University of Michigan Journal of Law Reform

Volume 54

2021

Prohibiting the Punishment of Poverty: The Abolition of Wealth-Based Criminal Disenfranchisement

Amy Ciardiello
University of Michigan Law School

https://doi.org/10.36646/mjlr.54.4.prohibiting

PROHIBITING THE PUNISHMENT OF POVERTY: THE ABOLITION OF WEALTH-BASED CRIMINAL DISENFRANCHISEMENT

Amy Ciardiello*

ABSTRACT

The majority of U.S. states disenfranchise formerly incarcerated individuals because of their poverty by conditioning re-enfranchisement on the full payment of legal financial obligations. This Note discusses the practice of wealth-based criminal disenfranchisement where the inability to pay legal financial obligations, including fines, fees, restitution, interest payments, court debts, and other economic penalties, prohibits low-income, formerly incarcerated individuals from voting. This Note argues this issue has not been adequately addressed due to unsuccessful legislative reforms and failed legal challenges. An examination of state policies, federal and state legislative reforms, and litigation shows that a more drastic state legislative solution is needed to ensure that no individual is prevented from voting because of their poverty. This Note argues wealth-based criminal disenfranchisement should be completely abolished.

TABLE OF CONTENTS

* J.D. 2021, University of Michigan Law School. Thank you to the *JLR* editing team and the *JLR* Symposium office for their help and thoughtful edits. Special thanks to my family for their love and constant support.

INTRODUCTION

On November 6, 2018, Floridians overwhelmingly passed a ballot initiative approving a state constitutional amendment known as Amendment 4.[1] This amendment re-enfranchised individuals with felony convictions who had completed "all [the] terms of [their] sentence including parole or probation."[2] As a result, an estimated 1.4 million people were eligible for re-enfranchisement.[3] After hearing about Amendment 4's passage, Rosemary McCoy, a Black woman with a felony conviction who had completed her sentence, stated:

> I thought, "Oh, my God! A piece of liberation. A piece so that maybe we can feel whole again." I thought maybe I could feel more positive and have a desire to move forward and look at

1. Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. Times *Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/76L3-UDER]; Tim Mak, *Over 1 Million Florida Felons Win Right to Vote with Amendment 4*, NPR (Nov. 7, 2018, 2:46 AM), https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4 [https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4] (reporting that 64% of voters voted in favor of Amendment 4).

2. FLA. CONST. art. VI, § 4(a)–(b) (amended 1992 and 2018).

3. *See* Jones v. Governor of Florida, 950 F.3d 795, 800 (11th Cir. 2020).

> America in a different way. I could see the power and the truth that our votes do count — until Senate Bill 7066 came along.[4]

However, Senate Bill 7066, a bill passed by the Republican-controlled legislature, created an additional, unforeseen barrier: eligible felons would have to pay all of their legal financial obligations (LFOs) to be eligible to vote.[5] By interpreting the amendment's phrase "all terms of sentence" to include the payment of legal financial obligations, the state legislature severely limited who was eligible for re-enfranchisement.[6] An estimated four-in-five individuals with felony convictions who would otherwise be eligible to vote were ineligible because they were unable to pay their outstanding court debts.[7] Moreover, Florida "has been unable to identify, for persons otherwise qualified for reenfranchisement [sic], the precise amount of their LFO obligation, making it literally impossible for [these persons] to satisfy the law's requirement even if they are financially able to."[8]

In an effort to firmly establish the statute's meaning, Florida Governor Ron DeSantis requested an advisory opinion from the Florida Supreme Court to determine whether the phrase "all terms of sentence" includes payment of legal financial obligations.[9] The Florida Supreme Court ruled in the affirmative, holding that this phrase does include all legal financial obligations.[10]

In a series of lawsuits, plaintiffs alleged that this statute violated the Fourteenth and Twenty-Fourth Amendments to the U.S. Constitution, as well as the Florida Constitution. A federal district court agreed; Judge

---

4. Fabiola Cineas, *What It's Like to Be Formerly Incarcerated and Fight for the Right to Vote*, VOX (Sept. 22, 2020, 8:30 AM), https://www.vox.com/21439753/florida-felon-voting-rights [https://perma.cc/82MD-VTR3].

5. *Id.*; FLA. STAT. § 98.0751(2)(a) (2020). Legal financial obligations, which can include fines, fees, restitution payments, and other financial payments associated with a person's interaction with the criminal justice system, are also referred to as "LFOs," or more generally, court debt. *See* CAMPAIGN LEGAL CTR. & GEORGETOWN L. C.R. CLINIC, CAN'T PAY, CAN'T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 20 (2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf [https://perma.cc/LQW8-5V98] [hereinafter CAN'T PAY, CAN'T VOTE].

6. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 22–23.

7. Supplemental Expert Report of Daniel A. Smith at 4, Jones v. DeSantis, No. 19-cv-00300 (N.D. Fla. Sept. 17, 2019) [hereinafter Smith Expert Report], https://www.brennancenter.org/sites/default/files/2019-10/SupplementalExpertReportofDanielA.SmithPh.D.UniversityofFloridaSeptember172019.pdf [https://perma.cc/DB8X-3QKN].

8. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., WHO MUST PAY TO REGAIN THE RIGHT TO VOTE? A 50-STATE SURVEY 1 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/07/Who-Must-Pay-to-Regain-the-Vote-A-50-State-Survey.pdf [https://perma.cc/MM7M-RZH2].

9. Advisory Opinion to the Governor Re: Implementation of Amendment 4, The Voting Restoration Amendment, No. SC19-1341, 288 So. 3d 1070, 1072 (Fla. 2020).

10. *See id.*

Hinkle, a Clinton appointee, held that the statute violated the Equal Protection Clause, as applied to individuals who were unable to pay, and the Twenty-Fourth Amendment's prohibition on "any poll tax or other tax."[11] However, in an appeal, Governor DeSantis made a rare request by asking the full Eleventh Circuit to hear the case due to its "exceptional importance."[12] DeSantis knew that the ten-justice en banc panel consisted of five Trump appointees, two of whom served on the Florida Supreme Court when it issued the initial advisory opinion.[13] Reversing the district court, the Eleventh Circuit upheld the statute as constitutional.[14]

Florida's legislative reform and subsequent litigation has brought needed national attention to the issue of wealth-based criminal disenfranchisement[15] and has exposed major flaws in recent reform efforts.[16] In all but two states and the District of Columbia, individuals are stripped of their voting rights once incarcerated.[17] It is estimated that 5.17 million individuals are disenfranchised due to a criminal conviction.[18] These individuals are disproportionately Black. Black individuals are disenfranchised 3.7 times more than non-Black individuals, resulting in the disenfranchisement of more than 6.2% of the Black adult voting-age population, compared to 1.7% of the non-Black adult voting-age population.[19]

---

11. Jones v. DeSantis, 462 F. Supp. 3d 1196, 1234 (N.D. Fla. 2020), *hearing en banc ordered sub nom.* McCoy v. Governor of Florida, No. 20-12003, 2020 WL 4012843 (11th Cir. July 1, 2020), *rev'd and vacated sub nom.* Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020).

12. *See* Dara Kam, *Amendment 4: DeSantis Files Unusual Appeal of Order Allowing Ex-Felons to Vote*, ORLANDO SENTINEL (June 10, 2020, 5:02 PM), https://www.orlandosentinel.com/politics/os-ne—20200610-kpn4k6ioxbewtkizltakuyvg4y-story.html [https://perma.cc/R65Q-88PD].

13. Even after a petition to force their recusal, these conflicted judges refused to recuse themselves. *See* Lawrence Mower, *Florida Judges Stand Out During Felon Voting Rights Case*, TAMPA BAY TIMES (Aug. 18, 2020), https://www.tampabay.com/florida-politics/buzz/2020/08/18/florida-judges-stand-out-during-felon-voting-rights-case [https://perma.cc/DY3A-AKC7].

14. Jones v. Governor of Florida, 975 F.3d 1016, 1016–17 (11th Cir. 2020).

15. This Note uses the phrase "criminal disenfranchisement" to describe this issue instead of "felon disenfranchisement" due to the presence of several state laws that explicitly or implicitly disenfranchise individuals with misdemeanors *and* felony convictions. *See generally* Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 1 (2019) (finding misdemeanor jail sentences decreased voting participation).

16. *See* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 60–61 n.17 (2019).

17. Currently, only Maine and Vermont allow individuals in prison to vote. *See* CHRIS UGGEN, RYAN LARSON, SARAH SHANNON & ARLETH PULIDO-NAVA, THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 6 (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction [https://perma.cc/6JW5-X2KV]. D.C. temporarily allowed incarcerated individuals to vote in the 2020 election and intends to make this permanent in the future. *See id.*

18. *Id.* at 4.

19. *Id.*

The vast majority of states further restrict voter eligibility based on whether an individual owes court debt. This practice of wealth-based criminal disenfranchisement directly limits a person's access to the political process because of their income. Wealth-based criminal disenfranchisement should violate the Supreme Court's holding in *Bearden v. Georgia* that the state cannot "punish[] a person for his poverty."[20] Yet, despite the fact that "[v]oting is simply too fundamental a right to condition on whether a person has made a monetary payment,"[21] wealth-based criminal disenfranchisement is common throughout the United States. Legal challenges and statutory reforms have attempted to prevent states from disenfranchising individuals because of their income.[22] As this Note will demonstrate, however, these legal challenges and statutory reforms have fallen short. Courts have blocked plaintiffs' actions, and statutory loopholes have impeded the success of legislative reforms. This Note proposes a more comprehensive reform to ensure no individual is prohibited from voting because of their income: the complete abolition of wealth-based criminal disenfranchisement at the state level.

Part I of this Note describes wealth-based criminal disenfranchisement and its impact on low-income and minority communities. Part II discusses legal challenges, arguments presented in those challenges, and failed legislative reforms. Part III examines various reforms, ultimately urging states to abolish wealth-based criminal disenfranchisement.

I. THE ECONOMIC LIMITATIONS OF CRIMINAL DISENFRANCHISEMENT

Thirty states authorize wealth-based criminal disenfranchisement, the practice by which states prevent formerly incarcerated individuals from regaining the right to vote solely because they owe legal financial obligations.[23] Traditionally, state law determines voter eligibility, even for individuals with federal convictions.[24] Because state processes for reenfranchisement vary, the format of reforms will depend on these existing processes.[25] This Part discusses the practice of wealth-based criminal

---

20. Bearden v. Georgia, 461 U.S. 660, 671 (1983).

21. CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 23 (2016), https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-3.pdf [https://perma.cc/X69M-NMUZ].

