# On the Voting Rights Battlefield
# A Moment of Grace

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In the midst of trying a major voting rights case, I had an epiphany. It came during my cross-examination of the state's chief expert witness about what Florida voters intended in passing a ballot initiative to end permanent felony disenfranchisement. The expert had missed something central about public support.

The case concerned Amendment 4 to the Florida Constitution, the 2018 ballot initiative permitting convicted felons to be restored to the franchise after completing the terms of their sentences. Before then, Florida had permanently stripped voting rights from anyone with a felony conviction. That had led to the staggering disenfranchisement of more than 10 percent of the state's voting-age population, a result of decades of steadily increasing criminalization of lower-level offenses.

The impact had been especially severe on African Americans. Nearly one in four could not vote because of the permanent ban. The people of Florida decided it was time for a change. Amendment 4 passed with support from nearly 65 percent of voters, with majorities from every political party and racial demographic. Indeed, Amendment 4 won considerably more support than any political candidate appearing on that ballot. Ron DeSantis won the gubernatorial election by less than half a percentage point, and outgoing Governor Rick Scott won a Senate seat by an even smaller margin—just 10,000 votes.

Widely circulated reports in the media estimated that about 1.4 million people would have their voting rights restored. Given the sheer number of people affected, Amendment 4 was hailed as one of the broadest expansions of the franchise since the passage of the Voting Rights Act.

## Political Backlash to Amendment 4

In a state notorious for extremely close, consequential elections, the stark expansion of the number of prospective voters drew immediate attention. Just a few months after his inauguration, DeSantis signed a bill, passed along strict party lines, that drastically narrowed the reach of the voters' initiative. It interpreted Amendment 4 as requiring that, to have voting rights restored, people must pay the multitude of fines and fees assessed after a conviction. There would be no exceptions for individuals too poor to do so.

The vast majority of people with felonies lack the means to pay the thousands of dollars in fines and fees associated with a conviction. Seventy to 90 percent of felony defendants in Florida are indigent. Moreover, Florida already had begun to shift much of the cost of maintaining its court system from general taxes to fees and surcharges imposed on criminal defendants appearing before its courts. Most costs assessed operate as court taxes, levied regardless of ability to pay.

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When a defendant is indigent, Florida courts consider that person's sentence finished once he or she completes the nonfinancial terms of his or her sentence and probation. Under the legislature's implementing law, however, the same would not be true for the person's right to vote. The legislature demanded full satisfaction of criminal justice debt to restore voting rights, regardless of the amount at issue or the person's ability to pay.

During floor debate, Florida legislators heard testimony underscoring that, given long-standing gaps in poverty and employment, the disenfranchising impact of the financial requirement would fall most severely on minority communities. The vast majority of those affected simply would not be able to pay the thousands, often tens of thousands, of dollars in fines, fees, and costs assessed against them.

