulating the PIC.[171] Currently, 178 countries have ratified Convention No. 29, including the

161. *Id.* at 702.
162. *Id.* at 704.
163. *See* Carson, *supra* note 16, at 13; *see also* Leung, *supra* note 5, at 682.
164. Milman-Sivan, *supra* note 2, at 1660 (quoting HCJ 2605/05 Acad. Ctr. of L. & Bus. v. Minister of Fin., 9(33) P.D. 483 ¶ 29 (2009) (Isr.)).
165. *Id.* at 1661 (quoting HCJ 2605/05 *Acad. Ctr. of L. & Bus.*, 9(33) P.D. 483 ¶ 36).
166. Goad, *supra* note 15, at 177.
167. *Id.* at 178.
168. *Id.*
169. *Id.*
170. *See id.* at 178–79
171. *See* Convention No. 29, *supra* note 124.

United Kingdom, Israel, Russia, Japan, Iran, and Canada.[172] Convention No. 29 bans the use of "forced" prison labor by private industries.[173] If inmate labor is "voluntary," then it is permissible.[174] The ILO permits the deduction of a certain amount of prisoners' wages, with their consent, for the purposes of reimbursing their room and board and compensating victims.[175] The ILO does not require this "voluntary" nature when prison labor is for "state use," as it is internationally recognized, for penological reasons, that a state can force prisoners to work for state purposes.[176] The United States, rather than participate in Convention No. 29, has not only expanded the use of inmates for private labor but has also expanded the privatization of prisons themselves.

The United States has the highest level of prison privatization, but at least eleven other countries also have some level of prison privatization.[177] Even countries that have ratified Convention No. 29, such as the United Kingdom and New Zealand, are increasing their use of private prisons.[178] Conversely, France does not force its prisoners to work, and prisoners who are employed by private companies enjoy expansive social rights such as "social security payments, retirement fund payments, workplace accident allowances, maternity benefits, and health benefits."[179] French prisoners, in turn, are considered the most productive in Europe.[180] Other countries have even had success with prison labor reform with drastically different policies and cultural norms than either France or the United States.[181]

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172. *Ratifications of C029 - Forced Labour Convention, 1930 (No. 29)*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312174 (last visited Mar. 25, 2021).

173. Convention No. 29, *supra* note 124.

174. Milman-Sivan, *supra* note 2, at 1632.

175. *Id.* at 1634.

176. *Id.* at 1621, 1645–46 (observing "Convention No. 29's exception to its general prohibition on forced labor is reserved solely for the state").

177. Stacey Jacovetti, *The Constitutionality of Prison Privatization: An Analysis of Prison Privatization in the United States and Israel*, 6 GLOB. BUS. L. REV. 61, 63, 63 n.232 (2016) ("Australia, Scotland, England and Wales, and New Zealand hold a larger proportion of their prisoners in private facilities [than the United States]. The highest percentage, at 19%, is found in Australia.").

178. Milman-Sivan, *supra* note 2, at 1637–38 (stating that the United Kingdom is second only to the United States in its number of private prisons with 12.9% of all prisoners in private prisons and there are "no signs of this trend waning" and New Zealand terminated all agreements with privately managed prisons in 2005, but since 2009 the government has once again allowed for private prisons to conduct business in New Zealand).

179. *Id.* at 1640 (citing International Labor Organization [ILO], *A Global Alliance Against Forced Labour, Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, at 28, Report I(B), International Labor Conference 93d Session (2005)).

180. *Id.* at 1639–40 (citing ILO, *supra* note 179).

181. *See id.* at 1647–48.

Unlike France, in Israel, all prisoners are required to work unless exempted medically or otherwise by the appropriate parole board.[182] Prisons Ordinance determines wages, conditions of employment, maximum working hours, days of rest, and vacations.[183] Also, in contrast to the United States,[184] no Israeli prisoner is considered an "employee" under the law even if working for a private company outside of the prison.[185] No prisoners are entitled to minimum wages, and neither the prison nor the private company are legally considered an "employer."[186] However, Israel recently became the first state to deem prison privatization unconstitutional.[187] The Israeli Supreme Court based this decision on the "symbolic harm" that incarceration in a private prison imposes on "prisoners' rights to human dignity and autonomy, regardless of the actual conditions in the private prison."[188] The Court looked to the prisoners' "human rights," rather than the more common arguments of unfair competition or unlawful delegation of authority.[189] The Court's ultimate decision, and its reasoning, may help persuade other countries, such as the United States, to legislate similar bans on the privatization of prisons.

V. A NEW REGIME AND ITS JUSTIFICATION

A. *Quasi-Employee Status*

A comprehensive reform of federal labor laws which takes into account the status of prisoners as quasi-employees is necessary—especially in light of the increased involvement of private enterprises in the PIC.[190] Courts have focused on whether prisoners are "employees" for the purposes of the FLSA and have treated the statuses of "prisoner" and "employee" as irreconcilable social conditions.[191] While the courts may be correct about this dichotomy, Congress needs to step in and address the more complicated nature of a prison laborer as a special class of quasi-employee, especially when contracted to a private company.[192] The relationship between prisoner and manager—whether a private firm

182. *Id.* at 1647.
183. *Id.* at 1647–48.
184. *See supra* Part II.
185. Milman-Sivan, *supra* note 2, at 1648.
186. *Id.*
187. *Id.* at 1624 (citing HCJ 2605/05 Acad. Ctr. of L. & Bus. v. Minister of Fin., 9(33) P.D. 483 (2009) (Isr.)).
188. *Id.*
189. *Id.* at 1658.
190. Leung, *supra* note 5, at 708; *see supra* Part IV.
191. Zatz, *supra* note 4, at 885.
192. *See* Leung, *supra* note 5, at 708.

or government agency—is both pecuniary and penological.[193] Congress has the authority to provide a new statutory regime even though the Constitution—namely, the Thirteenth Amendment—does not require it.[194] A committee of key stakeholders[195] should be brought together to discuss the issues addressed in this Article.[196]

When a prisoner works full time for the PIC, the prisoner interacts with his or her administrators as a quasi-employee for a significant amount of time.[197] It follows that the prisoner's behavior will exhibit some level of market character and that, when acting in this capacity, he or she should be provided some appropriate level of protection from abuse.[198] Prisoners are currently classified by their status as either a "prisoner" or an "employee," but, instead of deciding case-by-case when to classify a prisoner as an employee, new legislation should create a special classification of quasi-employee with its own unique level of labor rights.[199] This specially tailored classification could not only help protect prisoners' human dignity but, at the same time, could recognize other legitimate concerns, such as the need to maintain order in prisons and deter crime.[200] However, disregarding the pecuniary nature of prison labor is not only harmful to the prisoner as an individual but also ignores unacceptable—even if unintended—systemic discriminatory racial effects.[201] Additionally, the idea of quasi-employee status is already well-established in other areas of labor law.

193. Zatz, *supra* note 4, at 896 (citing Hale v. Arizona, 993 F.2d 1387, 1403 (9th Cir. 1993) (Norris, J., dissenting)).

194. *Id.* at 886.

195. *See supra* Part IV.B (referring to "key stakeholders" as "including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public").

196. *See supra* Part III.

197. Leung, *supra* note 5, at 696.

198. *See* Zatz, *supra* note 4, at 913.

199. *See id.* ("Instead, we might consider a proliferation of employments. A categorical divide between employees and nonemployees is not the only plausible way to manage tensions between employment protections and other valuable features of work relationships.").

200. *See* Maiwurm & Maiwurm, *supra* note 66, at 201–02.

201. *See generally* Leung, *supra* note 5.

Indeed, while it has not yet been applied to American prisoners,[202] the quasi-employee concept has deep historical roots.[203] Black's Law Dictionary defines "quasi" as "[s]eemingly but not actually; in some sense or degree; resembling; nearly."[204] It defines "employee" as "[s]omeone who works in the service of another person . . . [who] has the right to control the details of work performance."[205] Courts have found quasi-employee status for laborers who do not meet the statutory definition of "employee," but who nonetheless may or should qualify for certain rights or privileges under the labor laws. Early railroad law in Pennsylvania applied a quasi-employee test to determine whether non-railroad workers injured on railroad premises could recover damages similar to railroad employees.[206] These courts determined that if a person, while injured, was performing tasks normally performed by railroad employees, then the laborer could indeed qualify as a quasi-employee for recovery purposes.[207] Courts in the United States also use a quasi-employee test, focusing on functional equivalency, to determine whether certain legal privileges extend to non-employees, such as the attorney-client privilege.[208]

The quasi-employee theory also exists in foreign labor law. In a number of European countries, the courts apply a quasi-employee test to determine whether franchisees and other, debatably self-employed entrepreneurs qualify for certain statutory labor rights.[209] Qualification is normally based on the level of economic dependence the laborer has on

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202. For a brief look at how quasi-employment interacts with franchises under German law, see Karsten Metzlaff & Tom Billing, *Germany*, *in* GETTING THE DEAL THROUGH: FRANCHISE 3 (Philip F. Zeidman ed., 2019); for a discussion of how the law of various European countries might address quasi-employment, see A.Ph.C.M. Jaspers, Quasi-Employee, Quasi-Self-Employed: More than Just a Name, Introduction to Utrecht University Conference for Comparative Law (1999), *in* Utrecht Publishing & Archiving Services, https://dspace.library.uu.nl/bitstream/handle/1874/7207/article_print2.html;jsessionid=C0511CDACC063D2A80B0F5D7AFD83A0E?sequence=1#text20 [https://perma.cc/3WBZ-5FFY].

203. *See* Edward J. Imwinkelried & Andrew Amoroso, *The Application of the Attorney-Client Privilege to Interactions Among Clients, Attorneys, and Experts in the Age of Consultants: The Need for More Precise, Fundamental Analysis*, 48 HOUS. L. REV. 265, 285 (2011); *see, e.g.*, McClure v. Pa. R.R. Co., 53 Pa. Super. 638, 646–47 (1913) (evincing the existence of the concept since the early 1900s).

204. *Quasi*, BLACK'S LAW DICTIONARY (11th ed. 2019).

205. *Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

206. *See McClure*, 53 Pa. Super. at 646–47; Hayman v. Phila. & Reading Ry. Co., 214 Pa. 436, 439 (1906); Keck v. Phila. & Reading Ry. Co., 206 Pa. 501, 501 (1903).

207. *See McClure*, 53 Pa. Super. at 638; *Hayman*, 214 Pa. at 436; *Keck*, 206 Pa. at 501.

208. Imwinkelried & Amoroso, *supra* note 203, at 285 (citing Michele Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 748 (2009)).

209. Metzlaff & Billing, *supra* note 202, at 3; Jaspers, *supra* note 202 (noting "the issue [of determining quasi-employment] hinges on the extent of dependency of the workers concerned and the similarity of these quasi-workers to employees under an employment contract").

the parent company or employer.[210] In Germany, for example, self-employed franchisees may be "considered [as] quasi-employee[s]" if the franchisee demonstrates a requisite "economic dependency on the franchisor."[211]

The quasi-employee concept from historical American and contemporary European practice analogously applies to prison laborers. Inmates act in a functionally equivalent manner to employees by performing profit-producing tasks, sometimes tasks requiring trained skills, for an employer, effectively reducing companies' hiring needs. Correspondingly, prisoners generally have no other means to generate income because they are incarcerated and, therefore, have considerable economic dependence on their employer. Because courts in the United States refuse to extend FLSA rights to inmate laborers, and these laborers satisfy both historical tests for quasi-employee status, a new statutory definition and regulatory regime specifically tailored for prison laborers is required.[212] The penological nature of inmate labor, the size of the United States prison population, and the increased use of this labor by private companies, all combined with extremely low rates of pay and the racial disparities within the prison population, demand a permanent and well-defined quasi-employee status.

Any attempt to evaluate a prisoner's status based merely on the FLSA's definition of "employee" is not only ineffective but unadvisable.[213] Courts and scholars have made it clear that "coerced prisoner labor is incompatible with the principles [of contract] underlying the private sphere,"[214] and this Article takes it one step further, arguing that it is illogical to apply the same employment principles to each. The prison laborer—as a quasi-employee—belongs to a separate class, which needs proper regulation and protection under a new legal regime. Prisoners, as quasi-employees, unmistakably engage in an economic relationship with their supervisors and produce work.[215] However, prisoners are also always subject to the penological nature of their imprisonment. Accordingly, even "when two packages share a common element, they need not be treated as analytically the same, even in that one respect."[216]

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210. Metzlaff & Billing, *supra* note 202, at 3; Jaspers, *supra* note 202.
211. Metzlaff & Billing, *supra* note 202, at 3.
212. *See* Haslam, *supra* note 23, at 371.
213. *See supra* Part III.B & IV.A.
214. Milman-Sivan, *supra* note 2, at 1670.
215. Zatz, *supra* note 4, at 926.
216. *Id.* at 927.

B. *Suggested Intermediate Approach*

Professor Sinzheimer claims that labor law is on a mission to uphold "human dignity," and that this is the "special task of labor law."[217] And, Professor Walzer suggested in his letter to the Israeli Supreme Court that "*prisoners* should be at the center of criminal punishment rather than a means for profit making, for otherwise their right to *dignity* is compromised."[218] Prison labor involves both "the dignity of the person" and "integrity of the body," and therefore, careful attention should be given to these principles when crafting proper legislation, to a different degree than when crafting the laws governing private enterprise.[219] Furthermore, Professor Goldberg has established that there are "material" and "symbolic" gains to classifying a person as a "worker" rather than as a "welfare recipient," including higher productivity and less stigmatization.[220] The new quasi-employee legal regime should minimize policies that dehumanize prisoners or antagonize their dignity in ways that are unnecessary to their penological status.

One solution, which this Article does not recommend, would be to take the strict approach to the quasi-employee question and to ban all private profit-seeking use of prison labor, reserving this labor only for state use. However, a complete ban on the participation of private corporations in the PIC would not be advisable. There is evidence that private firm involvement has produced several positive outcomes, including "expanded work opportunities and higher wages for inmates."[221] A 2006 study by the National Institute of Justice "confirmed positive effects for PIE alumni/ae in terms of higher rates of employment and lower rates of recidivism than those of inmates whose work experience was in other prison programs."[222] Similarly, the UNICOR

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217. Milman-Sivan, *supra* note 2, at 1671–72 (noting that Professor Sinzheimer was one of the first scholars to specialize in labor law); *see, e.g.*, Michel Coutu, *With Hugo Sinzheimer and Max Weber in Mind: The Current Crisis and the Future of Labor Law*, 34 COMP. LAB. L. & POL'Y J. 605, 617 (2013).

218. Milman-Sivan, *supra* note 2, at 1674 (emphasis added) (citing Michael Walzer, *At McPrison and Burglar King, It's . . . Hold the Justice*, NEW REPUBLIC, Apr. 8, 1985, at 11). Professor Walzer is a famous American intellectual and political theorist. *See, e.g.*, Richard P. DiMeglio, *The Evolution of the Just War Tradition: Defining* Jus Post Bellum, 186 MIL. L. REV. 116, 118 (2005).

219. Aman & Greenhouse, *supra* note 18, at 359.

220. Zatz, *supra* note 4, at 949 (citing Chad Alan Goldberg, *Contesting the Status of Relief Workers During the New Deal: The Workers Alliance of America and the Works Progress Administration, 1935–1941*, 29 SOC. SCI. HIST. 337, 355 (2005)). Professor Goldberg is a prominent professor of sociology at the University of Wisconsin-Madison. *See, e.g.*, *About the Author*, UNIV. OF CHI. PRESS BOOKS, https://press.uchicago.edu/ucp/books/author/G/C/au5509187.html [https://perma.cc/AX6F-WAK3] (last visited Mar. 22, 2021).

221. Milman-Sivan, *supra* note 2, at 1646.

222. Aman & Greenhouse, *supra* note 18, at 392 (citing Moses & Smith, *supra* note 36).

program, which at times provides to the open market, has also been "linked to reduced rates of recidivism."[223] The strict solution is an unrealistic approach to the quasi-employee dilemma due to the current trends both nationally and internationally of increased private firm involvement within the PIC.[224]

Instead, this Article suggests taking an intermediate approach by banning private prisons and allowing state-run prisons to contract with private industries. First, the United States should use Israel as an example and ban the use of private-run prisons. This ban would convey the proper amount of respect for the human dignity of inmates, especially because those inmates are disproportionately black males and the United States has a history of racial discrimination.[225]

Israel has taken the unprecedented step of banning private-run prisons based on "the symbolic harm on prisoners' rights to liberty and human dignity" while still allowing for state institutions to contract with private companies.[226] Like the United States, Israel mandates that all prisoners must work unless medically unfit or under another exemption.[227] Some of the work in Israel is contracted out to private firms,[228] but even when working in these positions prisoners are refused "employee" status under the law.[229]

Next, this Article suggests that we borrow from France's libertarian principles of non-coercion and voluntary work,[230] but only in regard to prison-work for private firms or work designed for the open market. Under the suggested regime, quasi-employee prisoners could choose whether to volunteer to work for private firms in advertised opportunities, but would still be mandated to perform "prison housework" and other "state use" labor at reduced rates if they refused to take advantage of such postings.[231] All prison work for private firms would be voluntary,[232] and no coercion based on force would be permitted "except in the administration of the law."[233] Wages—when working for a private firm or providing goods and services for the open market—would be based on

223. Leung, *supra* note 5, at 690.

224. *See supra* Part I.

225. *See* Leung, *supra* note 5, at 684; Goad, *supra* note 15, at 179; *see also supra* Part IV.B.

226. Milman-Sivan, *supra* note 2, at 1662.

227. *See supra* Part V.A.

228. *Id.*

229. *Id.*

230. *Id.*

231. Milman-Sivan, *supra* note 2, at 1669 (contrasting the voluntary labor of a hypothetical "libertarian prison" with the forced labor of the United States federal prison system) (citing J. Roger Lee & Laurin A. Wollan, *The Libertarian Prison: Principles of Laissez-Faire Incarceration*, 65 PRISON J. 108, 108 (1985)).

232. *See supra* Part V.A. (discussing the French approach).

233. Milman-Sivan, *supra* note 2, at 1669 (citing Lee & Wollan, *supra* note 231, at 111).

competitive rates, reduced for any regulatory hurdles of hiring prisoners. In turn, a new prisoner minimum wage law and other appropriate labor laws would apply as tailored by the new regime.[234]

Under the new legal regime, the law should impose reasonable wage deductions, as currently imposed by PIE, for familial dependence, victim compensation, debt collection, and tax collection, and should provide an election for charitable donations.[235] Also, "prison housework" and labor for "state use"—as recognized internationally and by the ILO—should fit within the definition of "administration of the law."[236] The law's exemption for certain forms of forced labor, especially by the State, addresses possible concerns over unnecessary leisure and increased prison violence.[237] Each prison should have a committee to approve such mandatory "state use" work via formal procedures and with periodic review and audits, so as to avoid abuse.

