I. Introduction

Our aspirational democracy originally was founded on the concept that if you did not own property (i.e., have some tangible level of wealth) you could not have a voice in the political process. The prohibition on poll taxes proclaimed in the 24th Amendment to the U.S. Constitution was in part a response to the financial barriers that people, especially racial minorities, faced in exercising their right to vote. Unfortunately, one’s economic status continues to be an obstacle for millions of Americans who, but for monetary obligations associated with a past felony conviction, would be voting members of our society. If you are already poor, the likelihood that you can fully satisfy all fines, fees, costs, and victim restitution is very small. Therefore, the continuing intersection between voting and wealth is most vividly seen in felon re-enfranchisement laws, which has essentially led to the creation of a second-class citizenry with no say in how our government and social institutions are run. Moreover, in a nation where poverty and incarceration rates among people of color, youth, and women are disproportionately high, the denial of voting rights based on one’s economic status has an especially significant impact in these communities.

In November 2018, through a voting rights restoration ballot initiative (known as Amendment 4), Florida voters created a real opportunity for those most impacted by unfair and discriminatory laws and policies to play an active role in dismantling those systems. Prior to passage of Amendment 4, more than 10 percent of Florida’s voting age population—disproportionately Black and poor—were permanently banned from voting. The initiative was intended to extend voting rights to an estimated 1.4–1.6 million people. Unfortunately, the Florida legislature was swift in undermining the will of the people and impeding the momentum that the rights
restoration movement has otherwise successfully built. State election laws like Florida’s that deny people the right to vote based on a criminal conviction and then condition the restoration of that right on payment of all financial obligations create a permanent underclass. We must remain vigilant in challenging such policies in the courts, state legislatures, and through an inclusive and coordinated grassroots movement.

II. The Historical Use of Poverty as a Barrier to the Ballot Box

Florida's 2000 election drew international attention and criticism not only because of our country’s antiquated use of the Electoral College, but also because it exposed the state’s continued practice of permanently denying someone the right to vote based solely on a previous criminal conviction. News outlets reported on poor ballot designs that resulted in hanging chads and the tossing of ballots of eligible citizens, even those improperly flagged as felons. Although the myriad of voting problems and irregularities highlighted during that election continue to haunt us today, it was the false identification of voters as felons and the financial barriers imposed on rights restoration that outraged many people the most and created the momentum that led to Amendment 4’s ultimate passage.

It is understandable that people were shocked by the impact of Florida's felon disenfranchisement law given the passage of the Voting Rights Act of 1965, which prohibits the denial of voting rights based on one’s race or color, and the 1964 enactment of the 24th Amendment, which bans poll taxes or other taxes that impede one’s right to vote. The 24th Amendment provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

In Harman v. Forsennius, the U.S. Supreme Court struck down a Virginia law that required people to pay a $1.50 poll tax in order to remain eligible to vote in federal elections. The Court reasoned the law was “repugnant to the Twenty-Fourth Amendment,” which “nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed.” The Court extended its ruling in Harman to all elections, not just federal ones, in Harper v. Virginia State Board of Elections, relying upon the Equal Protection Clause. The Court concluded that “[t]he principle that denies the State the right to dilute a citizen’s vote on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay.”

In 1974, the Supreme Court upheld, in a case called Richardson v. Ramirez, California's felon disenfranchisement law under section 2 of the 14th Amendment, which provides:
[W]hen the right to vote . . . is denied to any of the male inhabitants . . . or in any
way abridged, except for participation in rebellion, or other crime, the basis of represen-
tation therein shall be reduced in the proportion which the number of such male
citizens shall bear to the whole number of male citizens twenty-one years of age in
such State.10

According to the Court, “the exclusion of felons from the vote has an affirmative
sanction in section 2 of the Fourteenth Amendment, a sanction which was not
present in the case of the other restrictions on the franchise which were invalidated
[in other cases].”11 Thus, the Court concluded that Congress expressly recognized a
state’s right to use one’s criminal history as a barrier to voting. Since then, numer-
ous cases have been brought to either limit the scope of Richardson’s application to
state felony disenfranchisement laws or to overturn the Court’s decision entirely.12

Florida’s first constitution was adopted in 1838, but it was the 1845 constitu-
tion that allowed for the disenfranchisement of someone convicted of a crime. The
disqualification from voting based on a criminal conviction has remained, in some
form or fashion, a provision in amended versions of Florida’s constitution ever since.