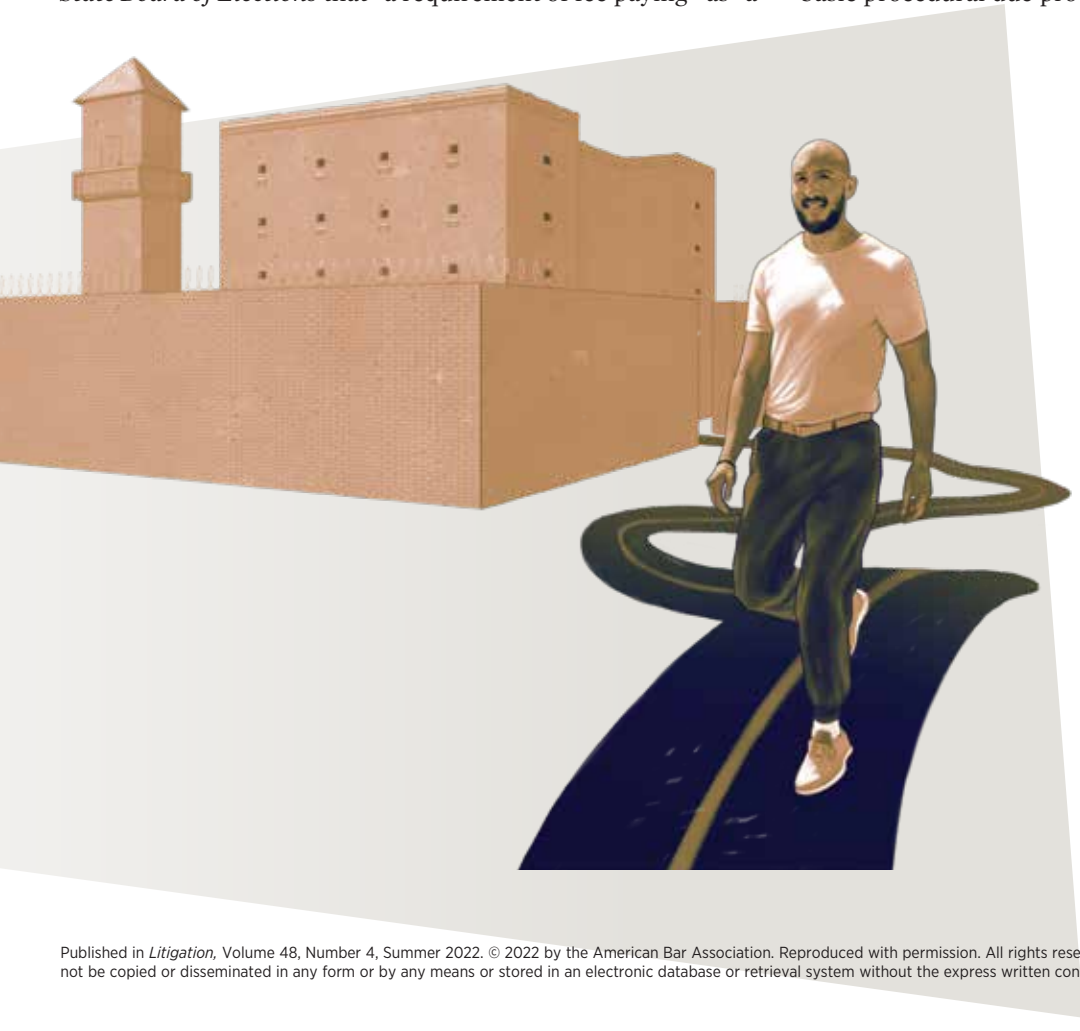
Most people enter the criminal justice system already poor. They certainly do not emerge from it with greater upward mobility. Quite the contrary, returning citizens, encumbered by a criminal record, already face extraordinary hurdles securing basic housing and employment. The legislature enacted the law anyway.

I was part of a team of advocates challenging the financial requirement imposed in the wake of Amendment 4. I'm a civil rights attorney who litigates at the intersection of voting rights and racial justice. I helped develop legal claims based on three pillars.

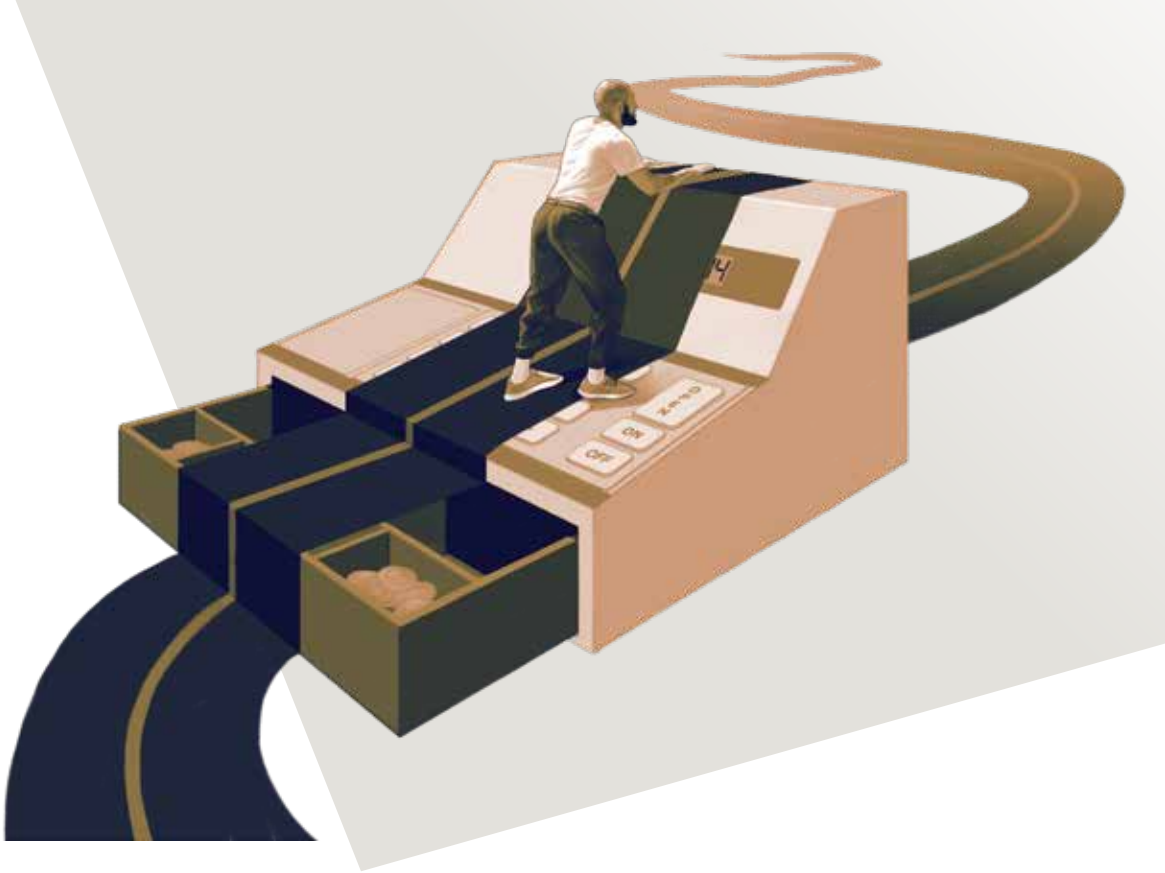
First, it is unconstitutional to make people pay to vote. Fifty-five years ago, the Supreme Court held in *Harper v. Virginia State Board of Elections* that "a requirement of fee paying" as "a condition for obtaining a ballot" violates the Equal Protection Clause. Furthermore, the plain text of the Constitution's Twenty-Fourth Amendment explicitly prohibits "den[ying] or abridg[ing]" citizens' ability to vote "by reason of failure to pay any poll tax or other tax." While the costs assessed by Florida's courts are not classic poll taxes, they do include "other taxes" charged for the maintenance of the state's criminal justice system.