This Article further suggests that the private firms benefitting from the use of prison labor should be required to create mandated corporate initiatives designed to hire a certain minimum level of prison laborers post-release without regard to their ex-convict status in the hiring process.[238] These initiatives would make it easier for prisoners to assimilate into society, thus reducing recidivism. This hiring requirement could ease some of the current concerns regarding racial profiling and discrimination, although consultation with the appropriate stakeholders through hearings and special committees appointed by Congress is necessary during the drafting of this legislation.[239]

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234. *Id.*; *see supra* Part V.A (demonstrating the difference in France's current voluntary work policies for prisoners versus this Note's suggested approach, which applies only to work for private companies or when providing products to the open market).

235. *See supra* Part I (borrowing this concept from PIE and other programs but encouraging reasonable compromise with regard to the maximum percentages deductible from inmate pay).

236. *See* Milman-Sivan, *supra* note 2, at 1669 (citing Lee & Wollan, *supra* note 231, at 111).

237. *See* Haslam, *supra* note 23, at 387, 390 (citing Hale v. Arizona, 993 F.2d 1387, 1401 n.1 (9th Cir. 1993) (Norris, J., dissenting)).

238. *See* Leung, *supra* note 5, at 683, 704 (citing Victoria's Secret and Whole Foods as examples of private firms that consider ex-convict status in the hiring process) (citing Alex Henderson, *9 surprising industries getting filthy rich from mass incarceration*, SALON (Feb. 22, 2015, 6:00 PM), https://www.salon.com/2015/02/22/9_surprising_industries_getting_filthy_rich_from_mass_incarceration_partner/ [https://perma.cc/GEG6-YHKQ]; Claire Zilman, *Why Whole Foods, Dollar General, and Panera have all been sued over a tiny hiring technicality*, FORTUNE (Jan. 16, 2015, 5:00 AM), http://fortune.com/2015/01/16/whole-foods-dollar-general-panera-hiring-lawsuit/ [https://perma.cc/85BN-CSMU]).

239. *See id.* at 704 (noting that "[s]ome studies show that hiring rates of Black workers for low-skill jobs in states that have 'banned the box' have actually declined, a result that many activists and organizers suggest is the result of stereotypes about Black men, and to some degree women, as criminals") (citing Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 39 (Univ. of Mich. Law & Econ., Research Paper No. 16-012, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795 [https://perma.cc/Q9PC-JNBA]; Jennifer L. Doleac & Benjamin Hansen, The Unintended

Finally, to address the risks involved with unionization of prisoners, special procedures could be developed specifically for prisoners in order to maintain safety while allowing them to have a voice in their pecuniary role as quasi-employees. One suggestion could be to have the inmates divided into representative subgroups of up to ten individuals, such as in a military chain-of-command.[240] Each subgroup of up to ten individuals could have a designated representative that would then embody the group's interests with nine other representatives—each representing ten prisoners. Therefore, this next higher-level subgroup would speak for a total of 100 individuals and so forth, without the dangers of having 100 prisoners congregating. Ultimately, a select group or individuals could represent the complete interests of each prison.

Furthermore, a 360-degree feedback system should be put into place to elicit concerns and recommendations from all participants, and regulatory enforcers should perform regular audits to ensure compliance and recommend amendments as deemed necessary by studies over time.[241] The 360-degree feedback system would allow prisoners to give feedback on their representatives, the representatives to give feedback on their prisoner constituents, the prisoners to give feedback on the employers and guards, and the guards and employers to evaluate prisoners performance in their labor. A comprehensive review of such feedback would provide a clearer and more accurate picture of compliance and performance with any new legislation and standards thereunder. Strict compliance with the legislation should be enforced, and heavy penalties laid down on those who attempt to abuse the system. This Article does not attempt to solve every issue that could potentially arise in the context of the quasi-employee, but merely gives some examples of solutions that a committee of the proper stakeholders could consider when developing new legislation.

Consequences Of "Ban The Box": Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden 5–6 (Oct. 2017) (unpublished manuscript), http://jenniferdoleac.com/wp-content/uploads/2015/03/DoleacHansenBanTheBox.pdf [https://perma.cc/3LYR-ZCKR]); *see also supra* p. 19 (referring to "key stakeholders" as "including prisoners, prisoners' families, prison administrators, correctional officers, victims, victims' families, the government, and the public").

240. *See* Jacob Morgan, *The 5 Types of Organizational Structures: Part 1, The Hierarchy*, FORBES (July 6, 2015, 3:05 AM), https://www.forbes.com/sites/jacobmorgan/2015/07/06/the-5-types-of-organizational-structures-part-1-the-hierarchy/#561f3b185252 [https://perma.cc/8WJ9-4YND] (discussing the basic breakdown of a hierarchical organization).

241. *See* Lynda Silsbee, *Everyday Leadership Acts of Courage: To Lead, You Must be Vulnerable*, FORBES (Feb. 12, 2019, 9:00 AM), https://www.forbes.com/sites/forbes coaches council/2019/02/12/everyday-leadership-acts-of-courage-to-lead-you-must-be-vulnerable/#35a1 1aa567d6 [https://perma.cc/SRV8-YHJE] (discussing the benefits of feedback).

CONCLUSION

The modern PIC, with its codependence on private firms, needs a new statutory regime recognizing a prisoner's status as a quasi-employee. This status should be based on the economic reality of the relationships involved, while respecting each prisoner's dignity as a person. Quasi-employee status for prisoners, especially when working for private companies, would allow for the provision of practical and professional skills, restoration of prisoners' dignity, the choice to exercise individual autonomy, and have a positive impact on both prisoners' physical and mental health.[242]

This new legal regime would remove the ambiguity of the FLSA and any need for courts to decide case-by-case what qualifies a prisoner for "employee" status.[243] The courts would no longer have to engage in judicial crafting and could rely on clear legislation for this distinct class of laborer that has attributes that are both penological and pecuniary.[244] This new legal regime would explicitly address the discriminatory nature of prison labor and some of its current implications for racial disparities in the prison system, specifically by ensuring certain rights for prisoners while contracted to private companies.[245]

This Article has made specific suggestions for measures that could be implemented in a legal reform that would recognize prisoners as quasi-employees and suggests that special committees, comprised of the appropriate stakeholders be included in any initiative to ensure the appropriate compromises are made for any final regime. These committees, appointed by the appropriate Congressional sub-committee, should consider the costs and benefits of each possible right and restriction applied to prisoner laborers. They should be thorough and comprehensive but leave room for flexibility and modifications as societal norms continue to shift and as the key stakeholders assess, reevaluate, and continually develop a workable system. Whatever the specific contours of this committee and its stakeholders, or Congress' ultimate proposed legislation, the definitive goal of its resultant regime should be clear—to create long overdue legal clarity and specifically tailored quasi-employee protections for America's prison laborer class, as this underrepresented class is increasingly providing profit-producing labor and services for the open market and private businesses.

242. Milman-Sivan, *supra* note 2, at 1648–49.
243. *See supra* Parts I–II.
244. *See supra* Part III.
245. *See supra* Part IV.

THE DUEL BETWEEN REVERSIBLE ERROR AND PRESERVATION: FLORIDA SUPREME COURT TO HAVE LAST WORD ON FAMILY LAW CASES WITH INADEQUATE STATUTORILY-REQUIRED FINDINGS

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INTRODUCTION

This Article revisits the issue of whether a family law case litigant must file a motion for rehearing to bring to the trial court's attention the lack of factual findings in its judgment in order to preserve the issue for appeal. In 2001, the Third District Court of Appeal in *Broadfoot v. Broadfoot*[1] established the rule that in family law cases, a litigant may not complain about a trial court's failure to make factual findings unless the matter was brought to the trial court's attention in a motion for rehearing to provide the trial court with an opportunity to correct its own errors.[2] In

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1. 791 So. 2d 584 (Fla. 3d DCA 2001).
2. *Id.* at 585.

2004, the Fifth District applied the *Broadfoot* rule in *Mathieu v. Mathieu*[3] with one caveat commonly known as the *Mathieu* exception: "[I]f the court determines on its own that its review is hampered, we may, at our discretion, send the case back for findings."[4] Back in 2005 the Fourth District decided *Dorsett v. Dorsett*,[5] which reached a contrary result and expressed disagreement with both *Broadfoot* and *Mathieu*.[6]

By 2012, all Florida district courts except the Fourth District had explicitly or implicitly followed the *Broadfoot* rule or the *Mathieu* exception.[7] Since the state of the law regarding this preservation issue was unclear, in a widely circulated 2012 Florida Bar Journal article, this author argued that the Fourth District should revisit *Dorsett* and follow *Broadfoot* and *Mathieu* so that all the district courts can speak with one voice.[8] But recently, the Fourth District decided *Fox v. Fox*,[9] which re-affirmed its earlier decisions that a party may raise the issue of lack of statutorily-required findings in alimony, equitable distribution and child support cases without the need to file a motion for rehearing.[10] The *Fox*

` 3. 877 So. 2d 740 (Fla. 5th DCA 2004) (per curiam).

4. *Id,* at 741 n.1.

5. 902 So. 2d 947 (Fla. 4th DCA 2005).

6. *Id.* at 950 n.3.

7. The First District embraced *Broadfoot* and *Mathieu* in *Owens* v. *Owens*, 973 So. 2d 1169, 1170 (Fla. 1st DCA 2007). The Second District acknowledged the Fourth District's disagreement with *Broadfooot* and *Mathieu* in *Esaw* v. *Esaw*, 965 So. 2d 1261, 1263 & 1267 n.1 (Fla. 2d DCA 2008) where the Second District affirmed the lower court even though the judgment below lacked the required factual findings. However, on July 3, 2019, the Second District decided *Engle v. Engle* wherein the Second District joined the Fourth District's decision in *Fox*, which held that "the failure to comply with the statute's requirement of factual findings is reversible error regardless of whether a motion for rehearing is filed." Engle v. Engle, 277 So. 3d 697, 699 (Fla. 2d DCA 2019) (citing Fox v. Fox, 262 So. 3d 789, 791 (Fla. 4th DCA 2018)). In reaching its conclusion, the Second District reviewed the line of cases from the First, Third, and Fifth Districts that followed *Ascontec Consulting, Inc.* v. *Young*, 714 So. 2d 585, 587 (Fla. 3d DCA 1998) and *Reis v. Reis*, 739 So. 2d 704, 705 (Fla. 3d DCA 1999), which do not stand for the proposition that a motion for rehearing is required to preserve the failure to make factual findings. Engle, 277 So. 3d at 699–700. Rather, *Reis* and *Ascontec* dealt with "claims that the trial court waited too long after an evidentiary hearing to issue its written order" and thus necessitating a new trial since the passage of time put into question whether the trial court can correctly recall the details of the hearing. Engle v. Engle, 277 So. 3d at 699–700. Moreover, in *Allen v. Juul*, the Second District followed its own decision in *Engle* and certified conflict with the First District's opinion in *Owens*, the Fifth District's opinion in *Mathieu*, the Third District's opinion in *Broadfoot*, and "the cases of those districts that rely on those opinions." Allen v. Juul, 278 So. 3d 783, 785 & 786 (Fla. 2d DCA 2019).

8. Larry R. Fleurantin, *The Debate Continues on Whether to Remand Family Law Cases with Inadequate Findings*, 86 FLA. BAR J. 27, 27 (2012). For further discussion of the preservation issue, *see generally* Daniel A. Bushell, *When Is a Motion for Rehearing Necessary to Preserve for Review a Trial Court's Error in Failing to Make Factual Findings?*, 93 FLA. BAR J. 46, 46 (2019).

9. 262 So. 3d 789 (Fla. 4th DCA 2018).

10. *Id.* at793.

decision is remarkable because it is an en banc decision that established a clear precedent in the Fourth District.[11] Subsequent to the Fourth District's decision in *Fox*, the Second District decided *Engle v. Engle* wherein the Second District joined *Fox* and certified conflict with the other three district court opinions.[12] *Fox* and *Engle* unequivocally raised the tension between the Fourth District and Second District on one hand and the other Florida district court opinions on the other hand. Now, it is up to the Florida Supreme Court to resolve the conflict certified by *Fox* and *Engle* and settle the law on this issue that is likely to reoccur.

This Article carefully examines the decision in *Fox* that receded from *Farghali v. Farghali*,[13] where a three-judge panel departed from the Fourth District's precedent that "the failure to make the [required] statutory findings constitutes reversible error."[14] In particular, the author uses the Fourth District's decision in *Fox* to illustrate why the prior panel precedent rule must be adhered to even if a subsequent panel is convinced that a case was wrongly decided.[15] One of the original panel members of the *Farghali* court changed his position and filed a concurring opinion in *Fox* explaining why the majority's position is more persuasive from the position expressed in *Farghali* and *Kuchera*.[16] *Fox* provides a careful and well-reasoned analysis that considers reversible error versus preservation.[17] The author is convinced that the legal system will be better served if Florida follows the rule established by *Fox*.[18] Therefore, this Article urges the Florida Supreme Court to approve *Fox* in order to stabilize the judicial system and establish a binding precedent to promote uniformity of law in Florida.

I. THE FOURTH DISTRICT'S EN BANC DECISION IN *FOX*

In *Fox*, the former husband argued that the trial court's failure to make statutorily-required findings in an award of alimony is reversible error whereas the former wife argued that the former husband did not preserve the issue for appeal because he did not file a motion for rehearing to bring the matter to the trial court's attention.[19] The Fourth District took the issue en banc to resolve a conflict within the district.[20] The conflict stems from the *Farghali*'s panel that departed from the Fourth District's

11. *See id.* at 791.
12. *Engle*, 277 So. 3d at 699 n.2 & 704.
13. *Farghali v. Farghali*, 187 So. 3d 338, 339 (Fla. 4th DCA 2016).
14. *Fox*, 262 So. 3d at 791.
15. *See infra* Part II.
16. Fox, 262 So. 3d at 795–96 (Conner, J., concurring) (citing *Farghali*, 187 So. 3d at 338; also citing *Kuchera v. Kuchera*, 230 So. 3d 135 (Fla. 4th DCA 2017)).
17. *Id.* at 794 (majority opinion).
18. *See id.* at 791.
19. *Id.*
20. *Id.*

precedent.[21] The *Farghali* court expressly adopted a First District's rule that "a party is not entitled to complain that a judgment in a marital and family law case fails to contain sufficient findings unless that party raised the omission before the trial court in a motion for rehearing."[22]

The court found that *Farghali* conflicts with the Fourth District's earlier decisions that did not require a motion for hearing to preserve the issue of sufficient findings.[23] In resolving the intra-district conflict, the court adhered to its prior decisions and held that "the failure to comply with the statute's requirement of factual findings is reversible error regardless of whether a motion for rehearing is filed."[24] The court therefore receded from *Farghali* and certified conflict with the other district courts.[25]

The en banc court noted that in *Dorsett* the Fourth District held that the failure to make sufficient findings in an equitable distribution award constitutes reversible error.[26] The *Dorsett* court acknowledged that both *Broadfoot* and *Mathieu* as having reached the opposite conclusion.[27] Next reviewed was the Third District's decision in *Broadfoot* that affirmed an alimony award even though the judgment did not contain the statutorily-required findings on the ground that "the award was clear and supported by the record."[28] In *Mathieu*, the Fifth District followed *Broadfoot* and affirmed a dissolution judgment despite the lack of statutorily-required findings because the husband failed to raise the issue in a motion for

21. Fox v. Fox, 262 So. 3d 789, 791 (Fla. 4th DCA 2018).

22. The *Farghali* panel departed from Fourth District precedent when the court followed the rule established by *Simmons v. Simmons*, 979 So. 2d 1063, 1064 (Fla. 1st DCA 2008). *See* Fox, 262 So. 3d at 792.

23. These earlier decisions held that the failure to make the statutorily-required findings constitutes reversible error. *See, e.g.*, Badgley v. Sanchez, 165 So. 3d 742, 744 (Fla. 4th DCA 2015); Rentel v. Rentel, 124 So. 3d 993, 994 (Fla. 4th DCA 2013); Mondello v. Torres, 47 So. 3d 389, 395 (Fla. 4th DCA 2010); Aguirre v. Aguirre, 985 So. 2d 1203, 1207 (Fla. 4th DCA 2008); and Dorsett v. Dorsett, 902 So. 2d 947, 950 n.3 (Fla. 4th DCA 2005).

24. *Fox*, 262 So. 3d at 791 (relying on Phila. Fin. Mgmt. of S.F., LLC. v. DJSP Enters., Inc., 227 So. 3d 612, 617 (Fla. 4th DCA 2017); and then relying on *In re* Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982) ("[A] panel of our court has no authority to overrule or recede from our precedent on the same legal issue").

25. *Id.* at 791 n.1 (noting that because Kuchera v. Kuchera, 230 So. 3d 135, 139 (Fla. 4th DCA 2017), followed *Farghali*, the court also receded from *Kuchera*).

26. *Id.* at 793.

27. *Id.* (citing Dorsett, 902 So. 2d at 950). Unlike *Farghali* and *Kuchera* that departed from binding precedent, all subsequent panels followed *Dorsett* as binding precedent. For example, in 2010, in *Mondello*, the Fourth District again expressed disagreement with *Mathieu*. *Mondello*, 47 So. 3d at 400 n.3. In *Rentel*, the Fourth District reversed and remanded an alimony award for failure to make statutorily-required findings. *Rentel*, 124 So. 3d at 994. The Fourth District in *Badgley* reiterated that the failure to make the statutorily-required findings warrants reversal, citing *Mathieu* again as contrary authority. *Badgley*, 165 So. 3d at 744.

28. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).

rehearing.[29] Both *Broadfoot* and *Mathieu* adopted an exception to the rule that when the court's review is hampered, they may remand the case for sufficient findings.[30]

The en banc court further considered *Owens* where the First District adopted *Broadfoot* and *Mathieu* and held that because the appellant failed to raise the lack of findings in a motion for rehearing, the issue is not preserved for appellate review.[31] The court also reviewed the Second District's decision in *Esaw* that affirmed the lower court based on a failure to show harmful error or provide a transcript, noting the lack of findings did not make the error fundamental.[32] In reaching its result, the *Esaw* court acknowledged that the Fourth District has disagreed with *Broadfoot* and *Mathieu*.[33]

The en banc court stated that:

> [d]espite the other districts' decisions requiring a party to file a motion for rehearing to preserve the issue of a trial court's failure to make statutorily-required findings in alimony, equitable distribution, and child support, we adhere to our

29. *Id.*

30. *Id.*

31. *Id.* (reviewing Owens v. Owens, 973 So. 2d 1169, 1169 (Fla. 1st DCA 2007).

32. *Id.* (citing Esaw v. Esaw, 965 So. 2d 1261, 1265 (Fla. 2d DCA 2007)).

