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Felony Disenfranchisement in Florida: Past, Present, and Future

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FELONY DISENFRANCHISEMENT IN FLORIDA: PAST, PRESENT AND FUTURE

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Laws that restrict individuals with felony convictions from voting are widespread in the United States, but those laws themselves vary widely from state to state. Only Maine and Vermont allow people who are incarcerated for a felony to vote. Other states further prohibit individuals on parole or probation relating to a felony conviction from casting a ballot. The most stringent laws, that prohibit not only persons on probation and parole from voting, but also those who have satisfied their entire sentence, are found only in election states, including Florida.[2]

Because of disparities in the criminal justice system, African Americans, and other people of color are disproportionately more likely to be kept from voting because of felony disenfranchisement laws. Indeed, in Florida, 23 percent of voting-age African Americans is disenfranchised because of prior felony convictions.[3] Under Florida law, regaining the right to vote following a felony conviction is exceptionally difficult. This article examines the fluctuating rules governing restoration of the right to vote in Florida, including legal challenges to those rules. This article concludes by discussing potential legal, policy, and advocacy routes for ameliorating the enormous burden that these rules place on people of color seeking to participate in the political process.

I. EVOLVING FELONY DISENFRANCHISEMENT RULES IN FLORIDA

The United States is unique amongst developed nations in its sanctioning of stringent felony disenfranchisement.[4] Florida is unique amongst the

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[2] Marla McDaniel et al., *Imprisonment and Disenfranchisement of Disconnected Low-Income Men*, URBAN INSTITUTE, 4 (August 2013), *available at* http://www.urban.org/UploadedPDF/412986-Imprisonment-and-Disenfranchisement-of-Disconnected-Low-Income-Men.pdf.

[3] *Id.* at 5-6.

[4] The Canadian Supreme Court held that criminal disenfranchisement laws are unconstitutional.

states in the stringency of its felony disenfranchisement, which leaves those convicted of a felony conviction permanently disenfranchised, absent affirmative action on the person with the conviction to seek restoration of the right to vote.[5] Although this practice has been a prominent characteristic of Florida criminal justice policy for many years, Florida, unlike most states, has moved to make these laws more restrictive in the last several years. That trend has had a significant detrimental impact on the state's electorate, with noticeable racial disparities. The fluctuation of the rules governing the restoration of civil rights in Florida only exacerbates the burdens on those formerly involved in the criminal justice system.

1. Origin of Felony Disenfranchisement in Florida

Disenfranchisement of individuals with felony convictions dates back to Florida's first constitution in 1838, which stated, "The General Assembly shall have the power to exclude from. . .suffrage, all persons convicted of bribery, perjury, forgery, or other high crime, or misdemeanor."[6] This provision remained essentially unchanged in Florida's 1861 and 1865 Constitutions.[7] However, the provision was significantly amended in the state's 1868 constitutional convention. It was changed to say, "nor shall any person convicted of a felony be qualified to vote at any election unless restored to civil rights. . .The legislature shall have power and shall enact the necessary laws to exclude from. . .suffrage, all persons convicted of bribery, perjury, larceny or of infamous crime."[8] That provision remained unchanged until the 1968 constitutional convention. The language was then amended to state that "[n]o person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability."[9]

Suavé v. Canada, [2002] 3 S.C.R. 519, para. 7 (Can.). The European Court of Human Rights found that denying offenders serving more than a one-year sentence was a violation of the European Convention on Human Rights. *See* Frodl v. Austria, App. No. 20201/04, Eur. H.R. Rep. (2010). It also declared that blanket criminal disenfranchisement laws are illegal. *See also* Hirst v. United Kingdom (No. 2), 2005-IX Eur. Ct. H.R. (2005).