Second, it is unconstitutional to punish people more harshly for their poverty. When it outlawed debtors' prisons in *Bearden v. Georgia*, the Supreme Court held that "punishing a person" for inability to pay violates "fundamental fairness." States may not extend or enhance punishment based solely on a person's nonpayment of criminal justice debt, unless the person had funds and willfully refused to pay. By extending disenfranchisement until all debt was paid, regardless of the amount owed or the person's financial circumstances, the pay-to-vote requirement did just that.

Third, it is unconstitutional for the state to demand that a person pay to vote if the state won't even disclose how much that person owes. Implementation of Amendment 4 had created an immediate administrative nightmare. Lawmakers warned that a person risked committing a criminal offense if the person registered to vote without paying off all his or her underlying criminal justice debt, but the state had no consistent accounting mechanism to determine how much an individual had paid or would need to pay to have his or her rights restored. A state violates basic procedural due process when it refuses to provide notice of whether conduct will result in criminal liability. Florida's legislature was demanding not only that people pay to vote but that they guess whether they had paid the full amount due and risk criminal prosecution if they got it wrong.



Legal challenges to felony disenfranchisement schemes have repeatedly failed. In *Richardson v. Ramirez*, the Supreme Court interpreted section 2 of the Fourteenth Amendment, which provided that states would have their representation in Congress reduced if they disenfranchised their citizens, but made an exception "for participation in rebellion or other crime." The *Richardson* holding is narrow; it simply concludes that felony disenfranchisement laws are *not necessarily* unconstitutional. Since *Richardson*, however, lower courts have created



something approaching a Constitution-free zone giving states carte blanche to impose virtually any form of voting restriction on returning citizens. The courts' refrain: People with felonies may be an ostracized minority, but if they want reform, they must plead their case to the public, not to the courts.

Amendment 4 presented a different and better basis for challenge. First, in urging the adoption of Amendment 4, returning citizens *had* successfully pleaded their case to the Florida public. Second, no prior felony disenfranchisement scheme had so brazenly charged people so much. Third, we had good case law on point. In 2005, in *Johnson v. Bush*, the conservative en banc Eleventh Circuit upheld Florida's permanent felony disenfranchisement system, but *Johnson* observed that the one thing a state *cannot* do is restore voting rights for a fee because "[a]ccess to the franchise cannot be made to depend on an individual's financial resources." Fourth, the legislature's implementation of the pay-to-vote system was so anarchic as to raise serious concerns for any reasonable judge.