22. *See, e.g.*, FLA. CONST. art. VI, § 4(a)–(b) (amended 1992 and 2018); Jones v. Governor of Florida, 975 F.3d 1016, 1016–17 (11th Cir. 2020).

23. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 21.

24. *See* Cherish M. Keller, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 CHI.-KENT L. REV. 199, 217–18 (2006).

25. *See* Colgan, *supra* note 16, at 55.

disenfranchisement, why and how states implement it, and its devastating effects on low-income populations.

A. *The Imposition of Monetary Sanctions*

The United States frequently imposes a variety of legal financial obligations on individuals as a result of their criminal convictions. Legal financial obligations can include different types of court debt, such as attorney appointment fees, incarceration fees, drug conviction fines, late fees, victim compensation and restitution fees, and other charges related to an individual's criminal conviction.[26] Fines are imposed as part of an individual's sentence as punishment for their criminal behavior and to deter future crimes, and are frequently subject to judicial discretion.[27] Fees can also be imposed by judicial discretion, but they are not part of the person's sentence and do not serve to punish the individual.[28] Instead, fees are used to generate revenue.[29] Both fines and fees may be associated with additional late fees and interest payments that increase the amount of debt one owes to the legal system.[30]

The amount of debt imposed on individuals who interact with the legal system has grown significantly over time due to increased costs from and the growth of the criminal justice system. States have funded this growth by adding new types of legal financial obligations to state penal codes, increasing existing fines and fees amounts, and reducing administrative costs by privatizing prisons.[31] This increase has resulted in "[a]n estimated 10 million people ow[ing] more than $50 billion in debt."[32] The national average debt incurred from court fines and fees, attorney fees,

---

26. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 20; *see also* Erika L. Wood & Neema Trivedi, *The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls*, 41 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 30, 37–38 (2007).

27. MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 11 (2017), https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf [https://perma.cc/S82B-NC4T].

28. *Id.* at 12.

29. *Id.*

30. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 20.

31. *See* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR 23–24 (2016); *see also* Hadar Aviram, *The Correctional Hunger Games: Understanding Realignment in the Context of the Great Recession*, 664 ANNALS, AAPSS 260–79 (2016).

32. DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIM. JUST., THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 7 (2014), https://johnjayrec.nyc/wp-content/uploads/2014/08/debtpenalty.pdf [https://perma.cc/QFM3-EVZL].

and restitution is $13,607, not including commissary or other related expenses.[33]

Paying off these debts is a complicated, arduous process that lacks transparency and leaves many individuals without assistance or information about how to pay. Some individuals do not even know how much they owe due to a lack of information. For example, after being purged from the voter rolls for a conviction twenty years prior, Alfonzo Tucker Jr. thought he had to pay a $135 late fee to vote; however, after he was denied the franchise, the state informed him that he did not have to pay this late fee and only had to pay his remaining balance of *four dollars* to vote.[34] For individuals owing larger debts, full payment may take decades. Edna Kathleen Lewis, a formerly incarcerated individual, will be ninety-five years old before she is able to pay off her debts.[35] Additionally, these debts can increase exponentially because of interest payments. One victim of domestic violence saw her debt *grow* from $33,000 to $72,000 after making payments for thirteen years.[36] Not only are these debts difficult to pay off, but they often exacerbate other issues felt by returning citizens, including a lack of housing, substance abuse problems, and issues securing employment.[37]

Further, formerly incarcerated individuals have an especially difficult time paying off these debts due to their lower earning potential. Formerly incarcerated individuals have a 52% lower annual income than their peers who have not been incarcerated.[38] Consequently, formerly incarcerated individuals earn, on average, almost half a million dollars *less* than their peers over the course of their careers solely because of incarceration; this is due in part to the stigma of incarceration, barriers to employment, mental and physical health challenges, and missed professional opportunities.[39]

---

33. SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 13 (2015), http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf [https://perma.cc/J55E-QJ5M].

34. CAN'T PAY, CAN'T VOTE, *supra* note 5, at 10.

35. *Id.* at 9.

36. Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, ATLANTIC (July 5, 2016), https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026 [https://perma.cc/ZE74-JQSS].

37. *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal-Justice-Debt-%20A-Barrier-Reentry.pdf [https://perma.cc/48MY-7TSZ].

38. TERRY-ANN CRAIGIE, AMES GRAWERT & CAMERON KIMBLE, BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 14 (2020), https://www.brennancenter.org/sites/default/files/2020-09/EconomicImpactReport_pdf.pdf [https://perma.cc/33P2-9CQQ].

39. *Id.* at 6, 13.

B. *The Purpose of Court Debt*

According to scholars, legislators impose court debt for three main reasons: (1) to punish offenders, (2) to provide victims with financial compensation, known as restitution, and (3) to fund public services.[40] Although the first two rationales for using fines and fees are cited by state legislatures, the third rationale, public cost recovery, has emerged as the most common reason for imposing fines and fees on individuals who interact with the legal system. As this Section discusses, however, there is another—unstated—reason for imposing court debt on individuals who interact with the legal system: partisanship.

Public cost recovery is the main reason state legislators impose court debt on individuals who interact with the legal system. For example, over 600 jurisdictions in the U.S. use fines and fees to fund more than 10% of their general revenue funds. [41] For 284 of those jurisdictions, that number increases to more than 20%.[42] The most commonly used mechanism to accomplish these percentages is through user fees.[43] A user fee is a type of fee charged to formerly incarcerated individuals as a result of their interactions with the criminal justice system.[44] These fees have increased significantly in recent years[45] and have had a stark impact on Black communities. Studies have shown that, regardless of budgetary needs, the higher a municipality's percentage of Black residents, the more likely the municipality is to rely on revenue from user fees.[46] States also depend on user fees to finance other aspects of government that have no relation to a person's criminal conviction, such as supplementing state retirement funds and even financing political campaigns.[47]

---

40. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN STATE L. REV. 349, 378 (2012).

41. Mike Maciag, *Addicted to Fines: Small Towns in Much of the Country Are Dangerously Dependent on Punitive Fines and Fees*, GOVERNING (Aug. 19, 2019), https://www.governing.com/archive/gov-addicted-to-fines.html [https://perma.cc/J7HD-TLLQ].

42. *Id.*

43. *See, e.g.*, FLA. CONST., art. V, § 14(b) (amended 1998) (mandating that "[a]ll funding for the offices of the clerks of the circuit and county courts . . . be provided by adequate and appropriate filing fees for judicial proceedings and service charges and costs for performing court-related functions" with limited exceptions); *see also* BANNON ET AL., *supra* note 37, at 4.

44. *See* Cammett, *supra* note 40, at 378–79.

45. *Id.*

46. In one study, "86% of the cities in our sample obtain[ed] at least some revenue through fines and fees, with an average of about $8.00 per capita" in cities with low Black populations, compared to "about $20.00 higher per capita" in cities with the highest Black populations. Michael W. Sances & Hye Young You, *Who Pays for Government? Descriptive Representation and Exploitative Revenue Sources*, 79 J. POL. 1090, 1091–92 (2017).

47. In Arizona, "the fines and fees collected from convicts––who are unable to vote in Arizona elections while they remain debtors––help fund Arizona's statewide election campaigns." HARRIS, *supra* note 31, at 46.

Revenue collection is not the only reason legislatures require payment of fees. Partisanship also motivates legislatures to adopt disenfranchisement policies. Scholars have shown criminal disenfranchisement may hurt the Democratic party.[48] This is because many formerly incarcerated individuals "come from poor or working-class urban districts, with low incomes, few job prospects, and low levels of formal education."[49] The combination of these factors tends to "push the 'average' felon toward the Democratic Party in any given electoral contest."[50] Since these individuals are largely low-income minorities who tend to vote Democratic, Republicans have used financial voting restrictions as a way to increase their own political power.[51]

Although the exact effect is hard to determine, re-enfranchisement of all formerly incarcerated individuals could have a significant electoral impact.[52] Since 1970, at least one presidential election and seven senate elections might have had different outcomes if formerly incarcerated individuals, who tend to vote Democratic, had been allowed to vote.[53] These conclusions demonstrate not only the strong political impact of re-enfranchisement on election outcomes, but also the weaponization of court debt by legislatures for their own political gain.

C. *The Discretionary Imposition of Wealth-Based Criminal Disenfranchisement*

The amount of court debt imposed on an individual due to their interactions with the legal system can severely impact their ability to pay off these debts and thus restrict their right to vote.[54] If a person cannot pay off their court debts, many states conduct an ability-to-pay

---

48. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 190–91 (2006); Colgan, *supra* note 16, at 144 n.464.

49. MANZA & UGGEN, *supra* note 48, at 183.

50. *Id.*

51. *Id.* at 182–83. Republicans have criticized Democratic efforts to help pay off fines and fees, such as recent criticism of Michael Bloomberg. *See* Jordan Fabian & Josh Wingrove, *Trump Calls Bloomberg 'Criminal' for Helping Florida Felons Vote*, BLOOMBERG (Sept. 24, 2020, 2:57 PM), https://www.bloomberg.com/news/articles/2020-09-24/trump-calls-bloomberg-criminal-for-helping-florida-felons-vote [https://perma.cc/9BU9-6MY9]. Additionally, the Florida Attorney General threatened to prosecute Bloomberg for these actions. *See* Nicole Via y Rada, *Florida AG Calls for Investigation into Bloomberg-Backed Felon Voting Rights Effort*, NBC NEWS (Sept. 23, 2020, 6:30 PM), https://www.nbcnews.com/politics/2020-election/florida-ag-calls-investigation-bloomberg-backed-felon-voting-rights-effort-n1240848 [https://perma.cc/JC3N-RVE2].

52. *See* Jeff Manza & Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 789–92 (2002).

53. *Id.*

54. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 20.

determination before disenfranchising them further.[55] If the court concludes after an ability-to-pay hearing that the formerly incarcerated individual is genuinely unable to pay, their voting rights will be restored, regardless of the presence of court debt. This process is discussed further in Part III.

An individual's personal finances may not be the only factor in determining whether they are able to pay. Governmental actors are frequently forced to use their discretion to determine whether an individual is able to pay. For example, during ability-to-pay hearings, Floridians must demonstrate they have a "genuine inability to pay."[56] Such statutes fail to provide additional guidance to help governmental actors make these ability-to-pay determinations.[57]

Although the Supreme Court has put in place safeguards to prevent deprivations of liberty in ability-to-pay determinations,[58] these safeguards provide the bare minimum of procedural protections required by the Supreme Court's decision in *Mathews v. Eldridge*;[59] they offer no real protection in this context and give no explicit guidance for how courts should determine whether someone is unable to pay. Without direction, judges are vested with the discretion to unilaterally determine whether an individual is able to pay, leading to drastically different standards and applications.[60] Thus, an individual who is genuinely unable to pay their legal financial obligations may be prohibited from exercising their right to vote simply because the judge adjudicating the ability-to-pay hearing did not take into account their entire financial situation, or believe that they were able to pay when they could not.