In Johnson v. Bush, which was a challenge to Florida’s felon disenfranchisement law
on the grounds that it was racially discriminatory and violative of other federal
laws, the Eleventh Circuit relied heavily on the fact that when the state’s 1868 con-
stitution was enacted, Black and White delegates from Florida to the post-Civil War
convention voted to include the prohibition.13 According to the court, the fact that
the delegation was mixed race helped negate any argument that the provision was
proposed and enacted for a racially discriminatory purpose.14 Specifically, the court
reasoned that “[t]he existence of racial discrimination behind some provisions of
Florida’s 1868 Constitution does not [] establish that racial animus motivated the
criminal disenfranchisement provision, particularly given Florida’s long-standing
tradition of criminal disenfranchisement.”15

The contemporaneous evidence of racial discrimination surrounding the adop-
tion of Florida’s 1868 constitution was not enough for the court to protect the fun-
damental right from being eroded in this odious manner.16 In order to convert slaves
into convicts, several states like Florida, which had a significant Black population,
created Black Codes and other laws to specifically target African Americans who for
the first time had a real opportunity to play a role in the political arena. Thus, Black
Codes were enacted for the very purpose of creating a new system of slavery.17 Amer-
ica has a long history of racism and classism that has seeped its way into the very
fabric of our electoral systems. Therefore, even assuming the Johnson court’s ratio-
nale was correct in terms of the historical origin and motivation behind Florida’s
felon disenfranchisement law, its disparate impact on newly enfranchised former
slaves with limited economic opportunities cannot be ignored.

Plaintiffs have relied upon the Court’s decisions in Harman and Harper to argue
that felon disenfranchisement laws that require full satisfaction of legal financial
obligations are a wealth-based qualification in violation of the Equal Protection
Clause and 24th Amendment. These litigants have drawn upon decisions such as *Gideon v. Wainwright*, which affirmed a person’s right under the Sixth Amendment to a court-appointed attorney if he or she cannot afford a private attorney. Other cases include *Bearden v. Georgia*, which held that a person could not be jailed or imprisoned for failing to pay a fine without at least an evidentiary hearing to determine the person’s ability to pay, and *Griffin v. Illinois*, in which the Court ruled that a criminal defendant could not be barred from appealing his or her conviction solely because the person cannot afford to purchase a copy of the trial transcript.

Unfortunately, the poll tax argument in the re-enfranchisement context has not always fared well, as demonstrated in the Eleventh Circuit’s decision in the *Johnson* case:

> The State is not constitutionally obligated to return this right to them on completion of their sentence. The victim restitution requirement, then, does not unduly burden the exercise of their right to vote given that that right has already been stripped from them. The victim restitution requirement is not a special fee that they must pay in order to exercise a right already existing in them, but a requirement made within the authority of the State to begin the process of having their civil rights fully restored.  

The Sixth Circuit, in *Johnson v. Bredesen*, adopted a similar rationale and concluded that, “[a]s convicted felons constitutionally stripped of their voting rights by virtue of their convictions, Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-Fourth Amendment claim.” Thus, a state can erect a rights restoration scheme, but then enjoy unfettered discretion in whether, when, and how to actually restore someone’s rights. Sadly, most courts have too narrowly interpreted the 24th Amendment in wrongly concluding it was never intended to prohibit a fuller range of financial obligations that people must satisfy in order to vote.

Prior to the successful 2018 ballot initiative, Florida was one of just a few states that still require a person with a felony conviction to seek restoration of rights through an executive clemency process. In 2011, then-Governor Rick Scott amended the clemency rules to impose a five- or seven-year waiting period (depending on the crime of conviction) on anyone seeking restoration of their civil rights after having already completed their sentence. Moreover, the re-enfranchisement process remained under the total, unrestrained, and unchecked discretion of the governor with no guiding principles as to how those decisions would be made.

In *Hand v. Scott*, people with criminal convictions who had applied for rights restoration and were either denied or still waiting years later to find out whether or not they would even have a hearing sued the state over its clemency procedures. The plaintiffs argued that Florida’s restoration scheme violated the Equal Protection Clause and the First Amendment because the state exercised “unbridled discretion” in denying people restoration of their voting rights that impacted not only the physical casting of a ballot, but also their right to engage in political speech. They
maintained the State Executive Clemency Board utilized arbitrary standards that resulted in people of color and low-income people being disproportionately denied clemency and without any consistency in how or why they would grant someone's application.26 The district court found that the plaintiffs' “right to free association and right to free expression were denied under a fatally flawed scheme of unfettered discretion that was contaminated by the risk of viewpoint discrimination.”27 The court permanently enjoined the board from “enforcing the current unconstitutional vote-restoration scheme” and ordered it to “promulgate specific and neutral criteria to direct vote-restoration decisions” along with “meaningful, specific, and expeditious time constraints.”28 Unfortunately, the Eleventh Circuit stayed the district court’s decision, determining that “[a]ll the appellees have offered in this case is a ‘risk’ that standardless determinations ‘could’ lead to impermissible discrimination; that is not enough to show a discriminatory purpose or effect.”29