5 FLA. CONST. art. 6, § 4 (West, Westlaw through Nov. 4, 2014, General Election).

6 FLA. CONST. art. VI, §§ 4, 13 (amended 1868).

7 FLA. CONST. art. VI, §§ 2, 9 (1968).

8 FLA. CONST. art. XIV, §§ 2, 4 (amended 1968).

9 FLA. CONST. art. VI, § 4 (1968).

2. *Changing Felony Disenfranchisement Rules in Florida*

Even after the last constitutional revision, Floridians were subjected to many changes in the application of the felony disenfranchisement constitutional provision. In 1974, the Florida legislature passed the Correctional Reform Act,[10] declaring that "[e]ffective July 1, 1974, upon conviction of a felony, the civil rights of a person convicted shall be suspended until he is discharged from parole or released from the custody of the department without parole, at which time such civil rights are automatically reinstated." The governor at the time, Ruben Askew, immediately sought an advisory opinion on the legislation from the Florida Supreme Court. The court found that this portion of the Act—automatic reinstatement of civil rights—unconstitutionally infringed upon the constitutional power of the Governor (with the approval of three members of the Cabinet) to restore civil rights.[11] Thus, this early legislative attempt to minimize the long-term effects of felony disenfranchisement failed.

Following the Florida Supreme Court's ruling, the Governor and the Cabinet in 1975 established the Rules of Executive Clemency, thereby creating the Office of Executive Clemency to process matters of executive clemency.[12] However, in an attempt to further the legislative intent of the invalidated part of the Correctional Reform Act, the Governor and three members of the Cabinet (together, the Board of Executive Clemency) implemented written rules under which certain categories of executive clemency cases would be eligible for automatic restoration of civil rights.[13]

From 1975 until 1991, the restoration of civil rights in Florida was automatic, although it was still necessary to apply and prove eligibility.[14] In 1991, the state began requiring a hearing before civil rights could be restored.[15] In 1999, the number of applicant criminal offenses that required a hearing before the applicant could have his or her right to vote restored was expanded to include about 200 crimes.[16] Governor Jeb Bush, however, shortened that list of offenses when media reports revealed

10 FLA. STAT. § 944.292 (1974).

11 In re Advisory of the Governor Civil Rights, 306 So. 2d 520, 524 (Fla. 1975).

12 FLA. PAROLE COMM'N, 2013 ANNUAL REPORT 14, *available at* https://www.fcor.state.fl.us/docs/reports/FCORannualreport201213.pdf.

13 FLA. PAROLE COMM'N, RESTORATION OF CIVIL RIGHTS' (RCR) CASES GRANTED 2009 AND 2010 4-5, *available at* https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf.

14 Margaret Colgate Love, NACDL Restoration of Rights Resource Project, July 2013 at 3, *available at* https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_fl.pdf.

15 *Id.* at 3.

16 *Id.*

enormous delays in the restoration process.[17]

In 2004, Governor Bush also established the Governor's Ex-Offender Task Force to assess the effectiveness of the state in reintegrating those involved in the criminal justice system. By the end of 2006, the Task Force concluded that successful re-integration was critical to reducing recidivism.[18] In addition, the Task Force recommended further study on "the loss of civil rights upon conviction of a felony, [. . .] with the aim of additional reform recommendations'[.]"[19]

In 2006, Florida Republican Charlie Crist's campaign promised to streamline the rights restoration process and improve the ability of formerly-incarcerated persons to vote and obtain professional licenses.[20] In April of 2007, Governor Crist, with the support of two of his three Cabinet members, revised and streamlined the rules governing the restoration of civil rights.[21] For many of those convicted of non-violent offenses, no affirmative action or petitioning would be required of them any longer.[22] Instead, the Florida Parole Commission would send a list of eligible persons who had completed their sentence to the Office of Executive Clemency.[23] Individuals on that list would have their civil rights restored without a hearing or investigation.[24] However, despite the improvement that these changes created, the new rules still fell short of the "automatic" restoration of rights promised during the campaign.[25] Restoration of civil rights still required the approval of the Clemency Board, requiring time and processing.[26] Those persons eligible for "automatic" restoration still found

17 Debbie Cenziper & Jason Grotto, *Violent Offenders Rights Restored While Lesser Offenders Wait,* MIAMI HERALD (Nov. 21, 2004), *available at* http://freerepublic.com/focus/f-news/1285619/posts.
http://search.proquest.com/docview/1000998163/F037CAFD824747F3PQ/2?accountid=14068.

18 Bryan Miller & Joseph Spillane, *Civil Death: An Examination of Ex-felon Disenfranchisement and Reintegration,* PUNISHMENT & SOCIETY, 14(4): 402-28, *available at* http://www.researchgate.net/publication/258181096_Civil_death_An_examination_of_ex-felon_disenfranchisement_and_reintegration.

19 *Id.* at 405.