Arbitrary decisions made in other stages of the judicial process can also impact whether an individual is deemed able or unable to pay and can thereby impact voting eligibility. For instance, government officials often decide whether to require payment or to waive an individual's court

---

55. *See* CRIM. JUST. POL'Y PROGRAM, *supra* note 21, at 26 (noting that ability to pay determinations are required before an individual is jailed for nonpayment).

56. *See* Jones v. Governor of Florida, 950 F.3d 795, 805 (11th Cir. 2020).

57. *See* BANNON ET AL., *supra* note 37, at 14. For instance, such direction could provide an income cut-off or instruct decision-makers to examine recent changes in the person's income, family expenses, or debts to see whether that person can afford to pay.

58. These safeguards include "(1) notice to the defendant that his 'ability to pay' is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." Turner v. Rogers, 564 U.S. 431, 447–48 (2011).

59. *See* Mathews v. Eldridge, 424 U.S. 319, 320–22 (1976).

60. *See, e.g.*, Colgan, *supra* note 16, at 75 (examining different standards and applications in ability-to-pay determinations).

debt altogether,[61] whether to grant an executive pardon waiving all or part of their court fees as a requirement for re-enfranchisement,[62] or whether to require payment as a condition of parole or probation.[63] Arbitrary decision-making can have the most detrimental impact when a governmental agent is deciding whether an individual is required to pay court debt as a condition of release from parole or probation. Some states explicitly *require* payment as a supervision condition for parole and/or probation,[64] while others make payment an *optional* supervision condition.[65]

The discretionary nature of ability-to-pay determinations means that the actions of individual judges directly affect whether an individual is deemed able to pay. These disconnected decisions lead to inconsistent results, which often have a disproportionately negative impact on racial and ethnic minorities due to subconscious biases.[66] Layers of discretionary decision-making may lead to drastically different payment amounts for individuals of different races, even if they have similar income levels, resulting in the disenfranchisement of more minorities than non-minorities.

D. *The Effects of Wealth-Based Criminal Disenfranchisement on Low-Income Individuals*

The collateral consequences of wealth-based criminal disenfranchisement impact low-income, formerly incarcerated individuals at an alarming rate, with an even greater burden felt by Black formerly incarcerated individuals.[67] In a recent expert report, Professor Daniel A. Smith analyzed the impact of Florida's recent statute on voter eligibility.[68] He concluded that "[d]ue to outstanding [legal financial obligations] . . . fewer than one-in-five—just 105,941 of the 542,207 [formerly incarcerated] individuals . . . are likely to be qualified to register to vote under SB7066."[69] These ineligible voters are unable to pay their fines and

---

61. *See generally* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 29–31.

62. *See* Colgan, *supra* note 16, at 83.

63. *See, e.g.*, MO. REV. STAT. § 559.100(2) (2021).

64. *See, e.g.*, DEL. CODE ANN. tit. 11, § 4104(a)(3) (2021); N.M. STAT. ANN. § 31-21-10 (2021).

65. *See, e.g.*, MO. REV. STAT. § 559.100(2) (2021).

66. The influence of subconscious biases on judicial outcomes is well-documented. *See, e.g.*, HARRIS, *supra* note 31, at 26; Irene Oritseweyinmi Joe, *Regulating Implicit Bias in the Federal Criminal Process*, 108 CALIF. L. REV. 965, 968–74 (2020).

67. *See generally* BANNON ET AL., *supra* note 37, at 4, 13, 29; Cammett, *supra* note 39, at 353–55.

68. This study was conducted as part of an expert report for litigation challenging Florida's new statute requiring payment of court debt for re-enfranchisement. *See* Smith Expert Report, *supra* note 7.

69. Smith Expert Report, *supra* note 7, at 19–20.

fees and are thus disenfranchised solely because of their income. Smith's conclusions demonstrate the widespread, detrimental impact these policies have *specifically* on low-income individuals. Thus, policies that disenfranchise individuals because of unpaid court debt exclude a large number of otherwise eligible voters from voting solely because of their income.

This financial barrier to full re-enfranchisement creates "shadow citizens" [70] trapped in a "potential lifetime of disenfranchisement."[71] Three-fourths of individuals have difficulties paying off their court debts,[72] resulting in payments stretching over long periods of time. These barriers to full payment deprive individuals of a fundamental part of American life: participation in the democratic process. This clearly "runs counter to the modern ideal of universal suffrage."[73]

In addition, legal financial obligations can lead to other immediate consequences. If an individual cannot afford to pay their obligations, they could lose their driver's license, their home, their car, their life savings, and even their freedom. In many jurisdictions, the consequences of being unable to pay can include further incarceration.[74] Individuals often face a choice: pay their fines and fees or sacrifice necessities like food or utilities. Keith, a sixty-one-year-old Black man, was forced to deprive his family and himself of running water to pay off court debt that accumulated after he wrote a bad check in 2014.[75] After he was berated and humiliated by a judge in court for failing to pay his debts, Keith's debt took over his life.[76] Keith described it as:

> Wake up in the morning, that's all you think about. "How can I pay this off?" 'Til the time you go to bed. "What can I do? What can I do? Where can I make a large amount of money that I can get this from behind me?" Every day, every minute that's what I

---

70. Cammett, *supra* note 40, at 352.

71. CRIM. JUST. POL'Y PROGRAM, *supra* note 21, at 23.

72. *See* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS JUST. CTR., REPAYING DEBTS 8 (2007), https://csgjusticecenter.org/wp-content/uploads/2020/02/repaying_debts_full_report-2.pdf [https://perma.cc/4YUC-X6PX].

73. ERIKA L. WOOD, BRENNAN CTR. FOR JUST., RESTORING THE RIGHT TO VOTE 4 (2009), https://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf [https://perma.cc/WU23-72VY].

74. S*ee* MCLEAN & THOMPSON, *supra* note 72, at 8. Despite the fact that the Supreme Court case *Bearden v. Georgia* requires courts to inquire into a person's ability to pay before incarcerating them, courts frequently ignore this and incarcerate individuals who cannot pay. *See* Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors' Prisons*, 34 YALE L. & POL'Y REV. 93, 98–104 (2015).

75. *See* LAISNE ET AL., *supra* note 27, at 1.

76. *See id.* at 2.

> think about . . . . That's all I'm thinking about right now, nothing else. What can I do?[77]

Legal financial obligations are not only "a substantial obstacle to reentry," they also create a "cycle of re-incarceration and cyclical recidivism."[78] Studies have shown that voting and recidivism are statistically correlated, with many formerly incarcerated individuals "bring[ing] their behavior into line with the expectations of the citizen role, avoiding further contact with the criminal justice system" once they are re-enfranchised.[79] Since "the act of voting manifests the desire to participate as a law-abiding stakeholder," allowing these individuals to re-join society and participate in the political process may actually *reduce* criminal activity and recidivism.[80]

E. *The Disparate Impact of Wealth-Based Criminal Disenfranchisement on Black Communities*

Wealth-based criminal disenfranchisement has a disparate impact on Black communities. Historically, voting restrictions, such as poll taxes, literacy tests, and felon voting prohibitions, were used to suppress the Black vote.[81] Today, wealth-based criminal disenfranchisement continues to disenfranchise Black voters and perpetuate racist disenfranchisement practices.[82] This effect on Black communities has led scholars to term the practice a "modern day poll tax," arguing that requiring individuals to pay legal financial obligations to be eligible to vote closely resembles historical poll taxes designed to suppress the Black vote.[83]

Additionally, Black offenders have an even more difficult time paying off their debts because they generally earn less than white offenders. After controlling for factors like education, age, and work history, Black offenders generally earn 10% less than white offenders.[84] A stark racial-economic divide between eligible and ineligible voters has emerged, revealing wealth-based criminal disenfranchisement's devastating impact on low-income Black communities.

---

77. *Id.* at 22.

78. Cammett, *supra* note 40, at 354.

79. Jeff Manza & Christopher Uggen, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 215 (2004).

80. *Id.* at 213.

81. *See* Wood & Trivedi, *supra* note 26, at 30.

82. *See* Cammett, *supra* note 40, at 364–69. *See generally* Smith Expert Report, *supra* note 7, at 18–19.

83. *See, e.g.*, J. Whyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & C.R. L. REV. 435, 437 (2001); Wood & Trivedi, *supra* note 26, at 35.

84. EVANS, *supra* note 32, at 11.

Academics analyzing the impact of Florida's new statute on racial minorities found that, of all eligible former felons, "only 10.3% of [Black individual]s, compared to 15.7% of white individuals, may be eligible to register and vote under SB7066 because they have paid off their [legal financial obligations]."[85] This means that an estimated nine in ten Black individuals with felony convictions, compared to six in seven similarly-situated white individuals, still owed legal financial obligations and were thus ineligible to vote.[86]

Financial barriers also create a chilling effect that prevents eligible individuals from voting. By creating a culture of intimidation and misunderstanding surrounding eligibility and voter registration, the electoral process dissuades eligible voters from voting due to a lack of information.[87] This chilling effect is felt by Black communities and disenfranchised individuals more broadly, resulting in reduced voter turnout in these marginalized communities.[88] Thus, restoring voting rights to individuals who owe criminal court debt and notifying them of their re-enfranchisement could improve overall voter turnout in Black communities, help re-integrate formerly incarcerated individuals into society, and reduce recidivism.[89]

II. LEGAL CHALLENGES AND LEGISLATIVE REFORMS

Although the Supreme Court has held that the right to vote is fundamental and essential to our democracy,[90] the Court has interpreted the Fourteenth Amendment to exclude formerly incarcerated individuals from this constitutional guarantee.[91] Since the Court decided in *Richardson v. Ramirez* that the right to vote for formerly incarcerated individuals is not fundamental, the Court has applied rational basis review to statutes that disenfranchise formerly incarcerated individuals.[92] Recent precedent from the Eleventh Circuit suggests that courts will continue

---

85. Smith Expert Report, *supra* note 7, at 18–19.

86. *Id.*

87. *See, e.g.*, Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 738, 740 (2009); *see also* Complaint at 6, Gruver v. Barton, No. 19-cv-00121 (N.D. Fla. June 28, 2019), https://www.brennancenter.org/sites/default/files/legal-work/Gruver%20v.%20Barton%20Complaint.pdf [https://perma.cc/4MJK-KW66].

88. Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1554 (2020).

89. *Id. See generally* Cammett, *supra* note 40, at 352–54, 375–78, 400–01.

90. *E.g.*, Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 708 (N.D. Ohio 2006).

91. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

92. *See id.* at 54–55; Cammett, *supra* note 40, at 389–91.

applying rational basis review in similar cases.[93] Given the high bar necessary to overcome rational basis review, this trend will drastically limit the efficacy of legal challenges to wealth-based criminal disenfranchisement. As a result, judicial reform is unlikely to eliminate the practice of wealth-based criminal disenfranchisement.

Different types of legislative reforms have also been proposed. Statutory reforms have emerged to standardize court debt policies. Yet these efforts have failed at the federal level. In 2019, the House of Representatives passed the For the People Act, which prohibited suspending voting rights for formerly incarcerated individuals unless they were currently serving a sentence or in a correctional facility or institution.[94] However, former Senate Majority Leader Mitch McConnell publicly criticized the bill and stalled it in the Senate.[95] Although the 117th Congress may be less gridlocked than the previous Congress due to Democratic control, historical debate over this issue may still make federal legislative reform difficult. As a result, state legislatures are the only remaining avenue of legislative reform.[96] State-level reforms have been implemented, but as discussed below, these reforms have also failed to eliminate wealth-based criminal disenfranchisement. For example, state reforms, such as the legislation interpreting Florida's Amendment 4 discussed above, have created loopholes due to vague statutory language.[97] This Part discusses legal precedent, arguments made in legal challenges to wealth-based criminal disenfranchisement, and state reforms.

A. *Court Precedent Involving Wealth-Based Criminal Disenfranchisement*

The Supreme Court has not considered the specific question of whether wealth-based criminal disenfranchisement is constitutional.[98] However, it has heard the question of whether criminal disenfranchisement *in general* is constitutional. The Court upheld criminal disenfranchisement in *Richardson v. Ramirez*, stating that Section Two of the

---

93. *See* Jones v. Governor of Florida, 975 F.3d 1016, 1030 (11th Cir. 2020).

94. For the People Act of 2019, H.R. 1, 116th Cong. § 1402 (2019).

95. *See* Matthew Haag, *Mitch McConnell Calls Push to Make Election Day a Federal Holiday a Democratic 'Power Grab,'* N.Y. TIMES (Jan. 31, 2019), www.nytimes.com/2019/01/31/us/politics/election-day-holiday-mcconnell.html [https://perma.cc/ZRJ2-5FRR].

96. *See, e.g.*, Keller, *supra* note 24, at 230–33 (discussing numerous federal bills that have been introduced but have failed to pass).

97. *See* FLA. STAT. § 98.0751(2)(a) (2020); *supra* text accompanying note 5.

98. The Supreme Court denied a motion to vacate a stay put in place by the Eleventh Circuit in *Jones v. DeSantis*, but did not address the merits of this question. *See* Raysor v. DeSantis, 140 S. Ct. 2600 (2020). https://scholar.harvard.edu/files/morse/files/46_jlegalstud_309.pdf (stating that the Supreme Court has only heard two criminal disenfranchisement cases: *Richardson v. Ramirez* and *Hunter v. Underwood*).

Fourteenth Amendment allows states to prohibit individuals who "participat[ed] in rebellion or other crime[s]" from voting.[99] In *Richardson*, the Court held that a state can "exclude from the franchise convicted criminals who have completed their sentence and paroles,"[100] because "the exclusion of felons from the vote has an affirmative sanction in [Section Two] of the Fourteenth Amendment."[101] As a result, *Richardson* requires courts to apply rational basis review to laws that limit the right to vote for formerly incarcerated individuals.[102] Because rational basis review is difficult to overcome, this practice impedes constitutional challenges to wealth-based criminal disenfranchisement. Although challenges can be brought if there is evidence of intentional racial discrimination, such discrimination presents an extremely high evidentiary burden which is very difficult to meet.[103]

Unlike the Supreme Court, circuit courts have addressed whether wealth-based criminal disenfranchisement is constitutional. The Sixth, Ninth, and Eleventh Circuits all agree that rational basis review should apply to statutes that disenfranchise formerly incarcerated individuals because of unpaid court debt.[104] Although the Ninth Circuit upheld a wealth-based criminal disenfranchisement statute under rational basis review, it indicated that, for individuals who are found unable to pay through an ability-to-pay determination, statutes that disenfranchise them because of unpaid court debt may not even pass the rational basis test.[105] Although the most recent decision from the Eleventh Circuit seemed to reject this claim, approval of this argument in other lower court decisions may nevertheless indicate a willingness to accept it in future litigation.[106]

In 2020, the Eleventh Circuit overturned its own prior decision affirming a preliminary injunction in favor of the plaintiffs and applied

---

99. Richardson v. Ramirez, 418 U.S. 24, 42 (1974).

100. *Id.* at 56.

101. *Id.* at 54.

102. *See id.* at 54–55.

103. *E.g.*, Hunter v. Underwood, 471 U.S. 222, 222 (1985) (holding that a criminal disenfranchisement statute can be struck down if there is evidence of purposeful racial discrimination, which was met by the legislature's explicit goal of establishing white supremacy).

104. *See* Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020); *see also* Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010).

105. *Harvey*, 605 F.3d at 1080 ("Perhaps withholding voting rights from those who are truly unable to pay their criminal fees due to indigency would not pass this rational basis test . . . .").

106. *See* Jones v. DeSantis, 462 F. Supp. 3d 1196, 1219 (N.D. Fla.), *hearing en banc ordered sub nom.* McCoy v. Governor of Florida, No. 20-12003, 2020 WL 4012843 (11th Cir. July 1, 2020), *rev'd and vacated sub nom. Jones*, 975 F.3d at 1016 (quoting Jones v. Governor of Florida, 950 F.3d 795, 813 (11th Cir. 2020)) ("Quite simply, Florida's continued disenfranchisement of these seventeen plaintiffs is not rationally related to any legitimate governmental interest.").

rational basis review to wealth-based classifications.[107] Here, the plaintiffs challenged a Florida statute that limited re-enfranchisement to individuals with felony convictions who had paid their legal financial obligations.[108] Previously, a panel of the Eleventh Circuit held that heightened scrutiny, not rational basis, applied.[109] Since these plaintiffs were genuinely unable to pay their court debts, the Eleventh Circuit panel held that this requirement was a wealth-based classification that restricted voter access and, therefore, merited heightened scrutiny.[110] As a result, the Eleventh Circuit panel created a "narrow exception to traditional rational basis review: the creation of a wealth classification that punishes those genuinely unable to pay fees, fines, and restitution more harshly than those able to pay . . . solely on account of wealth—by withholding access to the ballot box."[111] After applying heightened scrutiny to the classification at issue, the Eleventh Circuit panel determined that "the [legal financial obligations] requirement is likely unconstitutional as applied to these seventeen plaintiffs" for violating the Fourteenth Amendment.[112]

Yet a few months later, the en banc Eleventh Circuit overruled this decision, holding that rational basis review.[113] Because "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," the Eleventh Circuit en banc held that this statute was constitutional.[114]

B. *Federal Constitutional and Statutory Arguments*

Litigants have unsuccessfully challenged state statutes that disenfranchise formerly incarcerated individuals because of unpaid court debt under the United States Constitution.[115] Scholars and litigators have argued criminal disenfranchisement violates the First Amendment's

---

107. *See Jones*, 975 F.3d at 1027, 1029–30.
108. *Id.* at 1025.
109. *See Jones*, 950 F.3d at 817.
110. *See id.*
111. *Id.* at 809.
112. *Id.* at 827.
113. *Jones*, 975 F.3d at 1032–33.
114. *Id.* at 1035.
115. *See, e.g.*, Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020); Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010). In addition, litigants have challenged state statutes under individual state constitutions. These challenges are state-specific and are therefore not discussed in this Note.

protection of free speech,[116] the Eighth Amendment's ban on cruel and unusual punishment,[117] the Fourteenth Amendment's Equal Protection Clause's prohibition against race-based discrimination,[118] and Section Two of the Voting Rights Act,[119] but no higher court has accepted these arguments thus far. Nevertheless, lower courts have been receptive to arguments challenging these statutes under the Twenty-Fourth Amendment's ban on poll taxes and the Fourteenth Amendment's Equal Protection Clause,[120] which are examined below.

1. The Twenty-Fourth Amendment's Ban on Poll Taxes

The Twenty-Fourth Amendment states that the right to vote cannot be limited for failure to pay "any poll tax or other tax" in federal elections.[121] Litigants have argued state statutes that perpetuate wealth-based criminal disenfranchisement are poll taxes because they require payment of legal financial obligations before a person becomes eligible to vote.[122]

Although circuit courts have rejected this argument,[123] lower courts have indicated that they may be more favorable to it, specifically for criminal justice *fees*.[124] The district court for the Northern District of Florida determined that if criminal justice fees were assessed for the sole or primary purpose of raising revenue, regardless of whether an individual is guilty of a criminal charge, these fees would likely be a poll tax and thus

---

116. *See, e.g.*, Jones v. DeSantis, 462 F. Supp. 3d 1196, 1204 (N.D. Fla. 2020). *See generally* Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111 (2013).

117. *See, e.g.*, Thiess v. State Admin. Bd. of Election L., 387 F. Supp. 1038, 1042 (D. Md. 1974). *See generally* Amy Heath, Comment, *Cruel and Unusual Punishment: Denying Ex-Felons the Right to Vote After Serving Their Sentences*, 25 AM. U. J. GENDER SOC. POL'Y & L. 327 (2017) (arguing felon disenfranchisement laws violate the Eighth Amendment's ban on cruel and unusual punishment).

118. *See DeSantis*, 462 F. Supp. 3d at 1234.

119. *See, e.g.*, Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003). *See generally* Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L.L. REV. 93 (2018) (discussing why challenges under Section 2 of the Voting Rights Act have failed and analyzing ways plaintiffs can ultimately prevail).

120. *See DeSantis*, 462 F. Supp. 3d at 1234.

121. U.S. CONST. amend. XXIV, § 1.

122. *See, e.g.*, *DeSantis*, 462 F. Supp. at 1203–04.

123. *See* Harvey v. Brewer, 605 F.3d 1067, 1080 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742, 750–51 (6th Cir. 2010); Jones v. Governor of Florida, 975 F.3d 1016, 1017 (11th Cir. 2020).

124. *See DeSantis*, 462 F. Supp. 3d at 1232–34. In *Jones v. DeSantis*, the district court specifically stated that criminal *fines* were not a tax because their primary purpose was to punish the offender for their criminal conduct, unlike *fees*, which serve as a source of revenue regardless of the individual's guilt or innocence. *Id.*

violate the Twenty-Fourth Amendment.[125] In reaching this holding, the court stated that "if a fee assessed against a person who is not adjudicated guilty is a tax, then the same fee, when assessed against a person who is adjudicated guilty, is also a tax."[126] In Florida, these fees were not only assessed solely for the purpose of generating revenue, as mandated by the State Constitution, but were also assessed against individuals who were adjudged guilty and those who entered no-contest pleas.[127] As a result, the district court concluded these fees constituted a tax.[128] Although this argument was rejected by the Eleventh Circuit,[129] it could be accepted in future litigation.