While it is true that Florida’s felon disenfranchisement law dates back to 1845, before African Americans had the right to vote, the expanded scope and impact of the state’s policy has unquestionably resulted in racial minorities and poor people wielding much less political power and, consequently, control over the policies that govern their lives. Exclusion and voter suppression have served as the foundation of our electoral system, which explains why it has been so difficult to root out. For the most part, courts have failed to acknowledge that today’s felon disenfranchisement laws contribute to the underrepresentation of marginalized groups based on their race and socioeconomic status. Therefore, it is arguably dishonest for courts to ignore that race and class remain motivating factors in the proliferation of voter suppression laws.

III. Florida’s Historic Passage of the Voting Restoration Amendment

A. GETTING THE INITIATIVE ON THE BALLOT

The Sentencing Project estimated that, in 2016, around 6.1 million people (about 2.5 percent of the U.S. voting age population) were disenfranchised based on a felony conviction.30 Florida alone accounted for an estimated 1.6 million of those voters—around 10 percent of the voting-age population in the state.31 Those numbers alone are alarming, but when coupled with the fact that in Florida elections have been won within a 1 percent margin, the significance is even more stark.

In order to get the initiative on the ballot, supporters of the measure had to secure 766,200 signatures from at least 14 of Florida’s current 27 congressional districts.32 Petition signatures are only valid for two years from the date of signing, so reaching the numerical threshold in a timely manner is of the essence.33 Once a sufficient number of signatures are gathered, the state supreme court must review the language to make sure it is not misleading or otherwise confusing to voters.34 After passing this third crucial hurdle, the initiative is ready for placement on the ballot and the extremely hard work of getting enough votes for it to pass begins.
The Voter Restoration Act ballot initiative (known as “Amendment 4” because of its placement on the ballot) provided that:

(a) No 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. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation;

(b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.

Thus, the proposal allowed for the automatic restoration of voting rights to those with felony convictions who had completed their sentences, except for anyone convicted of murder or felony sexual assault. Otherwise, the only alternative remained an executive clemency process that a federal district court deemed to be “a fatally flawed scheme of unfettered discretion.” The Florida Rights Restoration Coalition (FRRC) and other organizations raised millions of dollars in order to mount the necessary public education campaign, recruit enough petition gatherers, both paid and volunteer, secure advertisements on television and billboards, organize community meetings, and do whatever else was necessary to get out the vote and make sure people ultimately voted “yes” on Amendment 4. Community activists and other volunteers gathered the necessary signatures for the petition and approval from the state supreme court to put the measure on the November 2018 ballot. In approving the language, the state supreme court held that

the ballot title and summary clearly and unambiguously inform the voters of the chief purpose of the proposed amendment. Read together, the title and summary would reasonably lead voters to understand that the chief purpose of the amendment is to automatically restore voting rights to felony offenders, except those convicted of murder or felony sexual offenses, upon completion of all terms of their sentence.

After hosting numerous community town halls, tabling at every kind of public event, running multiple television advertisements and other public service announcements, and engaging in deep canvassing, almost 65 percent of Floridians voted “yes” on Amendment 4. Notably, in that election, Republicans won the governorship and a majority of legislative and judicial seats. And, despite efforts to paint the rights restoration initiative as a partisan issue, a significant enough number of Republican voters also supported the amendment, which resulted in a tremendous number of people—estimated at 1.4–1.6 million—being enfranchised though a single law and policy change. The display of voters, regardless of political affiliation, rallying behind the rights restoration effort was also perhaps why people from all over the country
celebrated this historic victory; it evidences that even those with different political ideologies can jointly support a commonsense approach to re-enfranchisement.

B. THE FLORIDA LEGISLATURE’S CALCULATED UNDERMINING OF THE PEOPLE’S WILL

Over the past 15 years, numerous bills have been introduced to automatically re-enfranchise voters with felony convictions, but the legislature has done nothing to advance, let alone pass, these measures. In November 2018, Florida citizens decided they had had enough with waiting on the legislature to enact a rights restoration law that reflected the values of most voters, Republicans and Democrats alike. National and state-based civil rights groups, working under the umbrella of the FRRC, launched a successful multi-year campaign for a ballot initiative to amend Florida’s constitution. More than a million formerly convicted individuals can now participate in our democracy. Unfortunately, in an undisguised, blatant attempt to undermine the will of the people, the state legislature passed Senate Bill 7066 and materially changed the meaning and enforcement of Amendment 4.