33. *Id.* (reviewing *Esaw*, 965 So. 2d at 1265 n.1). The conflict was also noted in the concurring opinion. *See Esaw*, 965 So. 2d at 1268 (Silberman, J., concurring). But as previously noted, the Second District in *Engle* followed *Fox*'s reasoning and rejected the rationale offered. by the other district courts. *See* Engle v. Engle, 277 So. 3d 697, 702 (Fla. 2d DCA 2019). The *Engle* court noted that *Fox* interpreted *Esaw* to have implicitly approved the preservation rule established by *Broadfoot* and its progeny; however, the *Engle* court made it clear that was not the case as evidenced by Judge Silberman's concurrence encouraging litigants to raise the issue in a motion for rehearing since the Second District has not explicitly addressed the preservation issue. *See id*. at 699 n.2. The *Engle* court found *Fox*'s reasoning persuasive on several key points. First, the court noted that allowing trial courts to fail to make the required findings "will create future difficulty in subsequent modification proceedings" where the trial court has to determine whether "there has been a material change in circumstances." *Id.* at 702 (citing *Fox*, 262 So. 3d at 793–94). Second, remanding for the required findings is appropriate in these cases because the rules were not designed to allow trial judges to ignore statutory requirements, as family law trial judges should be aware of the findings that they are required to include in a family law judgment. *See id*. at 703 (citing *Fox*, 262 So. 3d at 794). Third, because these cases involve families and children, "foreclosing a litigant from raising" the issue on appeal for failure to raise the preservation issue in a motion for rehearing not only "creates a procedural bar to achieving equity" but also "allows trial courts to ignore specific legislative directives." *Id.* at 704 (citing *Fox*, 262 So. 3d at 794). Fourth, the *Engle* court acknowledges that family law cases involve a large number of litigants who appear before the trial court and the appellate courts pro se and therefore "this judicially created rule may create a trap that not only has the potential to affect all family law litigants but in practice could unduly affect pro se litigants." *Id*. (citing *Fox*, 262 So. 3d at 794). Hence, the Second District, like in *Fox*, urged the Family Law Rules Committee to review and address the issue. *Id*. (citing *Fox*, 262 So. 3d at 795).

> precedent that a party may raise the issue without having previously filed a motion for rehearing.[34]

The court reasoned that "the rules do not require the filing of a motion, many dissolution appeals are pro se, and a family court judge should be aware of the statutory requirements in rendering a decision on alimony, equitable distribution, and child support."[35]

The court noted the distinction between dissolution of marriage cases and other civil litigation.[36] Unlike in civil litigation where the final judgment is the end of the litigation process, a final judgment of dissolution "establishes ground zero for the purpose of petitions for enforcement, modification, and contempt proceedings."[37] Without the statutorily-required factual findings, "it is difficult, if not impossible," to enforce a judgment or to justify a modification based on a material change in circumstances.[38] The court reasoned that the refusal to review a trial court's failure to make the required findings "frustrate[d] the very purpose [of] those findings."[39] Because children and families are the focus, a rule requiring a motion for rehearing "is too restrictive and imprecise to operate fairly."[40] This is especially true where many family court cases are handled pro se."[41]

The majority addressed the dissent's suggestion that judicial economy should prevail over children and family and that requiring a motion for rehearing was just a preservation issue.[42] The majority disagreed, noting that "[t]he failure to make required factual findings is not the type of error that preservation rules were designed to avoid."[43] Likewise, "the preservation rules were not designed to allow a trial court to ignore statutory requirements of which it should be aware."[44]

The court noted that while the failure to make the statutorily-required findings may not be fundamental error, it is reversible error.[45] The en banc court, therefore, adhered to its prior precedent, approved the rule

34. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 793–94.
39. *Id.* at 794.
40. Fox v. Fox, 262 So. 3d 789, 794 (Fla. 4th DCA 2018).
41. *Id.* at 794.
42. *Id.*
43. *Id.*
44. *Id.* (stating that while a lawyer or a party should encourage the trial court to comply with statutory requirements, it should not be a rule to require a party to bring the statutory requirements to the trial court's attention in order to preserve the issue for appeal).
45. *See id.* (citing Walden v. Adekola, 773 So. 2d 1218, 1219 (Fla. 3d DCA 2000) (which "revers[ed] a sanctions order for failing to contain a willfulness finding, which can be raised for the first time on appeal")).

applied in *Badgley*, *Rentel*, *Mondello*, *Aguirre*, and *Dorsett* and receded from *Farghali* and *Kuchera* to the extent they departed from the Fourth District's established precedent.[46] After addressing the merits of the former husband's second issue—the trial court's refusal to allow him to discover and present evidence on the former wife's employability—the court reversed and remanded the cause for further proceedings.[47]

Judge Conner issued a concurrent opinion noting, "After participating in the panel decisions issued in *Farghali* and *Kuchera* and considering the various positions argued during the en banc consideration of this case, I have come to the conclusion that the majority's position is more persuasive."[48] Accordingly, he changed his position from that expressed in *Farghali* and *Kuchera*.[49]

Judge Kuntz also issued an opinion, concurring in part and dissenting part. Unlike the majority that held that the failure to make the written findings constitutes fundamental error, Judge Kuntz noted that "there is no general rule that the lack of statutorily required findings constitutes fundamental error."[50] Hence, the dissent would require parties to preserve the issue for appellate review, as required in all other instances absent fundamental error.[51]

In the case at bar, the dissent found the former husband waived his challenge to the court's alimony award, noting that the *Farghali* court reached the correct conclusion when it adopted the rule used by the First District in *Simmons*.[52] The *Simmons* rule tracked the rule applied by the other districts in *Esaw*, *Owens*, *Mathieu* and *Broadfoot*.[53] The dissent reviewed those decisions and found them to be persuasive, noting that the rule adopted in *Farghali* stands for the proposition that the appellate court's review is limited to issues raised before and ruled upon by the trial court.[54] As a result, issues raised for the first time on appeal will not be considered. "The requirement that a party preserve an issue is based on

46. Fox v. Fox, 262 So. 3d 789, 794–95 (Fla. 4th DCA 2018).

47. *Id.* at 791.

48. *Id.* at 796 (Conner, J., concurring) (citations omitted).

49. *Id.*

50. *Id.* at 799 (citing Esaw v. Esaw, 965 So. 2d 1261, 1265 (Fla. 2d DCA 2007)) (brackets omitted) (Kuntz, J., concurring in part and dissenting in part).

51. *Id.* at 796.

52. Fox v. Fox, 262 So. 3d 789, 797 (Fla. 4th DCA 2018) (Kuntz, J., concurring in part and dissenting in part).

53. *Id.* (citing Simmons v. Simmons, 979 So. 2d 1061, 1064 (Fla. 1st DCA 2008); *Esaw*, 965 So. 2d at 1261; Owens v. Owens, 973 So. 2d 1169 (Fla. 1st DCA 2007); Mathieu v. Mathieu, 877 So. 2d 740 (Fla. 5th DCA 2004) (per curiam); Broadfoot v. Broadfoot, 791 So. 2d 584 (Fla. 3d DCA 2001)).

54. *Id.* at 798 (citing State v. Barber, 301 So. 2d 7, 9 (Fla. 1974)).

fairness to the litigants, the court, and the judicial system."[55] It is to allow the judge and the opposing party an opportunity to correct the error.[56]

The dissent took issue with the majority's statements that dissolution cases are unlike civil cases and that "'it is equally, if not more, important' that a court make findings in a dissolution case."[57] The dissent pointed out that "an exception to the preservation requirement exists for fundamental error, not error this Court decides in a particular case to be important."[58] Because the former husband failed to preserve the issue of adequate findings in a motion for rehearing or by other means authorized by the rules, the dissent would affirm on this issue and recede from the Fourth District's earlier decisions requiring a contrary result.[59]

II. DISCUSSION AND ANALYSIS

A. *The Prior Panel Precedent Rule:* Farghali*'s Analysis Was Inconsistent with Then-Binding Fourth District Precedent*

In *Farghali*, a three-judge panel followed the First District's decision in *Simmons*, but disregarded the Fourth District's binding precedent.[60] In effect, the *Farghali* panel receded from *Dorsett* and its progeny that held "the failure to make the [required] statutory findings constitutes reversible error."[61] That was a violation of the prior panel precedent rule under Fla. R. App. P. 9.331.[62] If the *Farghali* panel had looked to Florida case law and Rule 9.331, it would have found that, as a subsequent panel, the *Farghali* court was bound to follow *Dorsett*, which dictates a contrary result from the one reached in *Farghali*.[63]

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55. *Id.* (citing City of Orlando v. Birmingham, 539 So. 2d 1133, 1134 (Fla. 1989)).

56. *Id.* (citing Castor v. State, 365 So. 2d 701, 704 (Fla. 1978)). The dissent cited to several Florida Supreme Court decisions that determined the failure to make required findings does not constitute fundamental error. *See* State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994); Hopkins v. State, 632 So. 2d 1372 (Fla. 1994); Seifert v. State, 616 So. 2d 1044 (Fla. 2d DCA), *approved in relevant part*, 626 So. 2d 207 (Fla. 1993).

57. Fox v. Fox, 262 So. 3d 789, 799 (Fla. 4th DCA 2018) (Kuntz, J., concurring in part and dissenting in part).

58. *Id.*

59. *Id.*

60. *See id.* at 791 & 792 (majority opinion).

61. *Id.*

62. FLA. R. APP. P. 9.311 (2019).

63. *See Fox*, 262 So. 3d at 792 (citing *In re* Rule 9.331, 416 So. 2d 1127, 1128 (Fla. 1982)). There are proper ways a district court's precedent may be overruled or receded from, but the way the *Farghali* panel receded from *Dorsett* was not one of them. First, a Florida district court's precedent may be overruled by an intervening U.S. Supreme Court or Florida Supreme Court decision. *See generally* Raoul G. Cantero, III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 75 FLA. BAR J. 40, 40 (May 2002). When an intervening decision from the U.S. Supreme Court or Florida Supreme Court implicitly overrules prior cases from the district courts of appeal, courts often certify the issue to the Florida Supreme Court for clarification. *Id.* The second way to overrule or recede from a precedent is by following the prior panel precedent

This author previously laid down the procedure to overrule or recede from *Dorsett* if a subsequent panel is convinced that *Dorsett* was wrongly decided: "[While] subsequent panels from the Fourth District must follow *Dorsett*, which has the force of binding precedent, a future panel may faithfully apply *Dorsett*'s holding and recommend en banc review."[64] That is the procedure, but the *Farghali* panel did not follow it.[65] Instead, the *Farghali* panel took it upon itself by receding from *Dorsett* and its progeny in violation of Rule 9.331.[66]

B. *The* Fox *Decision Rests on a Sound Analytical Framework*

In December 2018, the Fourth District decided *Fox*, which demonstrates that *Dorsett* was rightly decided and should be followed in cases like *Fox*.[67] *Fox* is a well-reasoned decision that considered the Fourth District's earlier decisions[68] and the other district courts' decisions,[69] with which *Dorsett* disagreed. A close review of the decision shows that *Fox* rests on a sound analytical framework.

In affirming the validity of *Dorsett*'s holding, *Fox* made three important points, explaining that appellate courts should not require family law litigants to file a motion for rehearing to preserve for appeal the lack of statutorily-required findings.[70] First, the rules do not require family law litigants to file a motion for rehearing in order to preserve the issue for appeal.[71] Although the Fourth District is not willing to impose such a requirement, it will apply such a rule if it is adopted. Hence, the en banc court stated that the Florida Bar Family Rules Committee may address this issue, because of judicial economy, by adopting the rule championed by the other district courts requiring a motion for rehearing to preserve the issue of the lack of statutorily-required findings for appeal.[72] "Absent such a rule, however, [the court] will not require a motion for rehearing to 'preserve' the issue."[73] Second, as the *Fox* court

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rule under Rule 9.331, which authorizes en banc review in order to maintain uniformity in decisions when a subsequent panel disagrees with a prior panel. As an alternative to the suggestion of en banc hearing, a subsequent panel could certify the issue to the Florida Supreme Court for resolution. *See* State v. Johnson, 516 So. 2d 1015, 1021 (Fla. 5th DCA 1987).

64. *See* Fleurantin, *supra* note 2, at 30 (citing O'Brien v. State, 478 So. 2d 497 (Fla. 5th DCA 1985)).

65. Fox v. Fox, 262 So. 3d 789, 792 (Fla. 4th DCA 2018).

66. *See In re* Rule 9.331, 416 So. 2d at 1128.

67. *Fox*, 262 So. 3d at 794.

68. *Id.* at 792.

69. *Id.* at 793–94.

70. *Id.* at 793,794–95.

71. *Id.* at 793.

72. *Id.* at 795.

73. Fox v. Fox, 262 So. 3d 789, 795 (Fla. 4th DCA 2018).

says, "many dissolution appeals are [handled] pro se;"[74] therefore, it does not serve the end of justice to refuse to hear the issue on appeal just because a litigant either forgot or failed to file a motion for rehearing. In fact, the court reasoned that the failure to review the issue on appeal "frustrates the very purpose for those findings."[75] Third, it is not a burden to require family law judges to comply with statutory mandates since family law judges should be aware that Chapter 61 requires them to make statutory findings in rendering decisions in cases involving alimony, equitable distribution, and child support.[76] There is no question that *Fox* rests on a sound analytical framework, as it explains its position and reaches its result after careful consideration of the other district courts' opinions and the dissent's position.[77]

Another persuasive point made by the majority is the distinction between dissolution of marriage cases and other civil litigation.[78] After the conclusion of an appeal at the district court level, a final judgment may not be modified, altered, or amended except as provided by rules or statutes.[79] "There is one [limited] exception to this absolute finality"—that is Rule 1.540(b), "which gives the court jurisdiction to relieve a party from the act of finality in a narrow range of circumstances."[80] Generally, after one year, a civil litigant may not avail itself to Rule 1.540(b) to attack a judgment.[81] That means civil ligation ends after the appellate process runs its course.[82]

Contrast that to final judgments in family law cases. The en banc court recognized that after the final judgment, a family law litigant tends to file petitions for enforcement, modification, and contempt proceedings.[83] The court is concerned that the lack of statutorily-required findings will hamper review.[84] The court's concern is justified because it will be difficult if not impossible to discern from the judgment the basis for enforcement, modification, or contempt if the initial judgment lacks the statutorily-required findings.[85]

In the duel between reversible error and preservation, the majority's position in *Fox* is more persuasive because it rests on firmer statutory

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74. *Id.* at 793.
75. *See id.* at 794.
76. FLA. STAT. § 61 (2019).
77. *Fox*, 262 So. 3d at 793–94.
78. *See id.* at 793.
79. De La Osa v. Wells Fargo Bank, N.A., 218 So. 3d 914, 917 (Fla. 3d DCA 2016). *See also, e.g.*, FLA. STAT. § 61.14.
80. Miller v. Fortune Ins. Co., 484 So. 2d 1221, 1223 (Fla. 1986).
81. *See* FLA. R. APP. P. 1.540(b)(1) (2019).
82. *See id.*
83. Fox v. Fox, 262 So. 3d 789, 793 (Fla. 4th DCA 2018).
84. *Id.* at 793–94.
85. *Id.*

grounds than the dissent's position. The lack of required findings "is not the type of error that preservation rules were designed to avoid."[86] While the court will not review unpreserved issues, it will not require a motion for rehearing based on the preservation rules, which were not designed to allow a trial judge to ignore statutory mandates.[87] The majority's position is consistent with the court's responsibility with respect to the application of alimony, equitable distribution, and child support statutes, which mandate a trial court to make factual findings in family law cases.[88]

According to the *Fox* majority, while the failure to make statutorily-required findings may not be fundamental error, it is reversible error.[89] The majority is concerned that the refusal to review a trial court's failure to make the required findings frustrates the very purpose of those findings, which are designed to protect children and families.[90]

Because the majority admits that the lack of findings is not fundamental error, the dissent takes the position that the preservation rule should prevail when it comes to the failure to make factual findings.[91] Both *Broadfoot* and *Mathieu* provided an exception that the appellate court may at its discretion send the case back for findings if its review is hampered.[92] According to the *Fox* dissent, the exception to the preservation requirement addresses the majority's concern.[93] Because the majority concedes that the lack of factual findings is not fundamental error, the dissent would affirm on this issue and recede from the Fourth District's earlier decisions requiring a contrary result.[94]

In reaching its conclusion, the dissent relied on several supreme court cases that determined the failure to make sufficient findings does not constitute fundamental error.[95] The dissent cited to *State v. Townsend*, but *Townsend* was not a case involving failure to make statutorily-required findings in a family law case.[96] Rather, *Townsend* involved a criminal defendant's failure to timely make contemporaneous objections under

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86. *Id.* at 794.

87. *Id.*

88. For a thoughtful discussion on how the *Fox* decision meets the Fourth District's responsibility respecting consequence, consistency, and coherence, see generally Larry R. Fleurantin, *Exhaustion of Administrative Remedies in Immigration Cases: Finding Jurisdiction to Review Unexhausted Claims the Board of Immigration Appeals Considers Sua Sponte on the Merits*, 34 AM. J. TRIAL ADVOC. 301, 302 (2010).

89. Fox v. Fox, 262 So. 3d 789, 794 (Fla. 4th DCA 2018).

90. *Id.*

91. *Id.* at 799 (Kuntz, J., concurring in part and dissenting in part).

92. Mathieu v. Mathieu, 877 So. 2d 740, 741 n.1 (Fla. 5th DCA 2004); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001).

93. *Fox*, 262 So. 3d at 799 (Kuntz, J., concurring in part and dissenting in part).

94. *See id.* at 799.

95. *See id.*; *supra* note 27 and accompanying text.

96. *See Fox*, 262 So. 3d at 799 (citing State v. Townsend, 635 So. 2d 949, 959 (Fla. 1994)).

§ 90.803(23) of the Florida Statutes to the trial judge's failure to make factual findings regarding reliability of child's statements.[97] The dissent also cited *Hopkins v. State*, but likewise, that case did not involve failure to make statutorily-required findings in a family law case.[98] *Townsend* and the other cited cases were criminal cases where the defendants were most likely represented by counsel whereas many dissolution appeals are handled pro se.[99] Because *Townsend* and the cited cases did not involve facts similar to *Fox*, reliance on those cases is misplaced.

C. *The Florida Supreme Court Should Approve the Rule Established by* Fox *to Stabilize the Judicial System and Promote Uniformity of Law in Florida*

The Florida Supreme Court should approve *Fox* to promote uniformity of law in Florida. *Fox* provided a well-reasoned analysis in approving the rule applied in *Dorsett* and its progeny. While the author acknowledges that an exception to the preservation requirement exists for fundamental error, the way the exception is carved is not sufficient to alleviate the majority concern.[100] The most salient impediment to the exception adopted in *Broadfoot* and *Mathieu* is that it is up to the discretion of appellate judges to send the case back for findings if the court's review is hampered.[101] According to Judge Conner, the caveat "can sometimes lead to speculation about what a trial judge was thinking. Discerning the unspoken thoughts of a trial judge can be problematic, when a trial judge's thinking is often dependent upon determining the credibility of witnesses."[102] Different panels will reach drastically different conclusions if it is up to an individual's judge discretion to send cases back for findings. Hence, it is a valid concern that the caveat will not be applied fairly and consistently.

CONCLUSION

This Article revisits the preservation issue in family law judgments that lack statutorily-required findings. The en banc decision in *Fox* and the Second District's decision in *Engle* unambiguously raised the tension

97. *Townsend*, 635 So. 2d at 951.

98. *See Fox*, 262 So. 3d at 799 (Kuntz, J., concurring in part and dissenting in part) (citing Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994)).