20 Farhad Manjoo, *What Was Charlie Crist Thinking?* SALON (April 6, 2007), *available at* http://www.salon.com/2007/04/06/crist_10/

21 *Id.*

22 *Id.*

23 *See* Bryan Miller & Joseph Spillane, *Governing the restoration of civil rights for ex-felons: an evaluation of the Executive Clemency Board in Florida,*" CONTEMP. JUST. REV. Aug. 8, 2012, at 1, 2 *available at* http://www.researchgate.net/publication/263729991_Governing_the_restoration_of_civil_rights_for_ex-felons_an_evaluation_of_the_Executive_Clemency_Board_in_Florida.

24 *Id.*

25 *Id.*

26 *Id.*

themselves caught in a backlog of paperwork in Tallahassee.[27]

In March of 2011, at the first Board of Executive Clemency meeting after Governor Rick Scott was elected, the Board voted unanimously to revise and pass more restrictive the rules governing the restoration of civil rights.[28] Under Scott, the Board of Executive Clemency promulgated Rules 9 and 10 of the Rules of Clemency, which provided for two levels of eligibility for restoration of civil rights.[29] Applicants convicted of more serious felonies are now required to wait seven years after the completion of their sentence, and must undergo a full investigation and hearing before the Board.[30] Applicants who fall into the category of less serious offenses must wait five years after the completion of their sentence before applying for the restoration of their rights, but they may be able avoid a hearing.[31] Any applicant whose request for restoration of civil rights is denied must wait two years before applying again.[32] Because the Board of Executive Clemency meets only quarterly in Tallahassee, an applicant who falls into the Rule 10 category may wait years for a hearing.[33]

The legislature in 2011 enacted a "decoupling" law, which prohibited licensing boards in the state from denying licenses based solely on the fact that the applicant for the license had not had his or her civil rights restored.[34] Agencies are not, however, prohibited from taking the lack of restoration of civil rights into account in making licensure decisions.[35]

II. EFFECT OF FELONY DISENFRANCHISEMENT LAWS IN FLORIDA

The effect of Florida's draconian felony disenfranchisement rules on its citizens and voters is jaw-dropping, especially when compared to the rest of the country. As of 2010, according to the most recent data available, over 1.5 million Floridians are prohibited from voting because of past felony convictions.[36] That number is increased from the approximately 1.1

27 *Id.* at 4.

28 *id.* at 2.

29 *Id.*; *See* Fla. R. Exec. Clemency 9-10; *See also* Reginald R. Garcia, Esq., Florida Executive Clemency: Seeking Mercy and Justice for Convicted Felons, FLORIDA DEFENDER (May 2011), *available at* http://www.floridaclemencyattorney.com/documents/FlDefender_2011_May.pdf.

30 Miller & Spillane, *supra* note 23 at 11; Fla. R. Exec. Clemency 10(A).

31 Fla. R. Exec. Clemency 9(A).

32 Fla. R. Exec. Clemency 14.

33 Miller & Spillane, *supra* note 23 at 2.

34 FLA. STAT. ANN. § 112.01(c) (repealed 2013).

35 FLA. STAT. § 112.01(2) (repealed 2013).

36 Christopher Uggen, Sarah Shannon, & Jeff Manza, *State-level Estimates of Felon Disenfranchisement in the United States*, THE SENTENCING PROJECT (July 2012) at 16, *available at* http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

million Floridians disenfranchised in 2004.[37] Of those 1.5 million disenfranchised in 2010, over 1.3 million have been released from prison or jail and have completed all probation and parole.[38] Given that there were 14.8 million people eligible to vote in Florida in 2010, this means that over 10% of Floridians above the age of 18 were denied their constitutional right to vote.[39] In the entire United States, 5.85 million citizens are disenfranchised, meaning that over 26% of the country's disenfranchised live in the state of Florida.[40]

The effect on African-American Floridians is even more disheartening. In 2010, over a half a million African Americans were disenfranchised, constituting 23.32% of the state's African-American voting age population. Of those disenfranchised, over 83% had completed their sentences.[41] The disparity is undeniable. While one out of ten Floridians are disenfranchised, nearly one of four black Floridians are denied the right to vote.[42]

Felony disenfranchisement laws generally also have an effect on recidivism rates. A seminal study has indicated that there is a statistically significant relationship between voting and the likelihood of recidivism following a felony conviction. The study found that "among former arrestees, about 27 percent of the nonvoters were rearrested, relative to 12 percent of the voters."[43] Thus, while many supporters of felony disenfranchisement justify those laws as demanding proof of rehabilitation prior to the restoration of the right to vote, that logic is flatly backward.