2. The Fourteenth Amendment's Equal Protection Clause

Litigants have also argued statutes that disenfranchise formerly incarcerated individuals because of unpaid court debt deny these individuals equal protection under the law solely on the basis of their income.[130] As described in Part A, *Richardson* requires the application of rational basis review to statutes that disenfranchise individuals.[131] Thus, a statute only needs to be rationally related to a legitimate government interest to withstand constitutional review.[132] Although some judges have expressed doubts over whether disenfranchisement is rationally related to the payment of court debts,[133] all circuit courts that have addressed this question have upheld these statutes under rational basis review, and thus have rejected arguments that disenfranchisement violates the Fourteenth Amendment's Equal Protection Clause.[134] If courts applied

---

125. *Id.*

126. *Id.* at 1234.

127. FLA. CONST., art. V, § 14(b) (amended 1998).

128. *See DeSantis*, 462 F. Supp. 3d at 1234.

129. *See Jones* v. Governor of Florida, 975 F.3d 1016, 1306–46 (11th Cir. 2020).

130. *See, e.g.*, *DeSantis*, 462 F. Supp. 3d at 1204; Harvey v. Brewer, 605 F.3d 1067, 1071 (9th Cir. 2010).

131. *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974).

132. *Id.*

133. *See, e.g.*, Stephens v. Yeomans, 327 F. Supp 1182, 1188 (D.N.J. 1970) (holding that there was no rational basis for disenfranchising resident citizens, and thus the statute was unconstitutional under the Fourteenth Amendment). There is an exception if there is evidence of *purposeful* racial discrimination, as was present in *Hunter v. Underwood*, however, this requires overt racial intent, which is extremely difficult to demonstrate. It is unlikely that litigants could successfully challenge these statutes as invidiously discriminating on the basis of race because of similar evidentiary issues. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

134. *See* Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742, 746–47 (6th Cir. 2010); Jones v. Governor of Florida, 975 F.3d 1016, 1033–35 (11th Cir. 2020).

heightened scrutiny instead, as the district court did in *Jones v. DeSantis*,[135] litigants would likely be more successful in challenging these statutes under the Equal Protection Clause.[136]

C. *State Legislative Reforms*

States use different mechanisms to disenfranchise individuals who owe court debt. The main mechanisms are: (1) conditioning re-enfranchisement on the payment of court debt through state statutes or state constitutions; (2) re-enfranchising individuals upon completion of all terms of their sentence; (3) requiring payment as a condition of release from parole or probation, an executive pardon, or clemency; (4) allowing the governor to re-enfranchise individuals through executive orders; or (5) requiring payment through one of the above mechanisms *unless* a person is determined unable to pay through a formal ability-to-pay hearing or similar adjudication.[137] Based on this author's research, however, no state affirmatively prohibits wealth-based criminal disenfranchisement. States have addressed wealth-based criminal disenfranchisement in several ways, including through legislative reforms, constitutional amendments, and executive orders. As this Section explores, these reforms have flaws due to the presence of loopholes and other unforeseen design failures.

1. Statutory Reform: Florida

The State of Florida is a prime example of the evolution of criminal disenfranchisement in the United States and exemplifies why a bold legislative solution, as opposed to litigation, is necessary to solve this issue. Floridians overwhelmingly passed a constitutional amendment that granted the right to vote to individuals with felony convictions, but the Florida legislature subsequently passed a statute that limited the amendment's re-enfranchisement provision to individuals with felony convictions who had paid their court debt.[138] Specifically, this bill defined the

---

135. *See DeSantis*, 462 F. Supp. 3d at 1217–18 (holding that, under heightened scrutiny, pay-to-vote systems for individuals who are genuinely unable to pay violate the Equal Protection Clause of the Fourteenth Amendment).

136. *See, e.g.*, Jones v. Governor of Florida, 975 F.3d 1016, 1030–32 (11th Cir. 2020) (holding that, because this wealth-based classification did not create a suspect class, rational basis review instead of heightened scrutiny applied).

137. *See generally* Colgan, *supra* note 16 (discussing the numerous ways states disenfranchise individuals because of unpaid court debt). Examples of specific mechanisms used by states are discussed in Part III of this Note. *See infra* Part III.

138. *See* FLA. CONST. art. VI, §4 (a)–(b) (amended 1992 and 2018); FLA. STAT. § 98.0751(2)(a) (2020).

statutory phrase "completion of all terms of sentence" to include payment of court debt due, which legislators said was necessary to clarify the phrase and prevent inconsistent interpretations.[139]

Florida legislators did not defend their actions by citing retributivist notions of justice or by arguing that restitution is a part of a person's sentence because it serves to compensate the victim, as other scholars and activists have.[140] Instead, legislators justified the bill as necessary for revenue collection and administrative convenience.[141] These legislators argued that they needed to restrict the number of newly eligible voters to ensure that the Florida Department of State did not experience an "increased workload" from processing thousands of voter registration forms of formerly incarcerated individuals who had completed the terms of their sentences.[142]

This restriction on re-enfranchisement in reality undermines the Florida Legislature's purported goal of administrative convenience. As the Florida Legislature bill analysis indicates, limiting re-enfranchisement to those who have paid off their legal debt would require increased funding and lead to a "significant workload increase."[143] The Department of Corrections or another government agency would have to monitor who has paid off criminal court debt, notify individuals who have paid off criminal court debt of their eligibility to vote, and notify the Department of State when an individual becomes eligible to vote.[144] Thus, the Department of State's responsibilities would simply be passed along to the Department of Corrections or another governmental agency. This contradicts the rationale for the restriction and fails even the lowest level

---

139. *See* PRO. STAFF OF THE COMM. ON RULES, FLA. S., BILL ANALYSIS AND FISCAL IMPACT STATEMENT, SB 70862 (Apr. 24, 2019), https://www.flsenate.gov/Session/Bill/2019/7086/Analyses/2019s07086.rc.PDF [https://perma.cc/2HZ4-A6PU] [hereinafter FLA. S. PRO. STAFF]. The Florida Senate considered two bills (SB 7086 and SB 7066) to implement this statutory limitation to Amendment 4. SB 7086 was ultimately not passed because its companion bill, SB 7066, was passed. Analysis of SB 7086 is cited in this Note because it contained more applicable constitutional analysis than SB 7066. The Florida legislature said these two bills were "similar," which, according to the Florida Legislature's FAQ, means the bills were "substantially similar in text or have substantial portions of text that are identical or largely the same." *Frequently Asked Questions (FAQs)*, FLA. LEGISLATURE, www.leg.state.fl.us/Info_Center/index.cfm?Mode=Help&Submenu=4&Tab=info_center [https://perma.cc/PLX8-LRDG].

140. Retributivists argue that formerly incarcerated individuals should never be able to vote because they deserve to be punished and are less trustworthy than law-abiding individuals. *See, e.g.*, Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 17–18 (2008).

141. *See* FLA. S. PRO. STAFF, *supra* note 139, at 2.

142. *Id.*

143. *Id.* at 27.

144. *See id.* A governmental agency would likely be tasked with monitoring the above eligibility cut-offs. Yet, as discussed above, neither the Florida statute nor the state itself has created a system for tracking who has paid off their debts and who is eligible to vote. *See* LOVE & SCHLUSSEL, *supra* note 8.

of constitutional review. The restriction is clearly not rationally related to a legitimate government interest, as applied to individuals who are genuinely unable to pay. Yet despite the blatant irrationality of this statute, the Eleventh Circuit en banc upheld it as constitutional.[145]

2. Statutory Reform: Washington State

Many state legislatures have attempted to eliminate wealth-based criminal disenfranchisement by amending their statutes or constitutions, as discussed in this Section.[146] Yet these well-intentioned legislative actions have also had unintended consequences, as reforms in Washington State demonstrate. After the Supreme Court of Washington upheld a statute requiring payment of court debt before re-enfranchisement,[147] the state legislature removed the payment requirement.[148] But Washington's reform did not re-enfranchise all eligible individuals. Instead, it only restored voting rights for individuals with in-state convictions who were determined to be *genuinely unable to pay*.[149] As a result, the state requires conducting an ability-to-pay determination before an individual is eligible for re-enfranchisement.[150] If the decision-maker in an ability-to-pay hearing determines, correctly or incorrectly, that the individual is able to pay their fines and fees, that individual will remain disenfranchised until they have paid.[151] As discussed in Part III of this Note, ability-to-pay determinations are extremely problematic for several reasons, predominately because of their discretionary nature. Thus, this reform does not completely eliminate wealth-based criminal disenfranchisement or even protect vulnerable individuals from being forced to hold debt they cannot afford to pay.

---

145. Jones v. Governor of Florida, 975 F.3d 1016 (11th Cir. 2020). Due to the current conservative majority of the U.S. Supreme Court, it is unlikely that this decision by the Eleventh Circuit will be overturned if a petition for certiorari is filed.

146. *See, e.g.*, FLA. CONST. art. VI, §4 (a)–(b) (amended 1992 and 2018).

147. *See* Madison v. State, 163 P.3d 757, 773 (Wash. 2007) (holding that the disenfranchisement of felons who have satisfied the terms of their sentences but have not paid all legal financial obligations is constitutional under the Washington State Constitution).

148. *See* WASH. REV. CODE § 29A.08.520(1) (2020).

149. *See generally* Nicolas L. Martinez, *Debt to Society? The Washington State Legislature's Efforts to Restore Voting Rights to Persons with Felony Convictions*, 22 STAN. L. & POL'Y REV. 329 (2011) (exploring whether the Washington state legislature actually re-enfranchised voters with the Voting Rights Restoration Act).

150. Washington defines a person's ability to pay as whether a person "has willfully failed to comply with the terms of his or her order to pay legal financial obligations." WASH. REV. CODE § 29A.08.520(2)(a) (2020).

151. *Id.*

In addition, Washington's statute has an additional mechanism for collecting fees from formerly incarcerated individuals. At the discretion of a judge, an individual may have to pay supervision fees once released from confinement as a condition of parole or probation.[152] Unless this requirement is waived, an individual who is assessed supervision fees cannot regain their voting rights until these fees are paid.[153]

Even though Washington intended to remove financial barriers to re-enfranchisement for low-income individuals,[154] discretionary measures within its statutory structure, such as ability-to-pay determinations, may in practice require impoverished individuals to pay court debt before being re-enfranchised.[155] Currently, the Washington State Senate is contemplating restoring voting rights for in-state convictions once these individuals are released from incarceration, which would permanently waive the payment requirement for individuals released from parole or probation.[156] Although this bill would be a significant improvement, it does not completely remove all discretion associated with legal debt.[157] Until Washington changes its ability-to-pay determinations, low-income individuals may continue to be disenfranchised because of their poverty.