99. *Id.* (citing *Townsend*, 635 So. 2d at 959 ("[T]he failure of a trial judge to make sufficient findings under the statute, in and of itself, does not constitute fundamental error." (citing *Hopkins*, 632 So. 2d 1372; *Seifert v. State*, 616 So. 2d 1044 (Fla. 2d DCA), *approved in relevant part*, 626 So. 2d 207 (Fla. 1993); *Jones v. State*, 610 So. 2d 105 (Fla. 3d DCA 1992))).

100. *Id.* at 799.

101. *See* Mathieu v. Mathieu, 877 So. 2d 740, 741 n.1 (Fla. 5th DCA 2004); Broadfoot v. Broadfoot, 791 So. 2d 584, 585 (Fla. 3d DCA 2001).

102. *See Fox*, 262 So. 3d at 796 (Conner, J., concurring).

between the Fourth District and the Second District on one hand and the other Florida district court opinions on the other hand. Because all Florida district courts are unable to speak with one voice on this issue, the Florida Supreme Court should resolve the conflict certified by *Fox* and *Engle* and settle the law once and for all. [103]

The Florida Supreme Court should approve the Fourth District's decision in *Fox* and the Second District's decision in *Engle* because there are no rules requiring family law litigants to file a motion for rehearing to preserve for appeal the lack of statutorily-required findings in a trial court's judgment. While we recognize all the district courts except the Fourth District and the Second District adopted an exception to the preservation requirement when it comes to fundamental errors, we cannot leave it up to the discretion of a panel of appellate judges to send a case back for findings if the lack of findings frustrates the court's appellate review. Leaving it up to individual judges' discretion will lead to speculation about what the trial judge was thinking and thus the exception will not be applied fairly and consistently. Consequently, the Florida Supreme Court should approve the rule established by *Fox* in order to stabilize the judicial system and promote uniformity of law.

[103] To date, the conflict certified by Fox and Engle has not been resolved. In fact, the Fourth District recently applied the holding of Fox in *Aponte v. Wood*, 308 So 3d 1043 (Fla. 4th DCA 2020). Therefore, the Florida Supreme Court has the last word either to accept jurisdiction to resolve the conflict or recommend the Family Law Rules Committee to review the issue and submit an amendment to the Family Law Rules of Civil Procedure for the supreme court's consideration and approval in order to promote uniformity of law in Florida.

THE CONSTITUTIONAL INCONGRUITY OF "MAY-ISSUE" CONCEALED CARRY PERMIT LAWS

Noah C. Chauvin[*]

Abstract

In 2019, at least 39,000 Americans were killed by guns. Given this epidemic of gun violence, it is no surprise when legislatures enact gun control measures; in fact, they should be applauded for doing so. However, the right to keep and bear arms is a fundamental constitutional right protected by the Second Amendment. While the precise scope of this right is unclear, it appears to include at least some right to carry guns outside of the home.

States have three categories of licensing schemes for those who wish to carry guns in public. In unrestricted or "constitutional carry" jurisdictions, citizens of the state do not need any license to carry. In "shall-issue" jurisdictions, citizens are required to have a permit, but the permitting entity has no discretion; provided that the applicant meets certain requirements, the government must issue the permit. In "may-issue" jurisdictions, the permitting entity has discretion as to whether to issue the permit, even if the applicant meets all the conditions. Most "may-issue" jurisdictions require applicants to prove that they have a good reason for wanting to carry a gun, such as a compelling need for self-defense. Even when these jurisdictions do not have this requirement, they give the permitting authority discretion as to whether to issue the license.

I argue in this Article that may-issue laws are unconstitutional. I examine four other fundamental constitutional rights: free speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to abortion. While the government may constitutionally limit each of these rights, it may not do so based on the subjective decisions of government officials, and certainly not based on the otherwise-lawful exercise of that right. Therefore, I argue that if the right to carry a gun outside the home is protected by the Second Amendment, then laws that require citizens to prove a good reason for needing to exercise that right are unconstitutional.

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* J.D., William & Mary Law School, 2019; B.A., SUNY Geneseo, 2016. I am grateful to Sammy Block and Matt Strauser for comments and feedback on an earlier draft of this Article, and to my brother, Sam Chauvin, for tolerating a sink full of dirty dishes while I finished writing it. All opinions, and all errors, are my own.

INTRODUCTION

In 2019, 39,525 Americans were killed by guns.[1] Of that number, 24,090 committed suicide and 15,435 were killed by others.[2] A further 30,140 people were injured by firearms.[3] Children under eighteen accounted for 3,811 of the total deaths and injuries.[4] There were 417 mass shooting incidents.[5] Given that a person is shot and killed every thirteen minutes in the United States,[6] it is little wonder that in the wake of some of the most horrifying mass shootings, politicians attempt to galvanize support for common-sense gun control measures, such as universal

1. *Past Summary Ledgers*, GUN VIOLENCE ARCHIVE (Sept. 25, 2005), https://www.gunviolencearchive.org/past-tolls [https://perma.cc/U82S-9846].

2. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

3. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

4. *Id.* (Figures are updated regularly and reflect the reported figures as of Jan. 14, 2021).

5. *Id.* Under federal law, a "mass killing" is "3 or more killings in a single incident." 6 U.S.C. § 455(d)(2)(A) (2018).

6. I calculated this based on the 2019 shooting statistics. 2019 appears to be a relatively average year, at least since Gun Violence Archive began keeping track of shootings. *See Past Summary Ledgers*, *supra* note 1.

background checks.[7] What is wonderous is that they face so much resistance when they try and implement such reforms.[8]

Yet, "the right . . . to keep and bear arms" for self-defense purposes is a fundamental right protected by the Second Amendment.[9] Of course, like virtually all rights, "the right secured by the Second Amendment is not unlimited."[10] That is why, even though the Second Amendment right "shall not be infringed,"[11] there is no "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[12] After all, the states have a compelling interest in protecting public health and safety, and most objective gun control laws and regulations are reasonably related to that interest.[13] But because the Constitution protects the right to own and carry guns, states are not free to regulate guns in whatever way they choose. The precise bounds of how the states may regulate gun ownership are somewhat unclear; since the Supreme Court identified a self-defense right guaranteed by the Second Amendment in *District of Columbia v. Heller*[14] and incorporated it against the states in *McDonald v. City of Chicago*,[15] it has only considered one other Second Amendment case.[16]

While the Supreme Court has considered relatively few gun rights cases, the lower courts have begun to flesh out the Second Amendment doctrine. In the decade after *Heller* was decided, lower courts resolved

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7. *See, e.g.*, Mark Osborne & Elizabeth Thomas, *Democratic Candidates Call For Gun Control in Wake of El Paso, Dayton Shootings*, ABC NEWS (Aug. 4, 2019), https://abcnews.go.com/Politics/el-paso-native-beto-orourke-fellow-democratic-candidates/story?id=64762694 [https://perma.cc/WD9A-H2GB].

8. *E.g.*, Gregory S. Schneider, *Virginia AG Herring: 'Second Amendment Sanctuary' Proclamations Have No Force*, WASH. POST (Dec. 20, 2019, 2:51 PM), https://www.washingtonpost.com/local/virginia-politics/virginia-ag-herring-second-amendment-sanctuary-proclamations-have-no-force/2019/12/20/5f7adcb2-234b-11ea-a153-dce4b94e4249_story.html [https://perma.cc/NWH8-GBR3].

9. U.S. CONST. amend. II; McDonald v. City of Chicago, 561 U.S. 742, 791 (2010); *see also* Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 659–60 (2019).

10. District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

11. U.S. CONST. amend. II.

12. *Heller*, 554 U.S. at 626; *see also* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015) ("[V]irtually no constitutional rights are absolute under contemporary doctrine.").

13. *E.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012). As I discuss below in Part III, I believe that the *Kachalsky* court's specific holding that New York's may-issue law was constitutional was in error.

14. 554 U.S. 570 (2008).

15. *McDonald*, 561 U.S. at 791.

16. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020). For an analysis of more than 1,000 lower court decisions concerning the Second Amendment in the decade following *Heller*, see generally Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433 (2018).

more than one thousand Second Amendment cases.[17] This has led to a maturing body of caselaw that increasingly falls in line with court analyses for other fundamental rights: many Second Amendment cases no longer present issues of first impression and are analyzed under a tiers-of-scrutiny approach.[18] Given this growing similarity between the Second Amendment and other constitutional rights, one would expect that government limits on gun ownership and possession would mirror restrictions on other constitutional rights. While the government can put at least some limits on most rights, it is required to do so in a neutral way; it cannot limit the right on a subjective basis, and certainly not based on the otherwise-legal use a person is making of the right.[19]

Many gun control laws and regulations work in precisely this manner: they establish neutral criteria for owning or possessing guns and are applied on a neutral basis. Take, for instance, New York's ban on high-capacity magazines.[20] It prohibits the knowing possession of "a large capacity ammunition feeding device . . . that has a capacity of, or that can be readily restored or converted to accept, more than ten rounds of ammunition."[21] The New York law, like any limitation on a constitutional right, can be objectively applied and reflects the legislature's judgment that the prohibition of large-capacity magazines serves the state's compelling interest in controlling crime.[22] However, not all gun control laws can be neutrally applied. Currently, nine states have what are known as "may-issue" concealed carry permit laws.[23] These laws give the permitting authority discretion as to whether to issue the permit, and typically require the applicant to show "[g]ood cause" as to why they need to carry a concealed weapon.[24]

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17. *See* Ruben & Blocher, *supra* note 16, at 1455.

18. *Id.* at 1488–96; *see also* Zick, *supra* note 9, at 660–75 (comparing the early development of First Amendment doctrine to the development of Second Amendment doctrine during its first decade).

19. *See, e.g.*, Noah C. Chauvin, *Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses*, 52 CREIGHTON L. REV. 29, 38–43 (2018).

20. N.Y. PENAL LAW § 265.36 (McKinney 2019).

21. *Id.*

22. N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 263–64 (2d Cir. 2015).

23. The states are California, *see* CAL. PENAL CODE § 26150(a) (West 2020), Connecticut, *see* CONN. GEN. STAT. § 29-28(b) (2020), Delaware, *see* DEL. CODE ANN. tit. 11, § 1441(a) (West 2020), Hawaii, *see* HAW. REV. STAT. § 134-9 (2019), Maryland, *see* MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2020), Massachusetts, *see* MASS. GEN. LAWS ch. 140, § 131 (2019), New Jersey, *see* N.J. STAT. ANN. § 2C:58-4 (West 2020), New York, *see* N.Y. PENAL LAW § 400.00 (McKinney 2019), and Rhode Island, *see* 11 R.I. GEN. LAWS § 11-47-11 (2020).

24. *See, e.g.*, CAL. PENAL CODE § 26150(a) (West 2020); *see also* Jack M. Amaro, Note, *"Good Reason" Laws Under the Gun: May-Issue States and the Right to Bear Arms*, 94 CHI.-KENT L. REV. 27, 29 n.19 (2019). It is not just in the realm of concealed carry permitting that the government employs subjective standards when making decisions that implicate people's Second Amendment rights. For instance, the Third Circuit recently held that "a criminal law offender may

This is not how constitutional rights work—people do not have to show good cause for why the government should not restrict their rights. For instance, a person's First Amendment right to wear a jacket that reads "Fuck the Draft" is not premised on whether he can prove that the only way to convey his message is to use those words.[25] Rather, it is grounded in our understanding that the government is not allowed to restrict speech based on its content, outside of certain narrow categories of expression.[26] Similar principles apply to all constitutional rights. While the government may place reasonable restrictions on a constitutional right, it cannot force a person to justify his or her otherwise-lawful use of that right. The thesis of this Article is that may-issue laws are unconstitutional because they allow the government to subjectively decide whether to limit a person's Second Amendment rights.

This Article proceeds in five parts. Part I considers the scope of the Second Amendment right, may-issue laws, and court decisions relating to those laws.[27] Part II discuses four fundamental rights—freedom of speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to abortion—and the bases for which the government can limit them.[28] Part III argues that in the context of how the Court treats other fundamental rights, may-issue laws are unconstitutional.[29] Part IV explains why it matters how we, as a nation, limit gun ownership.[30] Finally, Part V briefly responds to three counterarguments: that the Second Amendment does not protect carrying a weapon in public, that its language allows the government to limit gun ownership in a non-neutral fashion, and that gun ownership is different from other fundamental rights because guns are inherently dangerous.[31] A brief conclusion follows.[32]

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rebut the presumption that he lacks Second Amendment rights" if he shows that he "has shown 'that he is no more dangerous than a typical law-abiding citizen.'" Binderup v. Attorney Gen. of the U.S., 836 F.3d 336, 339, 366 (3d Cir. 2016) (en banc) (quoting United States v. Barton, 633 F.3d 168, 174 (3d Cir. 2011). Professor Adam Winkler has described this standard as a "rather abstract question [that] is impossible to answer, as it relies on predictions about the future dangerousness of the challenger and comparisons to a baseline of dangerousness of the average person that cannot ever be known." Adam Winkler, *Is the Second Amendment Becoming Irrelevant?*, 93 IND. L.J. 253, 256 (2018).

25. *See* Cohen v. California, 403 U.S. 15, 23–26 (1971).
26. *Id.* at 24.
27. *See infra* Part I.
28. *See infra* Part II.
29. *See infra* Part III.
30. *See infra* Part IV.
31. *See infra* Part V.
32. *See infra* Conclusion.

I. THE SECOND AMENDMENT RIGHT AND MAY-ISSUE LAWS

Courts are still in the process of fleshing out the full scope of the Second Amendment right. When the Supreme Court considered *District of Columbia v. Heller*[33] in 2008, it was the first time in almost seven decades it had taken a Second Amendment case. In *Heller*, the Court ruled that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," at least inside the home.[34] Two years later, the Court held in *McDonald v. City of Chicago* that the Due Process Clause of the Fourteenth Amendment had incorporated that right against the states.[35] Since that time, the Court has heard arguments in only one Second Amendment case.[36] Still, based on the Supreme Court precedent, as well as opinions from the lower courts, it is possible to draw some conclusions about the scope of the Second Amendment right. This Part discusses some of those conclusions. It then gives an overview of may-issue concealed carry permit laws, before discussing cases in which those laws have been challenged in court.

A. *The Scope of the Second Amendment Right*

For more than a century, the Second Amendment was understood as an individual right that protected the right to keep and bear arms for the purpose of serving in a militia. This conception of the Amendment came from two Supreme Court cases, *Presser v. Illinois*[37] and *United States v. Miller*.[38] In *Presser*, the Court considered a challenge to an Illinois statute that made it a misdemeanor, punishable by a fine of ten dollars or up to six months in jail, to form a private militia.[39] The petitioner challenged

33. District of Columbia v. Heller, 554 U.S. 570 (2008).

34. *Id.* at 592, 628–29.

35. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

36. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939 (2019) (granting certiorari). *But see* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526–27 (2020) (vacating and remanding the case as moot). The Supreme Court's reluctance to take on Second Amendment cases has led some to bemoan what they view as the Second Amendment's treatment "as a 'second-class' right.'" Mance v. Sessions, 896 F.3d 390, 398 & n.1 (2018) (Ho, J., dissenting from denial of rehearing en banc); *see also* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari); Peruta v. California, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari); Friedman v. City of Highland Park, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from denial of certiorari); Jackson v. City & Cty. of San Francisco, 135 S. Ct. 2799, 2799–2800 (2015) (Thomas, J., dissenting from denial of certiorari); Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 67–68 (2018); Zick, *supra* note 9, at 675–80. The Court did issue a per curiam opinion in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016), in which it held that the Second Amendment right to bear arms for the purpose of self-defense extended to stun guns.

37. 116 U.S. 252 (1886).

38. 307 U.S. 174 (1939).

39. *Presser*, 116 U.S. at 254.

his conviction under this law, arguing in part that it infringed on his Second Amendment rights.[40] The Court held that the statute was constitutional because it "only forb[ade] bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law," and did not "prohibit the people from keeping and bearing arms."[41]

Miller involved slightly different facts but reached a similar outcome. In *Miller*, the district court dismissed a federal indictment against the appellant for transporting a sawed-off shotgun across state lines, reasoning that the statute that outlawed such conduct violated the Second Amendment.[42] On taking up the case, the Supreme Court observed that there was no "evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' . . . ha[d] some reasonable relationship to the preservation or efficiency of a well regulated militia."[43] The Court ruled that because sawed-off shotguns were not weapons commonly used by militiamen, the indictment (and the federal statute it was based on) did not run afoul of the Second Amendment.[44]

After *Miller*, the Court did not consider a Second Amendment case for nearly seven decades. It broke that streak in 2008, when it took up *District of Columbia v. Heller*.[45] In *Heller*, a special police officer challenged a District of Columbia prohibition on the possession of handguns.[46] Specifically, the District made it a crime to have an unregistered gun, but did not allow handguns to be registered.[47] Additionally, no person was allowed to carry a handgun without a license, and lawfully owned firearms had to be disassembled or otherwise rendered unusable when stored in the home.[48] Heller challenged these restrictions on Second Amendment grounds, claiming—despite the holdings in *Presser* and *Miller* that the Second Amendment related to the

40. *Id.* at 264.

41. *Id.* at 264–65. The Court also held that "a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of congress and the national government, and not upon that of the state." *Id.* at 265 (citing United States v. Cruikshank, 92 U.S. 542, 553 (1875)). *Contra* McDonald v. Chicago, 561 U.S. 742, 791 (2010) (holding the opposite conclusion).

42. *Miller*, 307 U.S. at 175–77.

43. *Id.* at 178.

44. *Id.* at 178–83.

45. District of Columbia v. Heller, 554 U.S. 570 (2008).

46. *Id.* at 574–76.

47. *Id.* at 574–75.

48. *Id.* at 575.

need for a well-regulated militia—that they violated his right to defend himself within his home.[49]

In a 5-4 decision, the Court ruled that the restrictions did violate Heller's Second Amendment rights.[50] The Court first observed that its rulings in *Presser* and *Miller* did not foreclose the self-defense reading of the Second Amendment because *Presser* did not refute an individual rights view of the Amendment and *Miller* merely limited the "*types of weapons*" to which the right applies—those in common use for lawful purposes.[51] Neither case, according to the Court, explicitly held that the Second Amendment right did *not* include a right to keep and bear arms for self-defense purposes.[52] After observing that cases such as *Miller* were not "a thorough examination of the Second Amendment," the Court undertook a detailed textual and historical examination of the Amendment.[53]

The full text of the Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[54] The *Heller* Court first addressed whether the prefatory clause limited the right the Amendment protects.[55] The Court concluded that, while that clause announced a purpose, it did "not limit or expand the scope of the operative clause."[56] In other words, while the Second Amendment's announced purpose was to protect the ability to form a militia, the right actually guaranteed by the Amendment is "an individual right to keep and bear arms" for whatever lawful purpose; the Court gives the additional examples of self-defense and hunting.[57] The Court confirmed this analysis by examining analogous state constitutional provisions, alternative Second Amendment proposals, and interpretations of the Amendment by eighteenth and nineteenth century scholars, courts, and legislators.[58]

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49. *See id.* at 575–76; *see also* Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 10–12 (2012) (describing the consensus among constitutional historians that the right to keep and bear arms was understood at the time of the founding as a right to engage in military activity).