We won a preliminary injunction from the district court, ruling that the state unconstitutionally discriminates when it restores the voting rights of wealthy people while continuing to disenfranchise the poor. That decision was upheld by a panel of the Eleventh Circuit Court of Appeals. We proceeded swiftly and won at trial on each pillar of our claims.

The Eleventh Circuit, however, had been dramatically remade under Trump, who had appointed more than half of its judges in just two years. For only the second time in its history, the Eleventh Circuit decided to hear the appeal of the trial judgment en banc from the outset. Its newly configured majority had the numbers to overrule the earlier panel decision and was comfortable presuming that *Harper* and *Bearden* would no longer control at the current Supreme Court.

The en banc decision reinstituted the pay-to-vote system and, with it, de facto disenfranchisement for hundreds of thousands of indigent people with felony convictions. The decision casts back to Florida's intricate and shameful past concerning felony disenfranchisement.

## Florida's History of Disenfranchisement

Florida's original felony disenfranchisement regime was narrow. The state's first constitution, prepared in 1838, authorized the legislature to enact disenfranchising laws for "bribery, perjury, or other infamous crime." Between 1838 and 1865, there were roughly nine crimes designated by the legislature as warranting disqualification from voting or holding public office. There was no racially discriminatory impact because, as Florida was a slave state, no special mechanism was needed to exclude African Americans from voting.

After the Civil War, Southern states were forced to accept the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution and remove the explicit prohibition against Black enfranchisement. In 1868, Florida held a postwar constitutional convention. Two factions of Reconstruction lawmakers fiercely debated how political power would be distributed in postwar Florida. The larger faction included a significant number of former slaves and sought full suffrage for emancipated African American men. They proposed a reformed Florida constitution distributing representation in the state legislature based principally on county population size and abolishing felony disenfranchisement in favor of full, male suffrage, except in cases of treason.

The opposing faction, smaller in number but better connected to established plantation owners and northern cotton investors, sought continuity with the antebellum status quo at the expense of suffrage for emancipated Black citizens. They pressed for a system of apportionment that would assign far more voting power to sparsely populated white counties, permitting less than 25

Illustrations by Charles Chaisson

percent of the state's voters to elect a majority to the state Senate. Among other restrictions, their version of the state constitution expanded the original felony disenfranchisement clause to provide that a person convicted of *any* felony would no longer be qualified to vote.

The leaders of the larger faction testified before Congress that their opponent's version of the constitution "grants suffrage to, and removes all disabilities from, the vilest rebels and haters of the government . . . and disfranchises thousands of the colored voters." The smaller, pro–status quo faction lacked the numbers to advance their draft through regular order, so they staged a midnight coup, breaking into the Capitol building in the dead of night and preparing a draft constitution to sign and deliver to the governing Union general.

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The federal government received dueling drafts from the two delegations and ultimately authorized the one advanced by the status quo faction. One of the leaders of that delegation boasted in correspondence that his revisions to the state constitution had stopped Florida from becoming "n---erized."

Following the struggle over the Reconstruction constitution, Florida's system of felony disenfranchisement mutated. The number of convictions disqualifying a person from voting exploded to 135. At the same time, Florida had begun to enact Black Codes, following examples set in Mississippi and South Carolina. Those laws explicitly applied to "people of color" and criminalized them for vagrancy if they couldn't find employment, failed to work hard enough to satisfy their employers, or quit their jobs altogether.

Under the codes, recently emancipated African Americans could be arrested, tried, and imprisoned. Florida's version even contained an options clause for employers—they had authority to waive incarceration for the accused and instead "require that such laborer be remanded to his service" for a period of forced servitude instead. Slavery, by another name. In short order, Black Floridians were being convicted and incarcerated at rates vastly disproportionate to their population. From 1877 to 1900, African Americans made up more than 82 percent of the Florida prison population.

The ignoble history of the Black Codes was recounted by Justice Ginsberg alongside a concurrence by Justice Thomas in *Timbs v. Indiana*, a 2019 case concerning the Excessive Fines Clause. The two justices, hardly ideological partners, were aligned on the history. Justice Ginsberg noted that the system of fines and fees imposed in the southern states under the Black Codes was designed to "replicate, as much as possible, a system of involuntary servitude." Justice Thomas agreed. He cited congressional testimony from the debate over the Fourteenth Amendment underscoring the financially ruinous fines imposed on laborers under Florida's Black Codes: "A thousand dollars! That sells a negro for his life."