3. Other Categories of Statutory Reform: Condition of Clemency or Pardon, Governor Discretion, and Automatic Re-Enfranchisement

Other states have implemented statutory reforms to improve their re-enfranchisement policies.[158] Yet these reforms also have not

---

152. WASH. REV. CODE § 9.94A.703(2)(d) (2020).

153. § 29A.08.520(2)(a).

154. Martinez, *supra* note 149, at 333–34 (discussing the original intent of Washington H.B. 1517 and the resulting compromise bill that disenfranchises individuals unless they are genuinely unable to pay).

155. *Cf.* DEL. CODE ANN. tit. 15, §§ 6101–07 (2021); DEL. CODE ANN. tit. 11, § 4104(a)(3) (2021). Delaware's approach is similar to Washington's. Delaware has statutorily eliminated the requirement that formerly incarcerated individuals pay court debt for re-enfranchisement, but it has a mandatory payment requirement as a condition of parole and probation, which effectively prohibits individuals from voting until they have paid all debts.

156. News Trib., *State Senate Democrats Advance Bill to Restore Washington Felons' Voting Rights Faster*, SEATTLE TIMES (Jan. 26, 2020), www.seattletimes.com/seattle-news/politics/state-senate-democrats-advance-bill-to-restore-washington-felons-voting-rights-faster [https://perma.cc/R2Q7-8RBW].

157. Further, the bill has been stalled in the Washington State Senate. *See* Gene Johnson, *Momentum Builds for Letting People Vote on Parole*, ABC NEWS (Dec. 11, 2020, 2:18 PM), https://abcnews.go.com/Politics/wireStory/momentum-builds-letting-people-vote-parole-74674975 [https://perma.cc/KDL4-F4R2].

158. *E.g.*, OHIO REV. CODE ANN. § 2961.01 (West 2021); IDAHO CODE § 18-310 (2021); IDAHO CODE § 50.01.01(b)(v) (2021).

completely eliminated wealth-based criminal disenfranchisement. In Ohio, an individual is re-enfranchised when they are granted parole, judicial release, or a conditional pardon.[159] But if they seek clemency, they must pay all fines and fees before their application can be considered.[160] Similarly, in Idaho, an individual is re-enfranchised after "final discharge," but if they would like to apply for a pardon, they must send proof that all of their fines and fees *and* restitution payments have been paid.[161]

Two states, New York and Virginia, have implemented reforms in a different way: through executive order.[162] Acting pursuant to their state statutory or constitutional authority, the governors of Virginia and New York have temporarily eliminated wealth-based criminal disenfranchisement by issuing executive orders restoring the voting rights of all individuals with criminal convictions, despite unpaid court debt.[163] Although this is a step in the right direction, these actions are only temporary. A new administration could rescind these executive orders at any moment, and thus restore wealth-based criminal disenfranchisement. Therefore, these reforms fail to completely eliminate wealth-based criminal disenfranchisement.

III. ABOLISHING WEALTH-BASED CRIMINAL DISENFRANCHISEMENT

The Supreme Court has held that a state cannot "[punish] a person for his poverty."[164] Yet, the vast majority of states do just that: by denying the vote to formerly incarcerated individuals who cannot afford to pay, states punish these individuals because of their poverty. Other countries

---

159. OHIO REV. CODE ANN. § 2961.01 (West 2021).

160. *See* OHIO DEP'T OF REHAB. & CORR., POLICY 105-PBD-05, CLEMENCY PROCEDURES: NON-DEATH PENALTY CASES 3 (July 17, 2017), https://drc.ohio.gov/Portals/0/Policies/DRC%20Policies/105-PBD-05%20(July%202017).pdf?ver=2017-07-31-141430-593 [https://perma.cc/9PCD-KH4B].

161. *See* IDAHO CODE § 18-310 (2021); IDAHO CODE § 50.01.01(b)(v) (2021).

162. The governors of New York and Virginia are authorized to implement these executive orders by state statute and state constitution, respectively. *See* N.Y. ELEC. LAW § 5-106(2) (LexisNexis 2021); VA. CONST. art. II, § 1. The New York State Senate recently passed a bill that would automatically restore voting rights to all individuals who are released from incarceration, and would thus repeal the governor's authority to restore voting rights by executive order. S.B. 830B, 2021 State Assemb., Reg. Sess. (N.Y. 2021), https://www.nysenate.gov/legislation/bills/2021/s830/amendment/b?intent=support [https://perma.cc/L27C-96SL].

163. *See Voting Rights Restoration Efforts in New York*, BRENNAN CTR. FOR JUST. (Apr. 2, 2019), www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york [https://perma.cc/W28E-HT3T]; *see also* Press Release, Governor Terry McAuliffe, Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015), https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826609-en.html [perma.cc/89R9-HUAC].

164. Bearden v. Georgia, 461 U.S. 660, 671 (1983).

have started to distance themselves from the practice of criminal disenfranchisement and now subject it to heightened judicial review.[165]

As described in Part I, legislators have stated that fines and fees serve to (1) punish criminals, (2) compensate victims, and (3) generate revenue. In addition, partisanship also drives policymakers to implement legal financial obligations.[166] Yet, state legislators have refused to admit that partisanship or racial bias influences the enactment of these statutes. Instead, they put forth other justifications for these statutes, such as revenue collection or administrative convenience, neither of which are rationally related to voting or can be accomplished in ways that do not disenfranchise low-income individuals.[167]

Recent litigation in Florida has brought the negative implications of wealth-based criminal disenfranchisement into the public eye, resulting in increased calls for its elimination.[168] The majority of individuals support the notion that civil liberties should prevail over punitive notions of punishment,[169] and 91% of Americans "consider the right to vote as essential to their own personal sense of freedom."[170] Further, the movement for reform has gained support from not only liberals, academics, and policy organizations,[171] but also conservative organizations like the Cato Institute.[172] As the failed litigation in Florida demonstrates, however, legal challenges will likely continue to be ineffective at eliminating this practice.

Other proposed reforms involve structural changes to ability-to-pay determinations to ensure that individual biases are removed from these

---

165. *See* Reuven Ziegler, *Legal Outlier, Again - U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 199 (2011).

166. *See supra* Part I.

167. *See* FLA. S. PRO. STAFF, *supra* note 139, at 29.

168. David Litt, *Before Telling Protestors for George Floyd to Vote, Remember Not All of Them Are Allowed To*, NBC NEWS (June 4, 2020), https://www.nbcnews.com/think/opinion/telling-protesters-george-floyd-vote-remember-not-all-them-are-ncna1224011 [https://perma.cc/3V2R-L24T].

169. *See* Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OP. Q. 275, 276–77, 283 (2004).

170. PEW RSCH. CTR., PUBLIC SUPPORTS AIM OF MAKING IT 'EASY' FOR ALL CITIZENS TO VOTE 1 (2017), https://www.people-press.org/2017/06/28/public-supports-aim-of-making-it-easy-for-all-citizens-to-vote [https://perma.cc/SK57-QEHP].

171. *See, e.g.*, ALA. APPLESEED CTR. FOR L. & JUST., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL DIVIDE 41 (2018), http://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf [https://perma.cc/2YZR-L6GW]; *see also* ALLYSON FREDERICKSEN & LINNEA LASSITER, ALL. FOR A JUST SOC'Y, DISENFRANCHISED BY DEBT: MILLIONS IMPOVERISHED BY PRISON, BLOCKED FROM VOTING 19 (2016), https://www.allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf [https://perma.cc/B5FY-MHJN].

172. Brief for the Cato Institute as Amicus Curiae at 2, Jones v. DeSantis, 410 F. Supp. 3d 1284 (N.D. Fla. 2019) (No. 19-cv-00300).

processes.[173] Yet these reforms are also inadequate. If a state has a biased or subjective process for conducting ability-to-pay determinations, as discussed below, an otherwise eligible individual may still be denied the right to vote. Even assuming these biases could be removed, procedural and other obstacles associated with ability-to-pay determinations still remain, as discussed below.

As a result, more comprehensive reform is needed to address the devastating impact that wealth-based criminal disenfranchisement has on low-income individuals. If each state abolished wealth-based criminal disenfranchisement, formerly incarcerated individuals would never be denied the right to vote because of their poverty. This Part discusses the inadequacy of existing reform proposals and ultimately propose that states abolish the practice of wealth-based criminal disenfranchisement.

A. *The Inadequacy of Ability-to-Pay Determinations*

Many scholars have proposed reforming the ability-to-pay determination process by standardizing and streamlining ability-to-pay hearings to ensure no individual is disenfranchised because of their inability to pay.[174] Even with these reforms, ability-to-pay determinations are still flawed in multiple ways. For example, if a judge in an ability-to-pay hearing determines that an individual is able to pay when, in fact, they are not, this could result in a denial of that person's fundamental right to vote. Thus, discretionary determinations should not be used when determining who is eligible to vote if there is any chance of error.

Many states require individuals to pay court fines and fees before reenfranchisement.[175] Scholars have noted many issues with ability-to-pay hearings associated with these requirements.[176] Ability-to-pay hearings give judges large amounts of discretion, which perpetuates racial biases.[177] Additionally, it is notoriously difficult to determine whether a person is able to pay. Decisionmakers must examine an individual's past

---

173. *See, e.g.*, Colgan, *supra* note 16, at 139 (proposing structural reforms to ability-to-pay determinations); Meghan M. O'Neil & J.J. Prescott, *Targeting Poverty in the Courts: Improving the Measurement of Ability to Pay*, 82 L. & CONTEMP. PROBS. 199, 200 (2019) (proposing online ability-to-pay assessments to streamline and standardize ability-to-pay determinations).

174. *See, e.g.*, Colgan, *supra* note 16, at 139; O'Neil & Prescott, supra note 173, at 200.

175. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 21.

176. *See, e.g.*, Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175 (2019); Mary Fainsod Katzenstein & Mitali Nagrecha, *A New Punishment Regime*, 10 CRIMINOLOGY & PUB. POL'Y 555, 564 (2011).