50. *Heller*, 554 U.S. at 635.

51. *Id.* at 620–21, 624.

52. *Id.*

53. *Id.* at 623; *see also id.* at 635 ("[T]his case represents this Court's first in-depth examination of the Second Amendment . . . .").

54. U.S. CONST. amend. II.

55. *Heller*, 554 U.S. at 595–600.

56. *Id.* at 577–78.

57. *Id.* at 595, 599.

58. *See id.* at 600–19.

After examining its prior cases, the text, and the history of the Second Amendment, the Court turned to the District of Columbia laws at issue.[59] It found that "the inherent right of self-defense has been central to the Second Amendment right."[60] Because the D.C. handgun ban extended to all handguns that were used for what it called the "lawful purpose" of self-defense within the home, the Court ruled that the ban was unconstitutional.[61] The Court declined to identify what standard of scrutiny laws that restricted this self-defense right were subject to, because it found the complete ban on possessing any handguns in any situation would fail under any standard.[62] Accordingly, the Court held, D.C.'s complete ban on possessing a workable handgun in the home was invalid.[63] The Court acknowledged that "longstanding prohibitions on the possession of firearms by felons and the mentally ill, . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms" were presumptively valid.[64] However, the Court also recognized that "[t]he . . . enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[65]

Two years after *Heller*, the Court ruled in *McDonald v. City of Chicago* that the Second Amendment was a fundamental right, incorporated against the states by virtue of the Due Process Clause of the Fourteenth Amendment.[66] Then in 2016, the Court issued a *per curiam* opinion in *Caetano v. Massachusetts*,[67] in which it held that the Second Amendment right to bear arms for the purposes of self-defense extended to possession of stun guns.[68] However, the precise scope of the Second Amendment right remains unclear.

Many commentators "read *Heller* . . . as a guarantee of *some* right to carry a weapon anywhere a confrontation may occur," including outside of the home.[69] The federal circuit courts of appeal largely agree, though

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59. *Id.* at 628.

60. *Heller*, 554 U.S. at 628.

61. *Id.* at 628–29.

62. *Id.* In the years since *Heller*, lower courts have coalesced around intermediate scrutiny as the standard by which to evaluate Second Amendment claims. *See* Ruben & Blocher, *supra* note 16, at 1499-1500; Winkler, *supra* note 24, at 255 & nn.9–12.

63. *Heller*, 554 U.S. at 629.

64. *Id.* at 626–27.

65. *Id.* at 634 (alteration in original).

66. McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

67. 136 S. Ct. 1027 (2016) (per curiam).

68. *Id.* at 1028.

69. Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 YALE L.J. 1486, 1493 (2014); *see also id.* at 1518 (alteration in original) ("*Heller* requires that courts protect the open carry of firearms but allow for restrictions on concealed

they have not universally found the right to extend outside the home.[70] In its October 2019 term, the Supreme Court considered a case, *New York State Pistol & Rifle Ass'n v. City of New York*,[71] in which they were asked to clarify whether the Second Amendment right extends outside the home. Commentators expected that if the Court had reached the merits of that case, they would have found that at least some restrictions on carrying guns outside the home violate the Second Amendment.[72] However, the Court ultimately dismissed that case as moot on the Second Amendment issue and remanded for further proceedings.[73] As this paper was going to press, the Supreme Court agreed to take up the case of *New York Pistol & Rifle Ass'n v. Corlett*[74] during its October 2021 term; it is now widely expected that this will be the case in which the Court identifies some right to carry weapons outside the home for self-defense purposes.[75]

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carry."); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 CORNELL L. REV. 907, 916–17 (2012).

70. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 256–73 (2017). Professor Brannon Denning has argued that Judge Richard Posner's opinion in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), finding that the Second Amendment self-defense right must extend outside the home if it is to be meaningful, was an instance of judicial uncivil obedience—taking the principles of *Heller* to their logical limit as a means of implicitly criticizing them. *See* Brannon P. Denning, *Can Judges Be Uncivilly Obedient?*, 60 WM. & MARY L. REV. 1, 29–31 (2018); *cf.* JUSTIN DRIVER, THE SCHOOLHOUSE GATE 121–22 (2018) (discussing how Judge Posner did the same thing with student free speech rights).

71. 140 S. Ct. 1525 (2020).

72. *See* Adam Liptak, *Second Amendment Case May Fizzle Out at the Supreme Court*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/us/politics/second-amendment-supreme-court.html [https://perma.cc/F22V-UTQ8]. The expectation that if the Court had reached the merits it would have explicitly extended the Second Amendment right to self-defense outside the home mired the Court in some political controversy. The Court did not need to reach the merits of the case; New York City repealed the law at issue, so the case was moot. *See id.* Concern that the Court could decide a moot case for political reasons led several United States Senate Democrats to file an amicus brief in the case, in which they tacitly threatened the Court with court-packing measures. *See* Brief of Senator Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 18, N.Y. State Rifle & Pistol Ass'n v. City of New York, No. 18-280 (U.S. Apr. 27, 2020). This led incensed Senate Republicans to send a letter to the Clerk of the Supreme Court, blasting what they referred to as the brief's threats of "political retribution" and vowing that as long as they were members of the Senate, the Court would have no more than nine members. Letter from Mitch McConnell et al., U.S. Senators, to Scott S. Harris, Clerk, U.S. Supreme Court (Aug. 29, 2019), https://www.documentcloud.org/documents/ 6366251-McConnell-to-Supremes-re-ny-gun-case.html [https://perma.cc/2MUM-EHER].

73. *N.Y. State Pistol & Rifle Ass'n*, 140 S. Ct. at 1526–27.

74. _ S. Ct. _, No. 20-843, 2021 WL 1602643, at *1 (U.S. Apr. 26, 2021).

75. *See, e.g.*, Amanda Hollis-Brusky, *The Supreme Court Just Agreed to Hear a Second Amendment Case. That's Bad News for Gun Regulation Advocates*, WASH. POST (Apr. 27, 2021, 7:45 AM), https://www.washingtonpost.com/politics/2021/04/27/supreme-court-just-agreed-hear-second-amendment-case-thats-bad-news-gun-reformers/ [https://perma.cc/LS7X-CWBF]; Ed Kilgore, *Supreme Court Accepts Case that Could Overturn State Gun Laws*, N.Y. MAG.

B. *May-Issue Laws*

Although the Supreme Court has never explicitly said that the Second Amendment includes a right to bear arms outside of the home for self-defense purposes, all fifty states and the District of Columbia have at least some mechanism for allowing citizens to concealed carry guns in public.[76] There are three basic schemes for regulating concealed carry. In unrestricted carry jurisdictions, sometimes known as "constitutional carry" jurisdictions,[77] no permit is required to concealed carry a gun in public.[78] In shall-issue jurisdictions, a person needs a license to concealed carry, but the issuing authority has no discretion to deny the permit if the applicant meets a set of clearly defined, objective criteria.[79] In contrast, in may-issue jurisdictions, people need a permit to concealed carry *and* the issuing authority has discretion to deny issuing the permit on a subjective basis, even if the applicant meets all of the objective criteria.[80]

This Article is concerned with this last category, the may-issue laws. Nine states—California, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, and Rhode Island—currently have may-issue concealed carry permitting schemes.[81] California's law is illustrative of what these statutes typically look like. It provides:

> When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
>
> (1) The applicant is of good moral character.
>
> (2) Good cause exists for issuance of the license.
>
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time

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(Apr. 26, 2021), https://nymag.com/intelligencer/2021/04/supreme-court-takes-case-that-could-overturn-state-gun-laws.html.

76. *See* Winkler, *supra* note 24, at 258–59.

77. *See id.* at 258.

78. *See* Amaro, *supra* note 24, at 29 n.20.

79. *See id.* at 29 n.18.

80. *See id.* at 29 n.19. May-issue permitting schemes are sometimes alternatively referred to as "discretionary permitting." *E.g.*, Winkler, *supra* note 24, at 257.

81. *See* CAL. PENAL CODE § 26150(a) (West 2019); CONN. GEN. STAT. § 29-28(b) (2019); DEL. CODE ANN. tit. 11, § 1441(a) (2019); HAW. REV. STAT. § 134-9 (2019); MD. CODE ANN., PUB. SAFETY § 5-306 (LexisNexis 2019); MASS. GEN. LAWS ch. 140, § 131 (2019); N.J. STAT. ANN. § 2C:58-4 (West 2019); N.Y. PENAL LAW § 400.00 (McKinney 2019); 11 R.I. GEN. LAWS § 11-47-11 (2019).

> in that place of employment or business.
>
> (4) The applicant has completed a course of training as described in Section 26165.[82]

It is the second requirement, that the applicant show "good cause" for needing to carry a concealed weapon, that makes this a may-issue statute.[83] Other jurisdictions phrase this requirement slightly differently. For instance, Delaware requires that the applicant demonstrate "that the carrying of a concealed deadly weapon . . . is necessary for the protection of the applicant or the applicant's property, or both."[84] Still other states do not explicitly give any standard; Connecticut, for example, simply requires the permitting authority to determine that the applicant "is a suitable person to receive [a concealed carry] permit."[85] Regardless of their precise wording, each of the nine statutes has one key element in common: they all grant the permitting authority discretion to decide whether to issue the permit on a subjective basis.

C. *May-Issue Laws in Court*

By my count, six United States courts of appeal have considered whether may-issue laws are constitutional.[86] Those courts are the First, Second, Third, Fourth, Ninth, and D.C. Circuit Courts of Appeals.[87] While the D.C. Circuit has found may-issue laws unconstitutional,[88] every other circuit court to consider the issue has found that the laws pass constitutional muster.[89] Additionally, every state that currently has a

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82. CAL. PENAL CODE § 26150(a) (West 2019).

83. The requirement that the applicant prove that she "is of good moral character" arguably also gives the permitting authority some discretion, though sheriff's decisions with respect to this criterion are challenged less frequently than their determinations with respect to good cause. *E.g.*, Salute v. Pitchess, 132 Cal. Rptr. 345, 347 (Cal. Ct. App. 1976).

84. DEL. CODE ANN. tit. 11, § 1441(a); *see also* Application of Buresch, 672 A.2d 64, 65-66 (Del. 1996).

85. CONN. GEN. STAT. § 29-28(b) (2020); *see also* Ambrogio v. Bd. of Firearms Permit Exam'rs, 607 A.2d 460, 464 (Conn. Super. Ct. 1992).

86. Others have identified slightly different counts. *E.g.*, Winkler, *supra* note 24, at 255 & n.10.

87. *See, e.g.*, Wrenn v. District of Columbia, 864 F.3d 650, 666 (D.C. Cir. 2017); Peruta v. County of San Diego, 824 F.3d 919, 939 (9th Cir. 2016) (en banc); Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 880-81 (4th Cir. 2013); Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); *see also* Hightower v. City of Boston, 693 F.3d 61, 78-83 (1st Cir. 2012).

88. *Wrenn*, 864 F.3d at 666.

89. *Peruta*, 824 F.3d at 939; *Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 880–81; *Kachalsky*, 701 F.3d at 97; *Hightower*, 693 F.3d at 78–83. Some courts have found may-issue laws unconstitutional before later being reversed. *See* Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc); Woollard v. Gallagher, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.*, Woollard v. Gallagher, 712

may-issue law falls within the jurisdiction of one of the circuit courts that has found such laws constitutional.[90] This Section discusses the reasons courts have given for both upholding and striking down may-issue laws.

The Second Circuit's opinion in *Kachalsky v. County of Westchester*[91] has become the seminal decision among courts upholding may-issue laws. In that case, the court considered a challenge to a New York statute governing the issuance of concealed carry permits.[92] The may-issue statute in question required applicants to prove that "proper cause" justified them receiving a concealed carry permit.[93] In order to receive an unrestricted concealed carry license, applicants were required to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[94] The appellants challenged this restriction on Second Amendment grounds, arguing "that the Second Amendment guarantee[d] them a right to possess and carry weapons in public to defend themselves from dangerous confrontation and that New York [could] not constitutionally force them to demonstrate proper cause to exercise that right."[95]

The Second Circuit disagreed. It observed that *Heller* and *McDonald* did not squarely answer the question of whether New York's may-issue law was constitutional, and concluded "that the [Second] Amendment must have some application in the . . . context of the public possession of firearms."[96] Nonetheless, the court held that the proper cause requirement in New York's permitting statute was constitutional.[97] In reaching this determination, the court first looked to the "highly ambiguous" history and tradition of firearm regulation in the United States, and concluded that it did not clearly indicate one way or the other whether New York's

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F.3d 865 (4th Cir. 2013); *cf.* Young v. Hawaii, 896 F.3d 1044, 1050, 1071 (9th Cir. 2018), *rehearing en banc granted*, 915 F.3d 681 (9th Cir. 2019) (holding that while under *Peruta*, states may constitutionally limit the right to concealed carry in public, it is unconstitutional for them to ban open carry).

90. *See supra* note 81 and accompanying text; *see also Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/8AAQ-XNS4].

91. *Kachalsky*, 701 F.3d at 81.

92. *Id.* at 86.

93. *Id.* (quoting N.Y. PENAL LAW § 400.00(2)(f)). New York allows messengers employed by banks or express companies, state and city judges, and prison employees to receive concealed carry permits on a shall-issue basis. *Id.* (citing N.Y. PENAL LAW § 400.00).

94. *Id.* (quoting Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 256 (App. Div. 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981)).

95. *Kachalsky*, 701 F.3d at 88.

96. *Id.* at 89.

97. *Id.* at 97.

may-issue law was constitutional.[98] The court next rejected comparisons between New York's may-issue law and prior restraints on speech, holding that unlike the classically unconstitutional prior restraints, New York's law did not give officials "unbridled discretion" to decide whether to issue a permit.[99] Finally, the court concluded that the may-issue law should be subject to intermediate scrutiny—the law had to be "substantially related to the achievement of a [compelling state] interest"[100]—because it fell outside of the Second Amendment's "core" protection for keeping guns in the home for the purposes of self-defense.[101] The court concluded that the proper cause requirement was substantially related to New York's compelling interest in "public safety and crime prevention," so it was constitutional.[102]

Subsequent decisions from circuit courts upholding may-issue laws followed *Kachalsky*'s logic.[103] These decisions applied intermediate scrutiny and found that the challenged may-issue laws were substantially related to achieving compelling state interests.[104] The one court that drastically differed from *Kachalsky* was the Ninth Circuit, in its *en banc* opinion in *Peruta v. County of San Diego*.[105] In that case, the court found that "[t]he historical materials bearing on the adoption of the Second and Fourteenth Amendments" were "remarkably consistent"; according to the court, they showed "unambiguously" that concealed carry was not intended to be protected by the Constitution.[106] Accordingly, the court held "that the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public."[107] For that reason, the challenged may-issue statute was constitutional.[108]

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98. *Id.* at 91. The court observed that unlike the regulation at issue in *Heller*, New York's may-issue law was not clearly more extreme than most of its historical analogs—during the nineteenth century, some states upheld total bans on the public carry of firearms.

99. *Id.* at 92.

100. *Id.* at 96.

101. *Kachalsky*, 701 F.3d at 94.

102. *Id.* at 97.

103. *See* Drake v. Filko, 724 F.3d 426, 440 (3d Cir. 2013); Woollard v. Gallagher, 712 F.3d 865, 879–80 (4th Cir. 2013).

104. *See Drake*, 724 F.3d at 440; *Woollard*, 712 F.3d at 878–81.

105. *See* 824 F.3d 919 (9th Cir. 2016) (en banc).

106. *Id.* at 939. This is a far cry from the Second Circuit's determination that the history of concealed carry regulation was "highly ambiguous." *Kachalsky*, 701 F.3d at 91.

107. *Peruta*, 824 F.3d at 939. The court noted in dicta that even if the Second Amendment did include some protection of the right to concealed carry in public, the may-issue law in question would withstand intermediate scrutiny. *Id.* at 942. The Ninth Circuit is not the only United States court of appeals to hold that there is no Second Amendment protection for concealed carry; the Tenth Circuit reached the same outcome in its decision in Peterson v. Martinez, 707 F.3d 1197, 1211–12 (10th Cir. 2013).

108. *Peruta*, 824 F.3d at 939.

The D.C. Circuit is the only circuit court that has successfully struck down a may-issue law.[109] It did so in *Wrenn v. District of Columbia*,[110] a 2017 case involving a challenge to the District of Columbia's may-issue law. The challenged ordinance required an applicant for a concealed carry permit to show that she had a "good reason" for needing the permit.[111] The court found that the law implicated the "core" of the Second Amendment by limiting a person's ability to carry firearms for the purpose of self-defense.[112] The court observed that the District's may-issue statute operated as a total ban on ordinary citizens obtaining concealed carry licenses because it required applicants to prove that they had a greater need for self-defense than the average person.[113] Therefore, the court said the District's may-issue law was unconstitutional because, under *Heller*, "'complete prohibition[s]' of Second Amendment rights are always invalid."[114]

In *Woollard v. Sheridan*,[115] an opinion that was subsequently overturned on appeal, Judge Benson Everett Legg of the District of Maryland stuck down Maryland's may-issue statute for slightly different reasons.[116] The plaintiffs in that case alleged that Maryland's law, which required applicants for concealed carry permits to prove that they had "a good and substantial reason" to carry a handgun,[117] violated the Second Amendment because "it vests unbridled discretion in the officials responsible for issuing permits."[118] Judge Legg applied intermediate scrutiny and determined that while Maryland had compelling interests in preventing crime and advancing public safety, the statute was an "overly broad means by which . . . to advance this undoubtedly legitimate end," because it did not purport to keep guns out of the hands of the people most likely to misuse them, or out of places where they were most likely to be misused.[119] Moreover, Judge Legg said:

> If the Government wishes to burden a right guaranteed by the Constitution, it may do so provided that it can show a

109. The *Peruta* panel initially struck down California's law, before being overturned by the *en banc* panel. *See* Peruta v. County of San Diego, 742 F.3d 1144, 1179 (9th Cir. 2014), *vacated*, 824 F.3d 919 (9th Cir. 2016) (en banc).

110. 864 F.3d 650 (D.C. Cir. 2017).

111. *Id.* at 655.

112. *Id.* at 661.

113. *Id.* at 666.

114. *Id.* at 665 (quoting District of Columbia v. Heller, 554 U.S. 570, 629 (2008)). The original *Peruta* panel reached a similar conclusion. *Peruta*, 742 F.3d at 1170.

115. 863 F. Supp. 2d 462 (D. Md. 2012)

116. *See* Woollard v. Gallagher, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.* Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

117. *Id.* at 474.

118. *Id.* at 471, 474.

119. *Id.* at 473–74.