Beyond just the impact of these laws by demographic, the voting rights restoration process is "[. . .] an exhausting, emotionally draining process [. . .] "[44] that undoubtedly has a huge psychological effect on those willing to brave that route. During Governor Bush's administration, restoration of civil rights applications faced a rejection rate of 85%.[45] In the late 2000s,

37 Jeff Manza & Christopher Uggen, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 248 (Oxford (2006); Ryan S. King, *State Felony Disenfranchisement Reform, 1997-2008,* THE SENTENCING PROJECT (September 2008) at 9, *available at* http://www.sentencingproject.org/doc/publications/fd_statedisenfranchisement.pdf.

38 Uggen, Shannon & Manza, *supra* note 36, at 14.

39 *Id.* at 16.

40 Manza & Uggen, *supra* note 37.

41 *Id.* at 17.

42 Uggen, Shannon & Manza, *supra* note 36, at 15-17.

43 Manza & Uggen, *supra* note 37 at 70.

44 Thomas B. Pfankuch, *Clemency Board very cautious in restoring rights,* FLORIDA TIMES-UNION (June 3, 2001), at 1 (quoting Governor Bush), *available at* http://jacksonville.com/tu-online/stories/060301/met_6339439.html#.VXtRAWBtNUQ.

45 Ted Chiricos et al., *Racial Threat and Opposition to the Re-Enfranchisement of Ex-Felons,* 1 INT'L J. CRIM. & SOCIOLOGY 13, 17 (2012), *available at*

more than 60% of the applications were summarily rejected, most often because of outstanding victim restitution or court fees.[46]

The effect of Florida's frequently-in-flux restoration rules can further be understood by looking at the number of people restored to full civil rights in recent years. In 2009-2010, 30,672 Floridians regained the right to vote via the restoration of civil rights.[47] In 2010-2011, 5,771 Floridians were granted a restoration of civil rights.[48] After the change to the rules made by the Scott administration, the number of restorations completed in 2011-2012 dropped precipitously, with only 420 Floridians regaining the right to vote in that year.[49] The Tampa Bay Times reported in June of 2011 that there were more than 95,000 applications for clemency pending before the Board of Executive Clemency.[50] That backlog was dramatically reduced after the vast majority of those were ruled ineligible because of the newly-mandated waiting period.[51]

Finally, Florida's felony disenfranchisement laws have a political effect as well, which is best highlighted by the 2000 Presidential election. In Florida, the presidential race was decided by a 537-vote margin, at a time when approximately 600,000 former offenders were prohibited from voting in the state.[52] Indeed, one study indicated that as many as seven U.S. Senatorial elections would have had a different outcome absent felony disenfranchisement laws.[53] In light of this, the unavoidable political effect on lower turnout elections is certainly not difficult to appreciate.

III. CHALLENGES TO FELONY DISENFRANCHISEMENT IN FLORIDA

Opponents of felony disenfranchisement laws have employed a number of legal strategies to invalidate those laws, but legal challenges to felony disenfranchisement laws across the country have not been particularly successful. The United States Supreme Court first heard a Fourteenth

http://www.lifescienceglobal.com/home/cart?view=product&id=184.

46 *Id.*

47 Margaret Colgate Love, *NACDL Restoration of Rights Resource Project* (July 2013) FL1,at FL3, *available at* https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_fl.pdf.

48 *Id.*

49 *Id.*

50 Michael Bender, *Citrus County Electrician Gets Gov. Rick Scott's First Pardon*, TAMPA BAY TIMES, June 2, 2011, *available at* http://www.tampabay.com/news/politics/gubernatorial/citrus-county-electrician-gets-gov-rick-scotts-first-full-pardon/1173320.

51 Love, *supra* note 47.

52 George Brooks, Comment, *Felony Disenfranchisement: Law, History, Policy and Politics*, 32 FORDHAM URB. L.J. 851 (2005).