177. *See* HARRIS, *supra* note 31, at 26.

and present financial history, as well as predict their future financial status.[178] One study notes:

> Nothing is "simple" in assessing an individual's ability to pay. Relying on legislative, judicial, or administrative efforts to determine an individual's financial status or capacity is fraught with complications. To gain an accurate picture of the income position of an individual, whose work record is irregular at best, is constantly changing, and has financial obligations that might extend across multiple institutional arenas (child support, restitution, court, and state obligations in addition to informal or formal loans taken from family and friends) only can be beset by inaccuracies.[179]

Further, determining whether someone can pay involves a "moral determination about what people should be expected to pay, given their resources."[180] Officials frequently make this moral determination without considering the specific circumstances individuals in poverty face.[181] Hinging someone's fundamental right to vote on these uninformed decisions can create unfair outcomes that disproportionately impact racial and ethnic minorities.[182]

Although scholars have proposed promising reforms to standardize ability-to-pay determinations and eliminate biases,[183] these reforms do not completely eliminate the practice of wealth-based criminal disenfranchisement. For example, proposed automated and computerized proceedings, which attempt to standardize and make court proceedings more efficient, have accuracy and legitimacy barriers.[184] In addition, other issues arise when these automated tools are used, such as privacy concerns, the use of racially biased data, and a lack of data supporting their reliability.[185] Further, scholars argue that the best substantive outcomes for impoverished individuals should determine whether we use

---

178. *See* Zhen, *supra* note 176, at 201 (noting the conspicuous absence of "multi-generational layers of exploitation, financial insecurity, and state-sanctioned wealth stripping" from ability-to-pay determinations).

179. Katzenstein & Nagrecha, *supra* note 176, at 564.

180. Sandra G. Mayson, *Detention by Any Other Name*, 69 DUKE L.J. 1643, 1668 (2020).

181. *Id.*

182. *See generally* Zhen, *supra* note 176 (arguing that ability-to-pay determinations can worsen the "racial economic divide").

183. *See, e.g.*, Colgan, *supra* note 16, at 140 (proposing structural reforms to ability-to-pay determinations to standardize them and eliminate disparate outcomes); O'Neil & Prescott, *supra* note 173.

184. In addition, these studies were based on small sample sizes. *See* O'Neil & Prescott, *supra* note 173, at 221.

185. *See* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 Duke L.J. 1473, 1489–90 (2020).

these new technological reforms, not how user-friendly these automated programs are.[186] These reforms are promising, but they still may result in inaccurate ability-to-pay determinations, and thus disenfranchise individuals because of their poverty.

However, even if ability-to-pay hearings could be reformed, other issues still remain. For example, an indigent individual must not only be aware of and raise an inability-to-pay defense, but they also must navigate procedural obstacles, which can be more difficult when proceeding pro se.[187] These procedures may also be more costly than the fines and fees themselves.[188] While some jurisdictions only require individuals to swear under oath that they are unable to pay,[189] others require extensive financial documentation that can be difficult to produce for seasonal or non-traditional workers.[190] In addition, individuals may not be able to get an ability-to-pay hearing due to docket backlog and other local administrative issues.[191] Even if they get a hearing, they may be forced to incur other expenses to appear in court, such as unpaid time off from work, transportation costs, child care costs, and other expenses.[192] Thus, even if ability-to-pay determinations are reformed, other barriers may prevent individuals from effectively raising an inability-to-pay defense, resulting in further disenfranchisement.

B. *Abolish Wealth-Based Criminal Disenfranchisement*

There are several ways to eliminate wealth-based criminal disenfranchisement: (1) state legislators could abolish it; (2) states could adopt far-reaching reforms like those in either Colorado and Nevada, or in Maine and Vermont, as discussed below; or (3) states could adopt temporary measures to eliminate wealth-based criminal disenfranchisement while permanent reforms are being implemented. Due to questions regarding the feasibility of reforms in Colorado and Nevada and the far-reaching scope of reforms in Maine and Vermont, this Note recommends that states affirmatively abolish wealth-based criminal disenfranchisement.

---

186. *See, e.g.*, *id.* at 1521; VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (1st ed. 2017).

187. *See* CAN'T PAY, CAN'T VOTE, *supra* note 5, at 31.

188. *See* Zhen, *supra* note 176, at 202–03.

189. *E.g.*, VA. CODE ANN. § 19.2-355 (2021); OR. REV. STAT. § 135.050(1) (2019).

190. *See* Zhen, *supra* note 176, at 203.

191. *See* PFM'S CTR. FOR JUST. & SAFETY FIN., REDUCING RELIANCE ON CRIMINAL FINES AND FEES 6 (2020), https://assets.documentcloud.org/documents/20402303/fines-and-fees_final-report_nashville-davidson-county.pdf [https://perma.cc/A7PA-DNE7].

192. *See id.*

1. Abolition Through Affirmative State Legislation

The first way states could eliminate wealth-based criminal disenfranchisement is by affirmatively abolishing it through state legislation or state constitutional amendments. State abolition of wealth-based criminal disenfranchisement can take multiple forms depending on the existing legal structure of disenfranchisement. For example, a state that statutorily restricts voting rights because of failure to pay court debts must implement this reform legislatively. Conversely, a state with a state constitutional provision or a state constitutional amendment limiting voting rights must implement this reform by passing a constitutional amendment.[193]

State statutory reforms and constitutional amendments could take many forms to affirmatively abolish wealth-based criminal disenfranchisement. Yet above all, legislators must draft them carefully to avoid the outcome in Florida. Appropriate language may include: "No individual may be disenfranchised or prohibited from re-gaining the right to vote because of unpaid court debt or other legal financial obligations." Or, if a state currently re-enfranchises individuals once they are released from incarceration, legislators could qualify this by stating: "No financial restrictions, including unpaid legal financial obligations, shall prohibit an individual from being re-enfranchised." In addition, states must ensure that phrases like "terms of sentence," "court debt," or "legal financial obligations," are clearly defined to avoid loopholes like those in Florida's Amendment 4.

For example, Florida's state legislature could repeal the statute interpreting Amendment 4, or Floridians could pass an additional referendum clarifying the definition of "terms of sentence" to *not* include payment of any legal financial obligations, such as fines, fees, restitution, and other debts incurred from an individual's interaction with the criminal justice system.[194] As a result, the phrase "terms of sentence" would only include an individual's period of incarceration in a jail or prison.

Although it is easier to pass legislative reforms at the state level, state legislators may face the same legislative gridlock[195] that federal officials

---

193. *See, e.g.*, ARK. CONST. amend. LI, § 11(d)(2)(A)-(D).

194. In the meantime, individual municipalities or state court administrators could take small steps to help identify the amount of legal financial obligations owed by individuals. For example, local entities could improve their reporting processes and streamline data production to alleviate the statutory burden imposed on the state.

195. For example, in 2019, Iowa Senate Republicans killed a bill which would have amended the Iowa Constitution to automatically restore voting rights to felons once they have completed the terms of their sentences. *See* Dan Hendrickson, *Iowa Senate Republicans Kill Felon Voting Rights Constitutional Amendment Bill*, WHO13 (Apr. 4, 2019, 3:11 PM), https://who13.com/news/iowa-senate-republicans-kill-felon-voting-rights-constitutional-amendment-bill [https://perma.cc/3EM2-WEDJ].

do.[196] Advocates have been working to reform wealth-based criminal disenfranchisement for decades and have seen progress and changes in public opinion.[197] Yet some conservatives remain resistant.[198] To build the requisite momentum for this movement to succeed, formerly incarcerated individuals and impacted communities should lead the fight. With their expertise and connection to this issue, formerly incarcerated individuals could effectively lobby policymakers and further sway public opinion.[199]

2. Abolition Through Existing State Reforms

The second way states could eliminate wealth-based criminal disenfranchisement is by enacting reforms similar to those adopted in either Maine and Vermont, or instead reforms in Colorado and Nevada. Maine and Vermont are the only states that completely prohibit criminal disenfranchisement, regardless of whether a person is or was incarcerated.[200] Although Maine and Vermont accomplish this Note's goal of eliminating wealth-based criminal disenfranchisement, their reform grants all formerly incarcerated individuals the right to vote, regardless of whether they are currently incarcerated or on parole, and may spark fierce political backlash.[201]

States like Colorado and Nevada have undertaken the most promising reform by automatically re-enfranchising all formerly incarcerated individuals upon release from confinement.[202] However, the "serving a sentence" language in Colorado's statute and the "release from prison" language in Nevada's statute could be legislatively interpreted, as Florida's "terms of sentence" language was, to require payment before re-

---

After Senate Republicans killed this proposal again in 2020, Iowa Governor Kim Reynolds signed an executive order implementing the reform. *See* Press Release, Off. of the Governor of Iowa, Gov. Reynolds Signs Executive Order to Restore Voting Rights of Felons Who Have Completed Their Sentence (Aug. 4, 2020), https://governor.iowa.gov/press-release/gov-reynolds-signs-executive-order-to-restore-voting-rights-of-felons-who-have [https://perma.cc/RRZ8-WKJJ].

196. *See* Haag, *supra* note 95.

197. *See* TIERRA BRADFORD, COMMON CAUSE EDUC. FUND, ZERO DISENFRANCHISEMENT: THE MOVEMENT TO RESTORE VOTING RIGHTS 10 (2019), https://www.commoncause.org/wp-content/uploads/2019/08/FelonyDisenfrichisementReportv4-1-1.pdf [https://perma.cc/MP64-PH2H].

198. *See* Clegg et al., *supra*, note 140.

199. *See* BRADFORD, *supra* note 197, at 12.

200. *See* ME. STAT. tit. 21-A, § 112(14) (2021); VT. STAT. ANN. tit. 28, § 807(a) (2021); Colgan, *supra*, note 16 at 146; Meg Cunningham, *New Jersey Gov. Phil Murphy Restores Voting Rights for 80,000 on Probation or Parole*, ABC NEWS (Dec. 18, 2019, 3:38 PM), https://abcnews.go.com/Politics/jersey-gov-phil-murphy-restores-voting-rights-80000/story?id=67806071 [https://perma.cc/3LE8-79KN]

201. *See* Clegg et al., *supra* note 140, at 17.

202. *See* COLO. REV. STAT. § 1-2-103(4) (2021); NEV. REV. STAT. § 213.157(2) (2021).

enfranchisement.[203] Since Colorado's and Nevada's legislatures could alter their current laws to explicitly require payment, as Florida's legislature did, the efficacy of these specific statutory reforms remains to be seen. Thus, despite their efforts, Colorado and Nevada have not completely eliminated this issue. If other states adopt Colorado's and Nevada's approaches, they will have to clearly define "terms of sentence" and similar phrases to eliminate ambiguity and avoid the same outcome as Florida.

3. Alternatives to Abolition

If state legislative gridlock prevents states from adopting this Note's reform, states and localities could implement other, less effective reforms. These alternatives are only temporary fixes which do not fully accomplish this Note's goal, but they are steps in the right direction.