In that fashion, Florida's Reconstruction-era criminal justice system transformed into a mechanism for racial subjugation, continued servitude, and voter disenfranchisement through the state's expanding dragnet of disqualifying offenses. Fines and fees were key tools to accomplish those objectives. This regime was the direct ancestor of the system Floridians changed when they enacted Amendment 4.

That was not the only restriction on political participation. Florida also enacted poll taxes, literacy tests, a grandfather clause to exempt whites from the literacy test, long residency requirements for voting, and a white primary system. Those efforts sidestepped the Fifteenth Amendment by ensuring that state action would technically remain race neutral. Florida is merely one example. Its measures worked in tandem with equivalent steps adopted across the states of the former Confederacy. They formed the infamous shroud of voter suppression laws under Jim Crow that proved tremendously effective at barring African Americans from the franchise.

It took 100 years for the promise of the Civil War amendments to begin to become realized through the passage of the Voting Rights Act of 1965. The act finally delivered the legal tools necessary to address what *South Carolina v. Katzenbach* described as "the unremitting and ingenious defiance of the Constitution" the southern states had engaged in for decades.

## Dismantling the Voting Rights Act

Beginning in the 1980s, a series of concerted legal challenges were mounted against the Voting Rights Act, aimed at dismantling its protections. Those efforts culminated in the 2013 decision, *Shelby County v. Holder.* In *Shelby County*, the Supreme Court disabled the central mechanism in the Voting Rights Act, which had permitted the federal government to review changes to voting procedures in jurisdictions with documented histories of racial discrimination before those changes went into effect. That preclearance system had been the single most successful

innovation of civil rights–era legislation in increasing voter registration and political participation by racial minorities.

The Court's majority acknowledged progress achieved by the act but critiqued Congress's continued use of the formula it had established in 1965 to determine which jurisdictions would be covered. Congress had reauthorized the Voting Rights Act on multiple occasions, most recently in 2006, and adjusted the jurisdictions subject to preclearance. But the *Shelby County* majority held that the underlying coverage formula had not been sufficiently updated to reflect contemporary circumstances. In short, the Court concluded that the 1965 act had accomplished much of what it set out to achieve and that the preclearance system could therefore be phased out.

*Shelby County* attracted immediate rebuke from legal observers and has been subject to sustained and well-deserved criticism ever since. The decision remains a staggering exhibition of judicial overreach. The majority focused on objections to the coverage formula they might have raised had they been legislators. In so doing, the Court egregiously misperceived its role in our constitutional system, to catastrophic effect. In her searing, incandescent dissent, Justice Ginsberg delivered an eviscerating analysis that makes it hard to comprehend how the decision still stands. The majority's defensiveness is palpable. They know how badly they have been ferreted out.

*Shelby County* is wrong for many reasons, foremost that the text and unmistakable purpose of the Civil War amendments vest Congress—not the Supreme Court—with authority to enact legislation to enforce its provisions. For a century, the Civil War amendments stood as nearly dead letters for countless minority citizens. It was a century marked by sustained campaigns of terrorism targeting Black people through public lynchings, surreptitious murders, and periodic pogroms. Even at its most restrained and genteel, the South's caste system was characterized by extreme exclusion and oppression.

Across that century, one cannot credit the Supreme Court with staunchly and consistently protecting the rights of racial minorities. Quite the contrary, the Court repeatedly gestured to the political branches as the appropriate source for vindication of their rights. With political support for racial minorities finally achieved after decades of struggle, it is not for the justices to declare that Congress has done enough and that the mission against discrimination in voting has been accomplished.

The 2006 reauthorization of the Voting Rights Act was supported by an extensive legislative record, both marking progress and identifying persistent barriers to minority participation. Among other serious concerns, racial polarization in jurisdictions covered by preclearance was increasing, not decreasing, and preclearance was blocking sustained efforts at racial gerrymandering.

The Voting Rights Act was not Congress's only attempt to address the epidemic of racial discrimination in the states of the former Confederacy. Congress reauthorized the act multiple times, expressly because it found that the act was one of the measures that had begun to make a difference. As Justice Ginsberg wrote so memorably, "throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet." The Supreme Court punished legislation for its very success.

Most troublingly, it wasn't just the success of the Voting Rights Act that doomed it in the eyes of the *Shelby County* majority—it was the act's popularity. The 2006 reauthorization enjoyed overwhelming bipartisan support, passing unanimously in the Senate and with near unanimity in the House. That achievement, remarkable amid our hyper-partisan politics, should have been a significant point in favor of upholding legislation that the Constitution explicitly authorizes Congress to enact. At oral argument, however, Justice Scalia readily acknowledged that the very breadth of support for the act was the "problem that I have."