> satisfactory justification and a sufficiently adapted method. The showing, however, is always the Government's to make. A citizen may not be required to offer a "good and substantial reason" why he should be permitted to exercise his rights. The right's existence is all the reason he needs.[120]

For these reasons, Judge Legg ruled that Maryland's may-issue statute was unconstitutional.[121]

Despite the ample development of lower court precedent relating to may-issue laws—including now a circuit split over whether they are constitutional—the Supreme Court has consistently declined to weigh in on whether they violate the Second Amendment.[122] The Court's decision to deny certiorari in cases such as *Peruta* is part of the reason that Justice Clarence Thomas (among others) claims that "the Second Amendment [is treated] as a disfavored right."[123] The key to many of these arguments that the Second Amendment has received second-class treatment is the claim that the Second Amendment right is treated differently from other fundamental rights.[124] Professor Timothy Zick has argued persuasively that as a general matter, this is not the case.[125] But as I discuss in the two following Parts, may-issue laws *do* regulate the Second Amendment right in a manner that would be unconstitutional if it were used on other fundamental rights, because they allow government officials to grant or deny permission to exercise the right on a subjective basis.[126]

II. LIMITATIONS ON OTHER FUNDAMENTAL RIGHTS

As discussed in the Introduction, the government is permitted to place reasonable restrictions on even fundamental constitutional rights.[127]

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120. *Id.* at 475.

121. *Id.*

122. *E.g.*, Peruta v. County of San Diego, 137 S. Ct. 1995 (2017) (Thomas, J., dissenting from denial of certiorari); *see also* Joseph A. Gonnella, Comment, *Concealed Carry: Can* Heller*'s Handgun Leave the Home?*, 51 CAL. W. L. REV. 111, 139 & n.202 (2014). This is somewhat surprising, because one of the primary factors the Supreme Court considers when deciding whether to grant a petition for a writ of certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10. Of course, the Supreme Court often allows circuit splits to stand, even when fundamental constitutional rights are implicated. *See* Noah C. Chauvin, *Unifying Establishment Clause Purpose, Standing, and Standards*, 50 U. MEM. L. REV. 319, 344–45 (2021).

123. *Peruta*, 137 S. Ct. at 1999; *see also* Samaha & Germano, *supra* note 36, at 67–68; Zick, *supra* note 9, at 621–22.

124. *See* Zick, *supra* note 9, at 633.

125. *See id.* at 676 ("[T]he Second Amendment has not been subjected to any untoward or exceptional treatment in this regard either, particularly relative to how other fundamental constitutional rights have been treated by the Court.").

126. *See infra* Parts II–V.

127. *See supra* notes 10–12 and accompanying text.

While restrictions are allowed, they must be reasonable and neutral; a right cannot be restricted based on an otherwise-legal purpose for exercising it.[128] Indeed, "[t]he idea of a bureaucrat denying permission to exercise a right at his sole discretion is anathema to the very concept of fundamental rights."[129] This Part discusses this neutrality principle in the context of four fundamental constitutional rights: free speech,[130] free exercise of religion,[131] freedom from unreasonable searches and seizures,[132] and access to abortion.[133]

A. *Free Speech*

The First Amendment free speech right[134] is a useful place to begin my examination of the neutrality principle at work in constitutional rights for two reasons. First, Justice Scalia explicitly compared the Second Amendment right to the free speech right in his opinion for the Court in *Heller*, and lower courts have commonly used First Amendment reasoning by analogy in Second Amendment cases.[135] Second, the touchstone of speech regulation is content neutrality; the prohibition on government officials deciding whether to restrict a right based on the use a person is making of it—a subjective determination—is clearer here than it is with any other right.[136]

No free speech case illustrates this neutrality principle better than *National Socialist Party of America v. Village of Skokie*.[137] That case involved the American Nazi Party, who wanted to conduct a march—wearing their Nazi uniforms—in the Village of Skokie, a primarily Jewish town that was home to more than 5,000 Holocaust survivors.[138] The Nazis claimed that they merely wanted "to protest the Skokie Park District's requirement that [they] procure $350,000 of insurance prior to the[ir] use of the Skokie public parks for public assemblies"; members of the Skokie community on the other hand, felt that the march was

128. *Cf.* District of Columbia v. Heller, 554 U.S. 570, 634 (2008) ("The very enumeration of [a] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."). In Part II.E, I argue that similar principles apply to unenumerated rights such as abortion as well. *See infra* Part II.E.

129. Bishop, *supra* note 69 at 915.

130. *See infra* Part II.A.

131. *See infra* Part II.B.

132. *See infra* Part II.C.

133. *See infra* Part II.A.

134. The First Amendment says that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

135. *Heller*, 554 U.S. at 582, 595; Kopel & Greenlee, *supra* note 70, 212–13 & n.106.

136. Chauvin, *supra* note 19, at 38–43; *see also* Noah C. Chauvin, *The Need to Increase Free Speech Protections for Student Affairs Professionals*, 32 REGENT U. L. REV. 229, 248 (2020).

137. 432 U.S. 43 (1977); *see* PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE 2 (1999) (describing *Skokie* as a "'classic' free speech case").

138. Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21, 22 (Ill. 1978).

intentionally designed to intimidate Jews.[139] Initially, the Circuit Court of Cook County entered an injunction against the Nazis, prohibiting them from marching in their uniforms in Skokie.[140] The Illinois Appellate Court denied the Nazis' application for a stay pending appeal, and the Illinois Supreme Court likewise denied a motion for a stay or an expedited appeal.[141]

The Supreme Court of the United States ruled that this was unconstitutional.[142] The Court held that the denial of a stay acted as a final determination on the merits because it would deprive the Nazis of their First Amendment rights during the time the case was under appellate review.[143] The Court made clear that a state could not deny citizens their rights in this way unless it put in place strict procedural safeguards.[144] In other words, even though the Nazis' speech was odious, it was fully protected by the First Amendment. Illinois could not deny the Nazis their free speech rights even though they wished to exercise those rights for a despicable purpose.[145]

Of course, governments are allowed to put some restrictions on free speech.[146] It is perfectly constitutional for governments to outlaw

139. *Id.*

140. Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. at 43 (1977).

141. *Id.* at 43–44.

142. *Id.* at 44.

143. *Id.*

144. *Id.* (citing Freedman v. Maryland, 380 U.S. 51, 58 (1965)).

145. Village of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d at 25–26 (holding, "albeit reluctantly," that the Nazis had a First Amendment right to march in their uniforms, even though those uniforms included swastikas); *id.* at 26 (ruling that even potentially hostile reactions from people who viewed the march—known in modern free speech parlance as the "heckler's veto"—were not enough to warrant restrictions on the Nazis' speech); *see also* Chauvin, *supra* note 19, at 33, 43–47 (describing the "heckler's veto," which is used in modern free speech parlance to refer to someone opposed to a speaker's message disrupting the speaker).

146. *See, e.g.*, Frederick Schauer, *Every Possible Use of Language?*, *in* THE FREE SPEECH CENTURY 33, 41 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

incitements to violence,[147] fighting words,[148] child pornography,[149] and other things.[150] For instance, laws outlawing incitement must pass the so-called *Brandenburg* test; they may only punish speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action," not speech that advocates for violence in the abstract.[151] Likewise, restrictions on fighting words may only apply to "personally abusive epithets" that are "inherently likely to provoke violent reaction."[152]

Proscriptions of child pornography present a special case; child porn is so abhorrent that governments are given wide latitude to proscribe its

147. Only a narrow category of restrictions is permissible here. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (affirming that the government may punish speech as incitement only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); *see also* NAACP v. Clairborne Hardware Co., 458 U.S. 886, 909–10 (1982) ("'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts.") (quoting Thomas v. Collins, 323 U.S. 516, 537 (1945)); Chauvin, *supra* note 19, at 47–49; (discussing Supreme Court precedent for regulating speech that incited others to violence); Sean Radomski, Note, *We Helped Start the Fire: A College Sporting Event Incitement Standard*, 14 VA. SPORTS & ENT. L.J. 278, 294 (2015) (arguing for a more relaxed incitement standard at college sporting events).

148. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) ("[Fighting words] can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content*.") (emphasis in original) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)); Cohen v. California, 403 U.S. 15, 20 (1971) ("[T]he States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.") (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)).

149. *See, e.g.*, United States v. Williams, 553 U.S. 285, 297–99 (2008) (holding that proposals to engage in illegal activity, such as activity related to child pornography, are not protected by the First Amendment); New York v. Ferber, 458 U.S. 757, 764–65 (1982) (describing the test for when laws outlawing child pornography are constitutional).

150. Governments may also proscribe credible threats of violence, harassment, obscenity, libel, and slander. *See* Chauvin, *supra* note 19, at 43. (citing Doe v. Univ. of Mich., 721 F. Supp. 852, 862–63 (E.D. Mich. 1989)). Additionally, governments are allowed to limit the speech of their employees. *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); Connick v. Myers, 461 U.S. 138, 146–47 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."); Chauvin, *supra* note 136, at 241–42 (discussing restrictions on speech of public college employees). However, restrictions on the speech of government employees "must be directed at speech that has some potential to affect the [government employer's] operations." *Garcetti*, 547 U.S. at 418.

151. *Brandenburg*, 395 U.S. at 447.

152. *Cohen*, 403 U.S. at 20.

use and production.[153] However, there are limits. While governments may proscribe pornographic material that depicts actual children, material made using virtual images or young-appearing adult actors often cannot be outlawed.[154] Even child pornography, then, cannot be limited based on the repugnant content of the expression, but only on the harm that it causes when actual children are used to produce it. In sum, each time the government restricts the speech of its citizens, it must do so on a neutral basis that is divorced from the content of the speech to ensure that otherwise-legal speech is not captured by an overbroad statute.

B. *Free Exercise of Religion*

The First Amendment's free exercise clause gives constitutional protection to religious freedom.[155] The government can restrict religious practice, but it must do so on a neutral basis; it cannot prohibit an otherwise-legal practice because it is religious, nor can it discriminate among religions.[156] This principle has held true even though the test for what restrictions on religion are constitutional has changed several times over the past century and a half.

For decades, the free exercise clause was understood to protect religious beliefs, but not religious conduct. This understanding came from the Supreme Court's decision in *Reynolds v. United States*,[157] which involved a Mormon man who was convicted of bigamy.[158] The man challenged his conviction on a number of grounds, one of which was that his religious beliefs required him to practice polygamy, so the statute outlawing bigamy violated his First Amendment free exercise rights.[159] The Court disagreed, ruling that the free exercise clause "deprived [Congress] of all legislative power over mere opinion, but . . . left [it] free to reach actions which were in violation of social duties or subversive of good order."[160] Because "polygamy ha[d] always been odious among the northern and western nations of Europe," the Court concluded that the statute outlawing it was constitutional.[161] To hold otherwise, the Court

153. *See Ferber*, 458 U.S. at 763–64.

154. Ashcroft v. Free Speech Coal., 535 U.S. 234, 251 (2002) (citing *Ferber*, 458 U.S. at 763).

155. U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

156. Although the government cannot discriminate on the basis of religious conduct, it is allowed to accommodate religious practice by exempting it from otherwise-generally applicable laws. *See* Brian Soucek, *The Case of the Religious Gay Blood Donor*, 60 WM. & MARY L. REV. 1893, 1923–26 (2019).

157. 98 U.S. 145 (1878).

158. *Id.* at 150–51.

159. *Id.* at 161–62.

160. *Id.* at 164.

161. *Id.* at 164–67.

said, would be "to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[162] This could not be tolerated.

The Warren Court greatly expanded the religious freedom protections granted by the free exercise clause. They did this, for instance, in *Sherbert v. Verner*,[163] a 1963 case involving a woman who was refused unemployment benefits because she declined to accept, on religious grounds, a job that would have required her to work on Saturdays.[164] The Supreme Court held that denying the woman unemployment benefits violated her free exercise rights, even though her refusal to work was arguably "conduct" within the meaning of *Reynolds*.[165] In reaching this decision, the Court held that governments that burdened a person's free exercise of religion must demonstrate that the regulations were narrowly tailored to achieve "a 'compelling state interest.'"[166] The Court reaffirmed that this so-called "strict scrutiny" standard[167] applied to free exercise claims in its opinion in *Wisconsin v. Yoder*.[168]

In 1990, the Court issued its opinion in *Employment Division v. Smith*,[169] in which it turned away from the strict scrutiny approach to the free exercise clause for a standard that "emphasized deference to the political branches."[170] In that case, the petitioners were fired from their jobs at a drug rehabilitation facility after "they ingested peyote [a Schedule I drug] for sacramental purposes at a ceremony of the Native American Church, of which both [were] members."[171] Oregon denied them unemployment benefits because they had been fired for cause.[172] The petitioners challenged this denial, arguing that it violated their free exercise rights.[173] The Supreme Court held that the petitioners' free

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162. *Id.* at 167.

163. 374 U.S. 398 (1963), *abrogated by* Holt v. Hobbs, 574 U.S. 352 (2015).

164. *Id.* at 399–400.

165. *See id.* at 403, 408–09.

166. *Id.* at 403.

167. "Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws . . . . To pass strict scrutiny, the legislature must have passed the law to further a 'compelling governmental interest,' and must have narrowly tailored the law to achieve that interest." *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny [https://perma.cc/P5T8-BGFM] (last visited Sept. 21, 2020).

168. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

169. 494 U.S. 872 (1990). 494 U.S. 872 (1990). *See generally* Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA), 107 Stat. 1488, *as recognized in Hobbs*, 574 U.S. 352.

170. Douglas Laycock, *The Broader Implications of Masterpiece Cakeshop*, 2019 BYU L. REV. 167, 200.

171. *Smith*, 494 U.S. at 874.

172. *Id.*

173. *See id.* at 875.

exercise rights had not been violated.[174] To reach this decision, the Court changed the standard it used to decide free exercise cases. The Court said that generally applicable, religiously neutral laws did not violate the free exercise clause if they only incidentally burden a person's religious practice.[175]

Even under the weaker conception of the Free Exercise Clause the Court moved to in *Smith*, governments do not have *carte blanche* to burden religious exercise.[176] For instance, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[177] the Court reaffirmed the neutral and generally applicable *Smith* standard, but clarified that when a law is *not* neutral or generally applicable, strict scrutiny still applies.[178] On this basis, the Court invalidated a local ordinance that was designed to burden Santeria worshippers.[179] Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[180] the Court held that a "policy [that] expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character. . . . triggers the most exacting scrutiny."[181] The Court noted that, given its prior free exercise decisions, its application of strict scrutiny in a case in which a religious group was discriminated against based on its religion should be "unremarkable."[182]

Under whatever standard it has applied in its free exercise cases, the Supreme Court has always recognized that the government cannot infringe on people's religious freedoms based on the otherwise-legal nature of their religious practice. This is certainly true when cases are evaluated using a strict scrutiny standard. The laws at issue in *Lukumi* and *Trinity Lutheran* were subject to strict scrutiny—and were ultimately unconstitutional—because they discriminated based on religion; they were unlawful precisely because they were not neutral.[183] For laws to be subject to the lenient *Smith* standard, they must be neutral.[184] Even in

174. *Id.* at 890.

175. *Id.* at 879–80. The political reaction to the *Smith* decision was swift—and outraged. Federal lawmakers quickly passed the bipartisan Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq. (2018), which purported to restore the strict scrutiny standard to free exercise cases. The Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA did not apply to state and local laws. However, it did acknowledge in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 n.1 (2006), that RFRA applies to federal statutes).

176. *E.g.*, Laycock, *supra* note 170, at 202–03.

177. 508 U.S. 520, 531–32 (1993).

178. *Id.* at 531–32.

179. *See id.* at 545–46.

180. 137 S. Ct. 2012, 2021 (2017).

181. *Id.*

182. *Id.*

183. *See Lukumi*, 508 U.S. at 545–46; *Trinity Lutheran*, 137 S. Ct. at 2021.

184. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 878–80 (1990).

cases such as *Smith* and *Reynolds*, in which courts uphold laws that restrict religious exercise based on what religious practices that exercise entails, they do so largely when those practices are otherwise illegal.[185] Thus, in *Smith*, it was constitutional for Oregon to deny employment benefits to people fired for consuming peyote as part of a religious sacrament because consuming peyote was illegal,[186] and in *Reynolds*, the statute outlawing bigamy was constitutional because it was not enacted to target religions that called for their members to be polygamous.[187]

C. *Freedom from Unreasonable Search and Seizure*

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures."[188] In order to conduct a search or a seizure, the government must generally have either a warrant or probable cause.[189] However, the touchstone of the Fourth Amendment analysis is reasonableness; "there is no bright-line rule requiring law enforcement to obtain a warrant before seizing a person."[190] Regardless of whether the police seize people or evidence with or without a warrant, they must have objective, neutral reasons for doing so.[191] Two examples illustrate this point: the standards that control when the police are allowed to stop cars, and the criteria by which reports from confidential informants are evaluated.[192]

The Supreme Court articulated the standard that controls when law enforcement can stop vehicles in *Delaware v. Prouse*.[193] In that case, a police officer pulled over a car and caught the driver with marijuana in plain view.[194] The officer had no reason to make the stop; he had not witnessed the driver commit a traffic infraction, had not seen an

185. *Id.* at 874; Reynolds v. United States, 98 U.S. 145, 164–67 (1878).

186. *Smith*, 494 U.S. at 890; *see also id.* at 906 (O'Connor, J., concurring in the judgment) ("[A] religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.").

187. *Reynolds*, 98 U.S. at 164–67.

188. U.S. CONST. amend. IV.

189. Hillary L. Kody, Note, *Standing to Challenge Familial Searches of Commercial DNA Databases*, 61 WM. & MARY L. REV. 287, 295 (2019).

190. Kyle M. Wood, Note, *Taking Shelter Under the Fourth Amendment: The Constitutionality of Policing Methods at State-Sponsored Natural Disaster Shelters*, 60 WM. & MARY L. REV. 1071, 1078 (2019).

191. *See id.*; *see also, e.g.*, Delaware v. Prouse, 440 U.S. 648, 654 (1979); Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

192. There are a litany of other examples which are beyond the scope of this Article. For instance, when the police conduct pat-downs during investigatory stops—commonly known as *Terry* searches—they must be able to point to objective facts that created a reasonable, articulable suspicion that the person they pat-down is engaging (or about to engage in) criminal activity and is presently armed. *See Terry*, 392 U.S. at 20–22.

193. *Prouse*, 440 U.S. at 663, 648 (1979).

194. *Id.* at 650.

equipment violation, nor had he observed any suspicious activity.[195] Rather, he claimed he merely wanted to check the driver's license and registration.[196] The Court ruled that this was unconstitutional, explaining that "the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard.'"[197] The officer's failure to identify objective facts supporting the stop meant that the stop violated the Fourth Amendment.[198]

Officers must similarly rely on objective facts when evaluating tips from confidential informants. The Supreme Court articulated this principle in *Alabama v. White*,[199] a case in which the police stopped the defendant after receiving an anonymous tip that she was carrying cocaine.[200] The tipster described the defendant, where she lived, and claimed that at a certain time she would be leaving her apartment in her brown Plymouth station wagon, that she would be carrying drugs in her briefcase, and that she would take them to a particular motel.[201] The police officers saw the defendant leave her home at the described time and get into the described car; they pulled her over while she was driving down the street the described motel was on.[202] She consented to a search of her vehicle, and the officers found marijuana in the briefcase.[203] The Court held that the anonymous tip had sufficient indicia of reliability to give the officers reasonable suspicion to stop the defendant.[204] The Court noted that because the police were able to independently verify many of

195. *Id.*

196. *Id.* at 650–51.