Even though the initiative was always considered to be self-executing without the need for any implementing legislation, Senate Bill 7066 redefines the term “completion of sentence” to include restitution and monetary obligations even when a court has converted them to a civil lien. The law also places extreme burdens on county supervisors of elections by requiring them to personally verify whether any voter applicant has been convicted of a felony and, if so, has completed the terms of the sentence. Although other state agencies such as the Department of Corrections and secretary of state can offer assistance, the ultimate responsibility is on the supervisor of elections to determine the criminal history of anyone registering to vote, confirm the completion of a criminal sentence, and then track down any and all civil liens to corroborate whether those have been satisfied as well. Meanwhile, supervisors across the state are known to adopt varying internal policies and practices when it comes to the enforcement of election laws, most recently highlighted in the varying treatment of vote-by-mail ballots in different counties. Therefore, relying solely on supervisors of elections when it comes to administering Senate Bill 7066 is even more frightening.

The legislature knew exactly what it was doing when it required the full satisfaction of all monetary obligations as a voter qualification. Senate Bill 7066 imposes exorbitant financial barriers to the ballot box that many have decried as a modern-day poll tax. The average citizen who completes prison, parole, and probation faces steep challenges in securing gainful employment, safe and secure housing, and financial assistance to attend college, graduate school, or obtain a professional license. If enforced, the likelihood that most people who were eligible to vote under Amendment 4 can overcome those additional financial hurdles is much smaller. Therefore, Senate Bill 7066 runs afoul of the plain language and meaning of Amendment 4, now enshrined in the state constitution, as recognized by the state supreme court and understood by the voters.
In addition to being unconstitutional, Senate Bill 7066 creates a world of confusion for impacted individuals and the agencies and grassroots organizations that serve them. For those who benefitted from Amendment 4’s passage and have already registered to vote, they now face the loss again of their voting rights. Despite voters’ best intentions in passing Amendment 4, the legislature has craftily found a way to keep Florida’s disenfranchised population ever so high. Not only is this a huge setback, it also feeds into the growing distrust of the political system.

IV. Conclusion

Florida’s Amendment 4 victory was not just a major milestone for the state, but an incentive for other southern states still grappling with the lingering effects of institutionalized racism and cycles of poverty. Like the movement to secure the rights of indigent defendants to publicly funded defense counsel45 and cases that recognize a due process right when it comes to determining one’s ability to pay,46 Florida’s felon disenfranchisement law demands a concerted, organized movement to expand the 24th Amendment’s prohibition on poll taxes to apply in the re-enfranchisement context. That movement should include support for passage of federal legislation like the Democracy Restoration Act that would guarantee voting rights in federal elections upon release from prison,47 and continued advocacy at the state level for policy changes. The stakes are very high in Florida, especially for social justice organizations working to decrease the number of people in the criminal justice system and, consequently, those disenfranchised in the first place. Moreover, given the state legislature’s inability or outright refusal to contend with these challenging issues, we need to amplify, not silence, the political voices of those most directly impacted by the state’s current disastrous policies. Failure to do so is anathema to what true democracy looks like. The more than five million Floridians who voted in favor of Amendment 4 made their position clear—if legislators cannot move the state into the 21st century, the voters will.48

Notes

4. The Voting Rights Act states, in pertinent part, that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any
State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . .” 42 U.S.C. § 1973(a) (emphasis added).

5. U.S. CONST. amend. XXIV, § 1.
7. Id. at 534, 541–42 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).
9. Id. at 668.
12. See, e.g., Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010) (challenging “other crime” provision in section 2 of 14th Amendment on grounds that Congress never intended prohibition to apply to plethora of criminal offenses that exist in modern times); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (arguing that Washington’s felon disenfranchisement law, when coupled with racial bias and disparities in the criminal justice system, result in the denial of voting rights based on race in violation of section 2 of the Voting Rights Act); Muntaqim v. Coombe, 396 F.3d 95 (2d Cir. 2004) (raising similar Voting Rights Act section 2 claim).
14. Id. at 1219.
15. Id.
16. Id. at 1219–20.
17. See Hunter v. Underwood, 471 U.S. 222 (1985) (striking down Alabama’s felon disenfranchisement scheme on the ground that its adoption was motivated by racial animus as evidenced in part by the fact that crimes associated with Blacks were made disfranchising, but not those associated with Whites).
25. Id.
26. Id.
27. Id.
28. Id. at 1255.
29. Hand v. Scott, 888 F.3d 1206, 1210 (11th Cir. 2018). The plaintiffs have since conceded that with the passage of Amendment 4, their case is moot.

31. *Id.*


35. **Fla. Const.**, art. IV, § 8(a).


41. *Id.*

42. *Id.*


44. **Fla. Const.**, art. IV, § 4(a).


48. CNN, supra note 38.