First, local entities could limit judicial discretion over fines and fees. Some state statutes set quantitative limits on the amount of fines and fees that can be imposed, but allow judges to determine the exact amount,[204] while other states require fines and fees be imposed without judicial discretion.[205] By encouraging judges to use their discretion to limit the amount of fines and fees that must be paid before an individual can be re-enfranchised, local politicians, advocacy organizations, and constituents could counteract the negative effects of wealth-based criminal disenfranchisement. In addition, municipalities could adopt expedited hearings, known as "rocket dockets."[206] For example, Miami-Dade County adopted a process that allows judges to set aside financial penalties that prevent individuals from voting either completely or by converting the financial penalties to community service hours.[207]

Second, if a state's statute or constitution permits state governors to sign executive orders regulating voting eligibility, the state could implement temporary reforms like those adopted by New York and Virginia.[208] As discussed above, these executive orders effectively remove the requirement that all legal financial obligations be paid in order to register and vote. These executive orders are temporary. A new governor could

---

203. *See* § 1-2-103(4); § 213.157(2) .

204. *E.g.*, TENN. CODE ANN. § 40-35-111 (2021); LA. STAT. ANN. § 13:1381.4 (2020).

205. *See, e.g.*, N.Y. CRIM. PROC. LAW § 420.35 (LexisNexis 2021).

206. *See* David Smiley & Charles Rabin, *Felons Unable to Pay Fines, Fees Can Vote in Miami Under This First-of-Its-Kind Plan*, MIA. HERALD (July 30, 2019, 9:52 AM), https://www.miamiherald.com/news/politics-government/state-politics/naked-politics/article233254066.html [https://perma.cc/B938-EYVY].

207. *See id.*

208. *See* N.Y. ELEC. LAW § 5-106(2) (LexisNexis 2021); VA. CONST. art. II, § 1; S.B. S830B, 2021-2022 Legis. Sess. (N.Y. 2021).

rescind them once in office. Thus, this is a temporary solution that could be used as a placeholder until legislative reforms are adopted.

As a last-ditch effort, local organizations could organize campaigns to raise funds to help formerly incarcerated individuals pay off their fines and fees. For example, local organizations such as Free Hearts in Tennessee and the Florida Rights Restoration Coalition (FRCC) in Florida have organized funds to help disenfranchised individuals pay off their debts.[209] These organizations turned to fundraising as a last resort. The FRCC has been working for years to implement reforms in Florida and successfully advocated for the adoption of Amendment 4. After the U.S. Supreme Court refused to lift the Eleventh Circuit's order blocking these individuals from registering to vote or voting,[210] the FRRC decided to start a fundraiser to make sure these individuals could vote in the 2020 election. Although the three options above do not fully eliminate wealth-based criminal disenfranchisement, they are temporary measures that could be adopted while statewide reforms are implemented.

C. *Withstanding Opposition*

Critics may claim that abolishing wealth-based criminal disenfranchisement is drastic and unpopular,[211] but support for this position is growing.[212] Multiple policy organizations recommend that, until criminal disenfranchisement can be prohibited, states should eliminate wealth-based criminal disenfranchisement, which further demonstrates the moderate nature of this Note's reform.[213] Additionally, even though they have the affirmative authority to do so,[214] states are not required to

---

209. In Florida, these fundraising efforts gained national attention after Michael Bloomberg, LeBron James, and others contributed millions to this fund. *See* Lawrence Mower & Langston Taylor, *Celebrities Spent Millions so Florida Felons Could Vote. Will It Make a Difference?*, ELECTIONLAND FROM PROPUBLICA (Nov. 2, 2020, 6:00 AM), https://www.propublica.org/article/bloomberg-lebron-james-fines-fees-florida-felons [https://perma.cc/C7J8-BHBW]; *Nashville Fund Pays Fines and Fees Needed to Restore Voting Rights for the Disenfranchised*, TENN. TRIB. (Oct. 2, 2020), https://tntribune.com/nashville-fund-pays-fines-and-fees-needed-to-restore-voting-rights-for-the-disenfranchised [https://perma.cc/W3MJ-HNCX].

210. *See* Nina Totenberg, *Supreme Court Deals Major Blow to Felons' Right to Vote in Florida*, NPR (July 17, 2020, 5:00 AM), https://www.npr.org/2020/07/17/892105780/supreme-court-deals-major-blow-to-ex-felons-right-to-vote-in-florida [https://perma.cc/N9EN-Y69F].

211. *See* Clegg et al., *supra*, note 140, at 17–18 (noting that some people argue that formerly incarcerated individuals should never be allowed to vote because they deserve punishment and are less trustworthy than law-abiding individuals).

212. *See, e.g.*, Neil L. Sobol, Griffin v. Illinois*: Justice Independent of Wealth?*, 49 STETSON L. REV. 399, 427 (2020).

213. *See* ALA. APPLESEED CTR. FOR L. & JUST., *supra* note 171, at 41; FREDERICKSEN & LASSITER, *supra* note 171, at 19.

214. *See* Richardson v. Ramirez, 418 U.S. 24, 54 (1973) (citing U.S. CONST. amend. XIV).

disenfranchise formerly incarcerated individuals under the Fourteenth Amendment. As a result, disenfranchising formerly incarcerated individuals is the drastic approach, not re-enfranchising them.

Critics may also argue that this reform grants formerly incarcerated individuals the right to vote, which may face intense opposition.[215] But this Note's reform does not force states to re-enfranchise *all* formerly incarcerated individuals. Unlike Colorado's and Nevada's recent reforms, which require re-enfranchisement when individuals are released from confinement, this Note's reform would only require states to re-enfranchise individuals because of unpaid court debt according to existing law. Accordingly, this Note's reform allows states to choose whether and when to completely re-enfranchise formerly incarcerated individuals. Depending on the state's statute or constitution, individuals could be re-enfranchised when they are released from confinement, once they have completed all other parole or probation requirements, or a certain number of years after they have been released. Thus, this Note's reform merely prevents states from disenfranchising formerly incarcerated individuals beyond their statutory or constitutional limits *because of unpaid court debt*.

This Note's reform would simply mitigate the effects of poverty on disenfranchisement. As a result, this reform is not nearly as polarizing as criminal re-enfranchisement generally.[216] Since this Note's reform avoids the highly politicized question of whether to completely re-enfranchise formerly incarcerated individuals upon release, it is a less extreme version than Colorado's or Nevada's reform. In addition, this Note's reform also gives states the option of re-enfranchising these individuals according to their existing statutory and constitutional structures.

Due to political pressure and the rising popularity of electoral reform, states should be willing to implement reforms like the one proposed by this Note to provide greater access to elections and to ensure electoral legitimacy.[217] Currently, this political pressure may not be strong enough to effect change in conservative states, but it is clearly growing, as evidenced by pushback in Florida against state legislative reforms and support for wealth-based criminal disenfranchisement from conservative organizations.[218]

---

215. *See* Clegg et al., *supra* note 140.

216. *See*, *e.g.*, *id.* at 17.

217. *See* Taylor Walker, *Voting After Prison: The Movement in CA and Beyond to End Voter Disenfranchisement*, WITNESS LA (Jan. 10, 2020), http://www.witnessla.com/voting-after-prison [https://perma.cc/3PGE-Q3QT].

218. *See* Brief for the Cato Institute as Amicus Curiae, *supra* note 172, at 2.

This Note recognizes that abolishing wealth-based criminal disenfranchisement will re-enfranchise both individuals who are not able to pay as well as those who are able to pay. This is a natural consequence of this reform and must be accepted to ensure that all individuals who are genuinely unable to pay are not disenfranchised due to their poverty. Although critics may argue that re-enfranchising individuals who are able to pay their legal financial obligations will eliminate their incentive to pay, many formerly incarcerated individuals cannot afford to pay their debts in the first place. Consequently, continued disenfranchisement is not a realistic motivator for people to pay.[219] Further, fines and fees are not an effective source of revenue because many individuals cannot afford to pay them.[220] Thus, governmental revenues will not be depleted if this reform is implemented. In addition, imposing other penalties, such as suspending drivers licenses or imposing additional debt, will similarly fail to secure payment, since these penalties will impair an individual's ability to go to work and pay off already-accrued debts.

Finally, abolishing wealth-based criminal disenfranchisement would actually benefit states. The administrative burden placed on state election administration officials would be reduced. For example, states would not have to track whether an individual has paid off their legal debt before allowing them to register to vote.[221] States would, in reality, *save* tax dollars by reducing administrative labor costs.[222] As such, states have additional administrative incentives to abolish wealth-based criminal disenfranchisement, aside from equity and other concerns raised by this Note, and states should take action to eliminate it.

---

219. Policy organizations have argued that coercing payment through threats and other means is futile. The Fines & Fees Justice Center made this argument in situations where cars are impounded to coerce payment of traffic fines and fees: "If people can't afford to pay a parking ticket, how can they possibly afford a $144 impound fee?" *See COVID-19 Fines & Fees Policy Tracker*, FINES & FEES JUST. CTR., https://finesandfeesjusticecenter.org/covid-19-policy-tracker/reform-tracker/ [https://perma.cc/2Q7F-N26E] (last visited May 31, 2021).

220. The Brennan Center concluded that "fees and fines are an inefficient source of government revenue." MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHINSON, BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 5 (2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/SER2-LR8D]. In addition, many states have difficulties collecting debts owed. For example, "Florida, New Mexico, and Texas amassed a total of almost $1.9 billion in uncollected debt." *Id.* at 10.

221. *See* LOVE & SCHLUSSEL, *supra* note 8, at 1–2 (exemplifying Florida's inability to develop a system to track payment of legal financial obligations, even after months of litigation on this subject).

222. Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1023–29 (2019) (explaining how Florida's Amendment 4 actually increased the administrative burden on Florida's administrative officials by requiring them to create a system to keep track of legal financial obligation payments, coordinate between governmental departments, train government administrators, increase budgets to accommodate these changes, and provide information to citizens).

Conclusion

Since federal reforms are not currently practical due to congressional gridlock, state-level reforms are the only way to completely eliminate wealth-based criminal disenfranchisement. Wealth-based criminal disenfranchisement takes a fundamental right away from individuals and "punish[es] a person for his poverty" in violation of the U.S. Constitution.[223] Since reforms to date have failed to eliminate this unconstitutional practice, states must affirmatively abolish wealth-based criminal disenfranchisement. Abolition of wealth-based criminal disenfranchisement is necessary to prohibit the punishment of poverty and to ensure that formerly incarcerated individuals are able to exercise their fundamental right to vote without impediment.

223. Bearden v. Georgia, 461 U.S. 660, 671 (1983).