197. *Id.* at 654 (quoting *Terry*, 392 U.S. at 21). The objective standard can be probable cause or some lesser standard, such as reasonable suspicion. *See id.*

198. *Prouse*, 440 U.S. at 663. If an officer does have an objective basis for performing a vehicle stop, courts do not examine what his or her subjective basis was. *See* Whren v. United States, 517 U.S. 806, 810 (1996). Notably, the Court applies different logic when dealing with vehicle checkpoints. For instance, in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 447, 455 (1990), the Court held that a sobriety checkpoint at which all drivers were stopped and checked for signs of intoxication did not violate the Fourth Amendment because the invasion of privacy was small and the state had a strong interest in preventing drunken driving. However, even when operating these checkpoints, police are bound by objective limitations. They must operate consistently, for instance by stopping every car and following stated guidelines. *See id.* at 453.

199. 496 U.S. 325 (1990).

200. *Id.* at 327 (1990).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 330–32.

the facts the tipster conveyed, it was reasonable for them to believe that the tipster had inside knowledge of illegal activity.[205]

The Court is serious about its requirement that there be objective indicia of reliability when police make a stop or conduct a search on the basis of an anonymous tip. Thus, in *Florida v. J.L.*,[206] an anonymous tip that a black teenager wearing a plaid shirt was at a particular bus stop carrying a gun was not enough to give the officers reasonable suspicion to search him.[207] While the description of the boy was verifiably accurate, there were no objective indicators that he was *illegally* carrying the gun, so there could be no reasonable suspicion.[208] Accordingly, the stop was unconstitutional.[209]

Both vehicle-stops and evaluating information from confidential informants, then, illustrate the general principle that when the government acts in ways that implicate our constitutional rights, they must do so on an objective, neutral basis. If a police officer wishes to make a stop or to conduct a search—actions that implicate the core of the Fourth Amendment right—she must first have an objective reason for doing so. Failing that, her actions are unconstitutional.

D. *Abortion*

There is some debate over whether abortion is a fundamental right.[210] Proponents of the view that abortion is a fundamental right point to the Supreme Court's decision in *Roe v. Wade*,[211] while opponents of the fundamental rights view draw support from the Court's opinions in cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*[212] and *Gonzales v. Carhart*.[213] My purpose here is not to debate whether

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205. *White*, 496 U.S. at 332. The dissent observed that the facts conveyed by the tipster could just as easily convey inside knowledge about a neighbor's habits on her way to work. *Id.* at 333 (Stevens, J., dissenting).

206. 529 U.S. 266 (2000).

207. *Id.* at 272.

208. *Id.*

209. *Id.* at 274. The Court has said that one objective indicator of reliability is that an anonymous tip has been made via a 911 system. *Navarette v. California*, 572 U.S. 393, 400, 404 (2014). Given the increasing prevalence of doxing, this may no longer be a safe conclusion. *See* Julia M. MacAllister, Note, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 FORDHAM L. REV. 2451, 2455–62 (2017).

210. *See, e.g.*, Michael Dorf, *Symposium: Abortion Is Still a Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016, 11:28 AM), https://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/ [https://perma.cc/Y6D9-ERZA].

211. 410 U.S. 113 (1973).

212. 505 U.S. 833 (1992).

213. 550 U.S. 124, 158, 166 (2007) (ostensibly equating *Casey*'s undue burden standard to the rational basis standard most associated with non-fundamental rights). *Roe*, 410 U.S. at 152–53, 155 (holding that privacy is a fundamental constitutional right that "is broad enough to cover the abortion decision"); *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in part and dissenting

abortion is a fundamental right—I leave that to the experts. Rather, I assume that it is,[214] and instead merely focus on the ways in which states may permissibly restrict that right.

The Court first recognized the abortion right in its opinion in *Roe*.[215] In that case, the appellants challenged a Texas statute that made it a crime to obtain an abortion, unless doing so was necessary to save the life of the mother.[216] The appellants claimed that the Texas statute violated their Fourteenth Amendment due process rights and their rights to "marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."[217] The Court agreed, finding that the Constitution—through either the Ninth or Fourteenth Amendment—guaranteed a "fundamental" right of privacy, a right that "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[218] However, the Court acknowledged that the right was not unlimited; a woman was not "entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."[219] Rather, the Court said, the woman's privacy right had to be balanced against the government's interest in, for example, protecting the health of the mother.[220] Accordingly, the Court ruled that states could not regulate abortions during the first trimester, but could regulate them during the second trimester, and that they could ban them entirely at the point of fetal viability in the third trimester.[221] *Roe*, then, gave states objective markers for when they could regulate access to the abortion right.

The Court moved away from the *Roe* trimester framework in its opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[222] In that case, the appellants challenged several provisions of the Pennsylvania Abortion Control Act of 1982.[223] The Court's decision was fractured, but the controlling plurality opinion—coauthored by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter—rejected *Roe*'s "rigid" trimester framework, which the Justices "d[id] not consider

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in part) (claiming that the controlling opinion rejected the fundamental rights framework the Court adopted in *Roe*); *Gonzales*, 550 U.S. at 158, 166 (ostensibly equating *Casey*'s undue burden standard to the rational basis standard most associated with non-fundamental rights).

214. This assumption is well supported. *See* Dorf, *supra* note 210.

215. *Roe*, 410 U.S. at 113.

216. *Id.* at 117–18.

217. *Id.* at 129.

218. *Id.* at 152–53.

219. *Id.* at 153.

220. *Id*. at 162–63.

221. *Roe*, 410 U.S. at 163–65.

222. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 872–73 (1992).

223. *Id.* at 844.

to be part of the essential holding of *Roe*."[224] The plurality noted that "[the Court's] jurisprudence relating to all liberties . . . has recognized [that], not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right."[225] The plurality held that laws that merely had the "incidental effect" of burdening the abortion right were not unconstitutional.[226] However, any law that imposed an "undue burden" on a woman's right to obtain an abortion was unconstitutional.[227] Therefore, states could regulate abortion, but only on a neutral basis, and not in a way that directly prevented or overly burdened a woman's right to obtain one.[228]

In the decades following *Casey*, the undue burden test has endured.[229] Thus, the right to access abortion, too, may only be limited when the government applies neutral, objective criteria, no matter the standard the Court uses to evaluate whether regulations interfere with access to the right.[230] What those criteria are—and how they should be interpreted—is of course hotly contested.[231] But the point is that even when it comes to a right as controversial as abortion, the government may not regulate the right in a subjective manner.

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This Part has considered four fundamental constitutional rights, three enumerated and one unenumerated: the rights to free speech, free exercise of religion, freedom from unreasonable searches and seizures, and access to an abortion. Although each of these rights is protected by the Constitution, the government is still allowed to place reasonable restrictions on a person's ability to exercise them. However, for every one of these rights, the restrictions must be neutral; they cannot be made on the basis of the otherwise-legal use the person intends to make of the right.

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224. *Id.* at 872–73.

225. *Id.* at 873. The Court drew on examples from another fundamental right, voting, in making this point.

226. *Id.* at 874.

227. *Casey*, 505 U.S. at 874. *Id.*

228. *See id.*

229. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

230. There are also strong arguments that governments should not be able to limit access to abortion based on the reason a woman has for obtaining one. *See* David S. Cohen, *The Promise and Peril of a Common Law Right to Abortion*, 114 NW. U. L. REV. ONLINE 140, 143–44 (2019) (reviewing ANITA BERNSTEIN, THE COMMON LAW INSIDE THE FEMALE BODY (2019)).

231. *Abortion*, 20 GEO. J. GENDER & L. 265, 311 (2019) ("One thing remains certain: the legal framework surrounding abortion will continue to be a highly contentious topic in the legislative and judicial branches at both the federal and state level.").

III. MAY-ISSUE LAWS VIOLATE THE CONSTITUTION

Given the limitations on how the government may restrict constitutional rights, discussed in Part II, may-issue concealed carry permit laws appear to be unconstitutional because they allow the permitting authority to decide whether to restrict the Second Amendment right on a subjective, often non-neutral basis. In this Part, I briefly explain why may-issue laws do infringe on a protected constitutional interest. I then explain why they are unconstitutional, both when they merely give permitting officials subjective discretion over when to issue a permit, and when they require the applicant to prove why she has a special need for a concealed carry license.

In *Heller*, the Supreme Court said that self-defense was "the core lawful purpose" of the Second Amendment.[232] Although *Heller* specifically dealt with the right to keep guns in the home for the purposes of self-defense, that does not mean there is no Second Amendment right to carry guns for self-defense purposes outside of the home.[233] Indeed, as Judge Richard Posner noted in his majority opinion in *Moore v. Madigan*,[234] "the interest in self-protection is as great outside as inside the home."[235] Given the Supreme Court's holding in *Heller*, that the Second Amendment protects the right to keep and bear arms for self-defense purposes,[236] that right must apply outside of the home as well as inside of it.

True, as discussed in Part V.A, the Supreme Court did say in *Heller* that certain longstanding gun control regulations, such as bans on concealed carry in public, are presumptively lawful.[237] But there is a protected Second Amendment interest in carrying weapons outside the home, and regulations on concealed carry implicate that interest. Therefore, if a state implements a permitting scheme that allows some form of concealed carry in public, it must, consistent with how other constitutional rights are regulated, use a scheme that is objective and neutral.[238]

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232. District of Columbia v. Heller, 554 U.S. 570, 630 (2008).

233. *Id.* at 635; *see also* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); Meltzer, *supra* note 69, at 1518.

234. 702 F.3d 933, 942 (7th Cir. 2012).

235. *Id.* at 941.

236. *Heller*, 554 U.S. at 630.

237. *Id.* at 626. *See infra* Part V.A.

238. *See supra* Part II. Similar principles apply to other rights. For instance, in the context of free speech, governments sometimes create so-called "limited public forums, which are spaces that are not traditional public fora that the government has nonetheless opened to expressive activity." Matthew Strauser & Noah C. Chauvin, *Student-~~Athlete~~ Employee Speech*, 20 VA. SPORTS & ENT. L.J. (forthcoming 2020) (manuscript at 11), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542468. The government is not obligated

May-issue permitting schemes violate these principles. At a minimum, the laws give state officials discretion to determine, on a subjective basis, whether to issue a concealed carry permit.[239] Connecticut's may-issue statute, for instance, simply requires the permitting authority to determine whether the applicant "is a suitable person to receive [a concealed carry] permit."[240] Such discretion is anathema to the regulation of other fundamental constitutional rights. For instance, when a statute gives government officials the power to make subjective decisions about a person's speech, it is unconstitutional.[241] Similarly, a law that allows the government to make subjective decisions that burden a person's religious exercise violates the First Amendment because it is not generally applicable.[242] Police officers violate the Fourth Amendment when they pull over a car on a subjective basis absent probable cause or reasonable suspicion,[243] and if states only subjectively allowed women to access abortions, they surely would be imposing an undue burden.[244] May-issue laws are unconstitutional because they allow government officials to subjectively regulate a person's Second Amendment right. This is not how constitutional rights are supposed to work.

Admittedly, some may-issue laws have been limited by later court decisions that restrain permitting officials' discretion.[245] However, restrictions read into a may-issue statute by common law do not rescue the statute from the Second Amendment unless they remove *all* subjective decision-making. For instance, New York's may-issue law requires the permitting authority to determine that the applicant has a "proper cause" for needing to concealed carry.[246] Court decisions define proper cause as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[247] The problem with this definition is that while it does constrain permitting officials in some respects—it does give them a standard to apply[248]—it does not take away the ultimate subjectivity of the permitting decision. Permitting officials are still left to decide what the background self-defense needs of the community are and when an

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to create such fora, and it may close them at any time, but while it is operating them, it may only regulate them in a content-neutral manner. *Id.*

239. E.g., CONN. GEN. STAT. § 29-28(b).

240. *Id.*

241. *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977).

242. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531–32 (1993).

243. Delaware v. Prouse, 440 U.S. 648, 654 (1979).

244. *See* Whole Women's Health v. Hellerstedt, 136 S. Ct. 2292, 2300 (2016).

245. *See, e.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 92 (2d Cir. 2012).

246. N.Y. PENAL LAW § 400.00 (McKinney 2019).

247. *In re* Klenosky v. N.Y. City Police Dep't, 428 N.Y.S.2d 256, 256 (App. Div. 1980).

248. *See Kachalsky*, 701 F.3d at 92.

applicant's need is different enough from the general need to warrant carrying a gun. Even though caselaw has provided permitting officials with a standard the statute did not contain, they are still allowed a degree of subjective decision-making that would be unconstitutional if any other fundamental right were implicated.

May-issue laws that require the applicant to *prove* that she has a good reason for needing to carry a gun in public, such as Delaware's law, are even more constitutionally suspect.[249] As the Supreme Court said in *Heller*, "[t]he very enumeration of the [Second Amendment] right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."[250] This principle surely applies with as much force to the right to bear arms outside of the home. If there is some protected interest in carrying guns in public, the government cannot have the power to decide on a case-by-case basis whether an individual truly *needs* to exercise her rights.

No other fundamental constitutional right would tolerate a regulation that limited a person's ability to use that right based on what her use would be. In the context of free speech, this would be a classic content-based restriction.[251] The government may not restrict which words you can use based on whether it thinks you need particular phrases to adequately convey your message.[252] Likewise, the free exercise clause would be meaningless if the government was allowed to restrict a person's religious practice based on what religion she was practicing.[253] Fourth Amendment protections inure to all people, regardless of whether they are engaged in criminal activity.[254] Before her fetus is viable, a woman need not justify her desire to obtain an abortion; her right to privacy enables her to make this decision free from the prying of the state.[255] May-issue laws that require a person to prove that she truly needs to exercise her Second Amendment right therefore vary drastically from how other fundamental rights may be regulated. They are unconstitutional because "[t]he right's existence is all the reason [a person] needs" to be able to exercise it.[256]

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249. DEL. CODE ANN. tit. 11, § 1441(a) (West 2020).

250. District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

251. *See supra* Part II.A.

252. *See* Cohen v. California, 403 U.S. 15, 23–25 (1971).

253. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993).

254. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979).

255. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

256. *See* Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom.*, Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013).

IV. WHY IT MATTERS HOW WE LIMIT GUN OWNERSHIP

So, may-issue concealed carry permitting laws violate the Constitution—so what? None of that changes the immense dangers caused by guns.[257] Why should we care that may-issue laws violate the Constitution, when they serve to decrease access to something designed to *kill*? I believe there are two primary reasons, which I discuss in this Part. First, governments should not be allowed to subjectively limit the lawful exercise of a constitutional right—any constitutional right.[258] If the government could limit the Second Amendment right on a subjective basis, how could we prevent them from restricting rights to speech, freedom of religion, freedom from unreasonable searches and seizures, and abortion, among many others, on an equally subjective basis? Second, and perhaps even more importantly, may-issue laws mislead the general public about how constitutional rights work. This has dramatic consequences for both the gun control debate and our public understanding of *all* constitutional rights.

A. *Governments Should Not Subjectively Limit the Lawful Exercise of Constitutional Rights*

If may-issue statutes are constitutional, then the government may regulate people's Second Amendment rights on a subjective basis. Moreover, if the laws that require citizens to prove a "proper cause" for needing to carry a gun are constitutional, then the Second Amendment allows the government to require citizens to prove that they truly need to exercise a constitutional right. The problem with this is that the principles justifying such limitations on the Second Amendment right are not easily confined to the Second Amendment context; they could just as readily be imported to limit other fundamental constitutional rights.

As described above in Part I.C, courts that have upheld may-issue laws have largely done so after finding that the laws are substantially related to the "compelling[] governmental interest[] in public safety and crime prevention."[259] Those are indeed compelling state interests. And while guns pose particularly serious risks of harming public safety or being used to commit a crime,[260] other constitutional rights can also raise serious concerns in these areas. Many people, for instance, argue that certain types of speech are a form of violence that can cause health problems.[261] Officials have attempted to justify laws that discriminate

257. *See supra* notes 1–8.

258. *See infra* Part IV.A.

259. *See supra* Part I.C; Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).

260. *See supra* notes 1–8.

261. *See* Chauvin, *supra* note 19, at 63–65. *See also supra* notes 122, 131, 133, and 134. *See also infra* note 296.

based on religion by claiming that certain religious practices are bad for public health.[262] The Fourth Amendment protects people not committing crimes and people committing crimes equally; Fourth Amendment protections are not reduced, for instance, just because a person is illegally carrying a gun.[263] And finally, abortion opponents have argued for decades that restrictions on abortion are designed to safeguard human life.[264]

There is a way to frame virtually every constitutional right as a matter of life and death, of crime and safety. If one right can be subjectively regulated because it impacts public health or safety, then there is no reason that *every* right could not be regulated for the same reasons. We should care deeply that governments have been allowed to regulate Second Amendment rights in a subjective manner because the same justifications that support may-issue laws support subjective limitations on our rights to freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, and freedom to obtain an abortion.

Moreover, we should be suspicious of government efforts to subjectively limit our rights because governments consistently abuse their power to subjugate minority populations. An example from the gun control realm will illustrate this point. Several scholars have documented how gun control laws have been unevenly applied against racial minorities.[265] These scholars have identified "restrictive firearms laws . . . that were equal in the letter of the law, but unequally enforced."[266] This is the danger of laws that give government officials the subjective power to curb our constitutional rights: it is very difficult to prevent political majorities from suppressing the rights of minorities—be they racial, ethnic, religious, political, a function of gender identity or sexual orientation, or virtually any other marker—when the decisions of those in power cannot be easily evaluated for compliance with objective criteria.[267] We should not allow a constitutional right—any constitutional right—to be regulated in a subjective, non-neutral manner.

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262. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993).

263. *See* Florida v. J.L., 529 U.S. 266, 272 (2000).

264. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 150 (1973).

265. *See generally* Robert J. Cottrol & Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307 (1995); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17 (1995). *But see generally* Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 TEX. A&M L. REV. 95 (2016) (arguing that some early gun control laws were in fact intended to curb white-on-black violence).

266. Cramer, *supra* note 265, at 20.

267. *See, e.g.*, Chauvin, *supra* note 122, at 376–83.

B. *May-Issue Laws Mislead the Public About How Rights Work*

As the popular (at least among the #LawTwitter community) Twitter account @BadLegalTakes demonstrates on a daily basis, there is no shortage of misunderstanding by the general public about how the law works.[268] Public misunderstanding of any field is a bad thing, but misunderstanding of law can have particularly dire consequences because public discourse can impact the final shape that our constitutional rights take.[269] This section discusses why misunderstandings about our rights—any of our rights—are dangerous. Namely, the way we understand each of our rights informs our understandings of all of our other rights.