"Whenever a society adopts racial entitlements," he said, "it is very difficult to get out of them through the normal political processes. I don't think there is anything to be gained by any Senator to vote against continuation of this act. . . . [T]hey are going to lose votes if they do not reenact the Voting Rights Act." In that view, the danger came not from the steadily increasing racial polarization in voting that Congress had well documented, nor from the proliferation of new barriers to minority participation such as racial gerrymandering or draconian voter ID requirements, but rather that the Voting Rights Act had become too widely supported and sacred in American politics.

That approach to constitutional adjudication is perverse and dangerous. Under such a theory, the Court's purpose is not to serve as a neutral arbiter over cases and controversies, nor to interpret and apply the text, structure, or original purpose of the Constitution or pertinent legislation. Rather, untethered from traditional norms of judicial modesty and minimalism, the Court presumes to intervene and override the political process, as if minority groups had somehow hypnotized democratic majorities into protecting their rights too generously.

In his seminal work, *Democracy and Distrust*, the scholar John Hart Ely analyzes the text and structure of the Constitution to expand on the most famous footnote in constitutional law—footnote 4 of *United States v. Carolene Products Company*—establishing the framework within which higher standards of judicial scrutiny apply to state action intended to disadvantage "discrete and insular minorities." His influential theory posits that courts should focus less on divining substantive rights in the Constitution, such as the right to privacy, and more on ensuring access to fair political processes. That requires courts to give special attention to the participation of vulnerable or marginalized religious, ethnic, and social minorities, who might otherwise fail to gain a political foothold.

The Supreme Court's contemporary voting rights doctrine has not just abandoned the venerated framework of footnote 4; it has torn it inside out. The Court now deliberately ignores the very real, immediate threat of racial polarization and political exclusion. Instead, it focuses on the risk that minority groups might manipulate public sentiment to secure too much popular support. The dismantling of voting rights precedent did not end with *Shelby County* and has continued in a steady drumbeat of increasingly destructive decisions.

Popular support for the Voting Rights Act was never about racial entitlement. Generations of struggle built that popular will. If senators hesitate to cast a vote against the Voting Rights Act because they are afraid of losing votes, that demonstrates a strength in the system, not a flaw. Most societies do not have a good track record of integrating and incorporating marginalized groups. When communities build the popular will to ensure that minorities have a voice in the political process, it is imperative that courts and political branches facilitate those efforts, or at least stay out of the way.

## The People's Inclusive Vision of Democracy

Voters in Florida sought to make their democracy more inclusive when they adopted Amendment 4. The state's felony disenfranchisement system had metastasized far beyond its original scope to sweep in vast numbers of poor people from every racial background. Courts repeatedly rebuffed legal challenges to that system. After years of concerted effort, grassroots political advocates succeeded in changing the law though popular support. Yet, the response from Florida's political system and the federal appellate court was not to facilitate the voters' mandate; rather, it was to construe re-enfranchisement so narrowly as to cancel it almost entirely. In a direct echo of Florida's Reconstruction-era past, fines and fees would now be the mechanism to maintain permanent disenfranchisement for the vast majority of returning citizens.

Is that what the people of Florida wanted? This is in essence what I asked the state's expert at trial. He had devised a theory that media messaging around "repaying one's debt to society" had driven popular support for Amendment 4. He inferred that meant the public wanted returning citizens to pay fines and fees to regain their voting rights, regardless of whether they had the funds to do so. But the expert had missed key evidence in the data. In fact, the most popular reason prospective voters gave for supporting Amendment 4 was that "Americans believe in second chances" and that "restoring a person's ability to vote is the right thing to do for those who have turned their life around."

Wasn't this critical evidence that the expert had omitted? He had no answer.

It was a powerful moment in a powerful trial. Floridians had said they supported Amendment 4 because people should be forgiven. The act of forgiveness is not a sale. It is not a transaction. Forgiveness derives from a fundamental moral belief in the value of reconciliation and moving beyond mistakes of the past. Florida's own history of political and social oppression is a dark one. From the shadow of that history, voters overwhelmingly chose to expand the franchise to persons previously excluded. Regardless of the ultimate judicial ruling, the people's decision is worthy of deep respect.

We live in a society ripped apart by the sharpest partisan discord, violent threats, and direct appeals to racial division. On that battlefield, Amendment 4 stands as a unique moment of grace. ■