As Professors Zick and Winkler have documented, constitutional rhetoric has played an outsized role in how the Second Amendment has been interpreted, enforced, and supplemented.[270] One need not spend much time studying the gun rights community to see the rhetorical power that the Second Amendment holds; the phrase "shall not be infringed" is emblazoned on countless items of clothing, posters, and social media posts. As Professor Zick has noted, gun rights advocates' framing of the Second Amendment right as a guarantor of civil rights and civil liberty "appear to do little if anything to forge 'civic attachment' in the public at large" and instead seem to prime people for "perpetual culture wars."[271] While this would be concerning in its own right, it is particularly troubling because how the Second Amendment right is framed "will continue to affect" how courts interpret the Second Amendment and "fill an array of doctrinal gaps."[272]

May-issue laws may perform a similar function on the opposite side of the gun control debate. Gun control advocates often justify their positions by observing that a certain type of gun or gun accessory can be banned because it is unnecessary to perform some legal function of gun

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268. Bad Legal Takes (@BadLegalTakes), TWITTER, https://twitter.com/BadLegalTakes?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [https://perma.cc/7Q8H-YF29] (last visited Nov. 22, 2020). Two points on this. First, as much as I enjoy @BadLegalTakes, I wonder if the legal community is not doing the general public a serious disservice by punching down at Twitter trolls who do not understand how the law works. Second, when I was in high school, I was told that I must never cite to Wikipedia; now I am citing to a Twitter account. What a world.

269. *See* Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights, and Civil Liberties* 7–9 (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450947 [https://perma.cc/C9WM-29MB]).

270. *See* Winkler, *supra* note 24, at 259–61; Zick, *supra* note 269, at 46–53.

271. Zick, *supra* note 269, at 49; *cf.* Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 577–82 (2006). I should note that I am guilty in this paper of framing (at least some) gun rights as a civil liberty on par with First Amendment rights. Professor Zick indicates that this may be problematic. Zick, *supra* note 269, at 52.

272. Zick, *supra* note 269, at 51.

ownership. For instance, former Montana Governor Steve Bullock—a graduate of Columbia Law School—recently tweeted that "[n]o hunter needs a 30-round magazine, a bump stock, or an assault weapon."[273] This is doubtless true; hunters got by for millennia without any of these technologies. But it also strikes me as somewhat beside the point. The Second Amendment protects the right to keep and bear arms.[274] That most likely includes protection for bearing arms for the purpose of going hunting.[275] The reason to ban 30-round magazines, bump stocks, and assault rifles is that they are incredibly dangerous; they make it very easy for a single assailant to kill a great many people.[276] As I discuss below, the fact that they are unnecessary to perform an otherwise-legal purpose should not matter to the constitutional analysis.[277]

My favorite example of this phenomenon is the "30-50 feral hogs" meme.[278] In the wake of mass killings in El Paso and Dayton during the summer of 2019, many people expressed renewed support for common-sense gun control measures.[279] One man, responding to a tweet calling for restrictions on assault weapons, asked "[h]ow do I kill 30-50 feral hogs that run into my yard within 3-5 mins while my small kids play?"[280] The tweet went viral, and "30-50 hogs" quickly became a meme.[281] Part of it, I suspect, was people looking for anything amusing to distract them from the horrors of El Paso and Dayton. However, another part of it was people reacting to the seemingly ridiculous notion that a person would need an assault weapon to fend off feral hogs.[282] The teasing reactions were a result of people believing that no one would ever need an assault rifle to protect themselves or their families from wild hogs.

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273. Steve Bullock (@GovernorBullock), TWITTER (Oct. 21, 2019, 9:44 AM), https://twitter.com/governorbullock/status/1186277061150666753?lang=en [https://perma.cc/RJ5Y-72KV].

274. *See* U.S. CONST. amend. II.

275. *See* District of Columbia v. Heller, 554 U.S. 570, 599 (2008).

276. Brian Roth, *Reconsidering a Federal Assault Weapons Ban in the Wake of the Aurora and Portland Shootings: Is it Constitutional in the Post-Heller Era?*, 37 NOVA L. REV. 405, 434 (2013).

277. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012); *cf.* Cohen, *supra* note 230, at 142–43 (making a similar argument in the context of abortion rights); *infra* notes 283–286.

278. *See* Dylan Matthews, *30 to 50 Feral Hogs, Explained*, VOX (Aug. 6, 2019, 1:10 PM), https://www.vox.com/future-perfect/2019/8/6/20756162/30-to-50-feral-hogs-meme-assault-weapons-guns-kids.

279. *Id.*

280. *Id.*

281. *See id*; *see also* Andy Golder, *Here They Are, The Best And Funniest Feral Hog Tweets*, BUZZFEED (Aug. 6, 2019, 1:27 PM), https://www.buzzfeed.com/andyneuenschwander/here-they-are-the-best-and-funniest-feral-hog-twe [https://perma.cc/B6NM-C54Z].

282. *See* Matthews, *supra* note 278 (noting that, according to wildlife scientists, there is good reason for this skepticism).

I believe that may-issue laws and the cases that uphold them contribute to a gun control culture in which people believe that firearms can be banned if people cannot adequately justify a need for them. May-issue laws teach that whether a person can exercise her constitutional right to keep and bear arms is at the subjective discretion of a government official.[283] Further, they indicate that if a person cannot justify her need for a gun, she may not have one.[284] As I described above in Part III, may-issue laws are unconstitutional.[285] Bans on certain weapons are perfectly lawful, but not because a person does not need them to hunt or defend her home from feral hogs. Rather, they are lawful because they are objective and are reasonably related to the government's compelling interest in protecting public health and safety.[286] Many people fail to understand this distinction, and part of the reason is that there are laws on the books that allow government officials to make subjective decisions about whether a person really needs a gun.

My fear is that this understanding of the Second Amendment will inform the public understanding of other fundamental constitutional rights. As Professor Justin Driver has written in a related context, "[t]he most prominent cost" of policies designed to eliminate any risk of violence "is the heavy toll placed on . . . notions of what it means to be an American citizen."[287] If people believe that the Second Amendment right can be limited if a person fails to adequately justify her need for it, they would have no reason to believe that other fundamental rights do not operate in the same manner. Calls to ban speech, for instance, are often premised on the idea that a person does not need to use particular words to convey her message.[288] If we are not careful, people could begin to believe that all constitutional rights can be limited unless a person can justify a need for them. Given public discourse's ability to shape the legal form of our rights, this is deeply concerning.[289]

V. COUNTERARGUMENTS

Few topics are more likely to raise political hackles than debates over gun control.[290] Gun control is a fraught issue because the stakes are so high; a gun control regulation can save lives at the same time it infringes on one of our fundamental liberties. When two such principles are in tension, there are bound to be compelling arguments on both sides. In this

283. *See supra* Part I.B.
284. *Id.*
285. *See supra* Part III.
286. *See* Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).
287. DRIVER, *supra* note 70, at 240.
288. *See* Cohen v. California, 403 U.S. 15, 20 (1971).
289. Zick, *supra* note 269, at 7–9.
290. Braman & Kahan, *supra* note 271, at 577–82.

Part, I briefly detail and respond to three counterarguments to my thesis that I initially found persuasive: that the Second Amendment does not protect carrying a weapon in public, that the Second Amendment's language limits the purposes for which a person can keep a gun, and that the right to keep and bear arms should be treated differently from other rights, given how dangerous guns are.

A. *The Second Amendment Does Not Protect Concealed Carrying a Firearm in Public*

Supporters of may-issue laws might argue that while under *Heller* the Second Amendment protects the right to keep and bear arms *in the home* for the purposes of self-defense, it does not include the right to carry firearms *outside* of the home. This position is not unsupported. Even as it recognized a Second Amendment right to possess handguns in the home for self-defense purposes, the *Heller* Court noted in dicta that certain limitations on the right to keep and bear arms, such as "prohibitions on carrying concealed weapons," are presumably lawful.[291] Several United States circuit courts of appeal have explicitly held that there is no Second Amendment right to concealed carry outside the home, reasoning that *Heller* found or indicated that total bans on concealed carry are presumably constitutional.[292]

As I discussed above in Parts I.A and III, I believe that this argument is incorrect.[293] In *Heller*, the Supreme Court identified self-defense as "the core lawful purpose" of the Second Amendment.[294] While *Heller* itself focused on the appellee's right to keep a gun in his home for the purposes of self-defense, it does not follow that there is no self-defense right outside of the home.[295] As the Seventh Circuit noted in *Moore v. Madigan*, a person's right to defend herself using a gun is surely just as important in public as it is in her home.[296] If there is a Second Amendment right to carry weapons outside of the home, then laws that regulate concealed carry implicate that right.

Even though the *Heller* Court indicated that prohibitions on concealed carry were presumably constitutional, that does not give governments freedom to regulate concealed carry in any manner they choose. As I

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291. *See* District of Columbia v. Heller, 554 U.S. 570, 626–27 (2008).

292. *See, e.g.*, Peruta v. County of San Diego, 824 F.3d 919, 936, 939 (9th Cir. 2016) (en banc); Peterson v. Martinez, 707 F.3d 1197, 1211–12 (10th Cir. 2013); *see also* Kopel & Greenlee, *supra* note 70, at 268–69.

293. *See supra* Parts I.A & III.

294. *Heller*, 554 U.S. at 630.

295. *See, e.g.*, Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012). *But see* Meltzer, *supra* note 69, at 1518 (arguing that *Heller* implies a right to open carry, but not concealed carry, outside the home).

296. *Moore*, 702 F.3d at 942.

discussed in Part III, laws that regulate concealed carry must be objective and neutral. Total bans on concealed carry meet this threshold; they do not leave decisions about issuing a concealed carry permit up to a government official's discretion, and they do not premise those decisions on the use the applicant intends to make of the permit.[297] May-issue laws on the other hand, *always* leave the permitting decision up to the discretion of a government official, and the decision is often based on the use the applicant intends to make of her right.[298] They therefore violate the neutrality principle that applies to all fundamental constitutional rights and impermissibly infringe on a person's protected interest in concealed carrying a gun in public.

B. *The Second Amendment's Limiting Language*

By its text, the Second Amendment premises the right to keep and bear arms on the necessity of "[a] well regulated Militia . . . to the security of a free State."[299] On its face then, the Amendment appears to protect the right to keep and bear arms only in the context of forming a well-regulated militia. And as I described above in Part I, that was the understanding of the Amendment for more than a century.[300] Supporters of may-issue laws, then, might well argue that the Second Amendment only protects the right to keep and bear arms when a person does so for the purpose of participating in a militia (this is a closely related argument to the one discussed in the previous Section).

This counterargument is unpersuasive because the cat is already out of the bag. While the argument is appealing on its face, it does not reflect the reality of our current constitutional landscape. The Supreme Court held in *Heller*—and reaffirmed in *McDonald*—that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense.[301] *Heller* and *McDonald* were both 5–4 decisions, but by the time the Court issued its opinion in *Caetano v. Massachusetts*, the principle that the Second Amendment applied to instruments of self-defense was so well established that when confronted with the question of whether stun guns were protected by the Second Amendment right, the

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297. *Cf.* Wrenn v. District of Columbia, 864 F.3d 650, 665–66 (D.C. Cir. 2017) (stating that the good-reason law is necessarily a total ban, even though it allows for some residents with "special" defense needs to bear arms, because it infringes on the right to carry in the face of "ordinary" self-defense needs); Amaro, *supra* note 24, at 46–47 (arguing that good reason laws impose a total carry ban on *most* people because of state discretion). Of course, if there is a Second Amendment right to carry weapons outside of the home for self-defense purposes, then jurisdictions that enact total bans on concealed carry must allow some form of open carry.

298. Amaro, *supra* note 24, at 47.

299. U.S. CONST. amend. II.

300. *See supra* notes 37–44 and accompanying text.

301. District of Columbia v. Heller, 554 U.S. 570, 628 (2008); McDonald v. City of Chicago, 561 U.S. 742, 791 (2010).

Court issued a *per curiam* opinion finding that they were.[302] The Court did not even need to hear oral arguments because "Heller rejected the proposition 'that only those weapons useful in warfare are protected.'"[303] Given this line of cases, it is clear that a majority of the Court has accepted the holding in *Heller* that the Second Amendment—despite its plain text—includes a right to keep and bear arms for self-defense purposes.[304] Absent a reversal of course by the Court (a prospect that seems unlikely), the Second Amendment right is not limited to owning firearms for the sole purpose of participating in a well-regulated militia.

C. *Guns Are Dangerous*

I began this Article with a paragraph detailing how dangerous guns are.[305] As we see time and time again in the United States, guns in the hands of the wrong people pose an enormous threat to public safety.[306] This is why the government has a compelling interest in regulating guns; doing so serves the government's interests in advancing public safety and preventing crime.[307] Given the obvious dangers of guns, what prevents the government from regulating them as it does things such as dangerous speech? After all, speech is protected by the First Amendment, but that does not prevent the government from being able to ban certain types of speech, such as fighting words.[308] May-issue laws actually give greater access to guns than to certain types of dangerous speech, because they do not operate as complete bans. Or, to take the argument even further, maybe guns are just different. Perhaps they are so dangerous that the government can regulate the Second Amendment right in manners in which it would not be able to if other constitutional rights were implicated. I will address each of these counterarguments in turn.

First, of course the government can regulate dangerous things, even when those things are protected by the Constitution. Thus, the government is perfectly within its rights to ban fighting words—those words that, just by being spoken, are likely to cause a fight.[309] My argument is not that the government cannot regulate guns, it is only that when governments do so, they must do it on a neutral and objective basis. The same is true of restrictions on fighting words because governments

302. Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016).

303. *Id.* at 1028 (quoting *Heller*, 554 U.S. at 624–25).

304. *Cf.* Liptak, *supra* note 72 (reaching this same conclusion in the context of the oral argument in *New York Pistol and Rifle Ass'n v. City of N.Y.*).

305. *See supra* notes 1–8 and accompanying text.

306. *See supra* notes 1–8 and accompanying text; *see also* Zachary Hofeld, *Studying Abroad: Foreign Legislative Responses to Mass Shootings and Their Viability in the United States*, 28 MINN. J. INT'L L. 485, 511 (2019).

307. *E.g.*, Kachalsky v. County of Westchester, 701 F.3d 81, 97 (2d Cir. 2012).

308. R.A.V. v. City of St. Paul, 505 U.S. 377, 383–84 (1992).

309. *Id.* at 385.

may only restrict words that are, as a matter of general public understanding, inherently likely to cause a fight or indicate a willingness to fight.[310] Moreover, bans on fighting words do not operate as bans on all speech, but only on very particular words used in defined contexts. Thus, the appropriate Second Amendment analogue to bans on dangerous speech such as fighting words would be bans on dangerous *conduct* with guns, such as murder, or bans on carrying guns where doing so creates an unacceptable risk of violence in particularly sensitive places, such as K-12 schools or churches.[311] While governments may restrict the manner in which people *use* their guns when those uses are dangerous to other people, the fact that guns can be used to hurt other people does not give the authority to totally ban them, just as the government could not ban all speech because some of it is "dangerous."

Second, it is quite true that guns are dangerous—certainly more dangerous than any speech.[312] But as the Supreme Court has said, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[313] It is this enshrinement of the Second Amendment right that prevents governments from regulating concealed carry in a different manner than they do other constitutional rights. With the new understanding that the Second Amendment protects a personal right to carry guns for the purposes of self-defense, there must be some constitutional protection for carrying guns outside of the home.[314] Given that the right to carry firearms in places where there might be a confrontation is protected by the Constitution, there is no basis to allow the government to regulate it differently than it does with other constitutional rights. Allowing the government to regulate the Second Amendment right on a subjective basis would open the door to subjective evaluations of our freedoms of speech and religion, our freedom from unreasonable searches and seizures, and our freedom to access abortion services if we wish to do so. This is a result that cannot be borne.

CONCLUSION

The argument I have advanced in this Article is relatively narrow: may-issue concealed carry permitting laws are unconstitutional because they allow government officials to subjectively decide whether to restrict an applicant's Second Amendment rights. This is not how constitutional

310. *See* Cohen v. California, 403 U.S. 15, 20 (1971).

311. *See* GIFFORDS L. CTR, GUNS IN SCHOOLS, https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/guns-in-schools/#state [https://perma.cc/WB8L-ANAY] (last visited Oct. 8, 2020)].

312. *See* Chauvin, *supra* note 19, at 63–65.

313. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

314. Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012); *supra* notes 69–72 and accompanying text.

rights work. As I discussed in Part II, the government may impose reasonable restrictions on constitutional rights such as the freedom of speech, freedom of religion, freedom from unreasonable searches and seizures, and access to abortion.[315] However, the government may not restrict those rights on the basis of the otherwise-lawful use that a person makes of those rights.

None of this is to suggest that government officials are obligated to issue a concealed carry permit to anyone who asks for one. As discussed in Part I.B, many states have shall-issue permitting schemes that still require the applicant to meet certain objective conditions before the government issues her a concealed carry permit.[316] Indeed, even a total ban on concealed carry is likely lawful.[317] Under my conception of the Second Amendment, *most* gun control measures, including universal background checks, assault weapon bans, requiring owners to report lost or stolen guns, and even so-called "red flag" laws are constitutional.[318] Such laws pass constitutional muster because they do not give government officials the opportunity to limit an applicant's Second Amendment right based on the otherwise-lawful use she intends to make of that right.

Guns are dangerous. Regulating who owns them and how they are carried is common sense. But "the right to keep and bear [a]rms" is also protected by the Constitution.[319] The government must not be allowed to restrict a constitutional right—any constitutional right—based on the otherwise-lawful use that a person plans to make of it.

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315. *See supra* Part II.

316. *See supra* Part I.B.

317. *See* District of Columbia v. Heller, 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").

318. These four measures are part of a gun control legislative package proposed by Virginia Governor Ralph Northam. *See* Schneider, *supra* note 8. A list of all eight proposed measures is available at Press Release, Office of the Governor, *Governor Northam Unveils Gun Violence Prevention Legislation Ahead of July 9 Special Session* (July 3, 2019), https://www.governor.virginia.gov/newsroom/all-releases/2019/july/headline-841482-en.html [https://perma.cc/YZK2-3U6Z].

319. U.S. CONST. amend. II.

LET THE SUNSHINE IN: FLORIDIAN FELONS[1] AND THE FRANCHISE

Joshua H. Winograd[*]

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.

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 ago[3] 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 judiciary[12] 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

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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]

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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

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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

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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

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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 states[59] 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

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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 floors[62] 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 Florida[65]—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 years[78]—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 FRCA 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

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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.brennancenter.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.brennancenter.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/2009-2010 ClemencyReport.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.

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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

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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 wigged out*, TAMPA BAY TIMES (Nov. 4, 2016), tampabay.com/news/perspective/a-quick-history-of-floridas-presidential-politics-from-whigs-to-wigged-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]

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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]

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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 (FRRC), a grassroots organization.[134] Formerly convicted persons operate the FRRC with the goal of eradicating disenfranchisement and discrimination against convicted persons.[135] Meade eventually became president and executive director of the FRRC, where his legal literacy mobilized the organization's mission to reform Florida's felon disenfranchisement law.[136]

The FRRC 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]

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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,

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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

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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

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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.

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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, s*upra* 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

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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

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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

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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

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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.* at666. 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]

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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

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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-Appelants 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-FVF4] (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*

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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

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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

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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.