53 Manza & Uggen, *supra* note 37.

Amendment challenge to such a law in *Richard v. Ramirez* in 1974.[54] In *Ramirez*, the Court rejected Plaintiffs' Fourteenth Amendment challenge, relying on an exception in Section 2 of the Equal Protection Clause that allows states to abridge the right to vote because of "participation in rebellion, or other crime."[55] Asserting the inconsistent logic that one part of the Equal Protection Clause prohibited a practice that another part of the Clause expressly endorsed, the Court thus concluded that felony disenfranchisement was as least facially constitutional.[56]

In 1985, however, opponents of felony disenfranchisement laws did succeed in convincing the Court that those laws could be intentionally discriminatory in violation of the Fourteenth Amendment. In *Hunter v. Underwood*,[57] the Supreme Court invalidated an Alabama felony disenfranchisement law where a substantial amount of evidence indicated that the law was passed in order to discriminate against black voters.[58] Thus far, *Hunter* has been the only exception to the *Ramirez*.

More recently, voting rights litigators have tried to attack felony disenfranchisement laws under Section 2 of the Voting Rights Act. In 1982, Congress revised Section 2, creating a "results" test that made clear that discriminatory intent is not necessary to establish a violation of Section 2. Under the 1982 Amendment, a violation of Section 2 is established when, in the "totality of circumstances," the impact of a challenged voting practice is discriminatory. To date, the three Circuit Courts of Appeals that have considered Section 2 challenges to felony disenfranchisement laws have all rejected the application of Section 2 to such laws.[59] Given the absence of a circuit split, the Supreme Court has yet to take up the issue, and voting rights litigators seem to be declining to pursue such challenges.

Challenges mounted against Florida's particularly stringent felony disenfranchisement laws have not been more successful than challenges in less restrictive states. The first devastating blow to opponents of felony disenfranchisement was delivered in *Beacham v. Braterman*.[60] In *Beacham*,

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

55 *Id.* at 43.

56 *Id.* at 55.

57 Hunter v. Underwood, 471 U.S. 222 (1985).

58 *Id.* at 233.

59 Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010); Johnson v. Governor of State of Florida, 405 F.3d 1214 (11th Cir. 2005). The Sixth Circuit "assumed" that Section 2 would apply to a felony disenfranchisement law, but found that there was no discriminatory effect resulting from Tennessee's law; Wesley v. Collins, 791 F.2d 1255, 1259-61 (6th Cir. 1986).

60 Beacham v. Braterman, 300 F. Supp. 182, (S.D. Fla.) aff'd, 396 U.S. 12, 90 S. Ct. 153, 24 L.Ed. 2d 11 (1969).

which was decided before *Richardson v. Ramirez*, the U.S. Supreme Court summarily affirmed a trial court's dismissal of Plaintiff's class action lawsuit challenging Florida's felony disfranchisement law. The lower court rejected Plaintiffs' Fourteenth Amendment equal protection claim, based almost entirely on the reasoning that the denial of voting rights following a felony conviction is a longstanding and quite common practice.[61] That court also flatly rejected the allegation that the Plaintiffs' due process rights were violated by the vesting of the power for the Governor of Florida, with the approval of three members of the Cabinet, to restore the right to vote to some people with felony convictions and not to others. The court stated, "[t]he restoration of civil rights is part of the pardon power and as such is an act of executive clemency not subject to judicial control."[62] In a per curiam decision, the Supreme Court affirmed the district court's ruling.[63]

But *Beacham* was not the last challenge to Florida's felony disenfranchisement law. In 2001, acting on behalf of all Floridians convicted of a felony who have completed their sentences but remain ineligible to vote, eight plaintiffs filed a lawsuit challenging Florida's felony disenfranchisement law under the First, Fourteenth, Fifteenth and Twenty-Fourth Amendment, and under the Voting Rights Act.[64] The District Court granted summary judgment to Defendants on Plaintiffs' Fourteenth Amendment claim. It concluded that the Supreme Court's decisions in *Ramirez* and the same District Court in *Beacham* (which summarily affirmed by the Supreme Court) precluded such a claim. Like the Court in *Richardson*, the District Court reiterated that Section 2 of the Fourteenth Amendment expressly sanctioned such an action.[65] The Court likewise rejected Plaintiffs' First Amendment claim.

The District Court in *Johnson* granted Defendant's summary judgment on Plaintiffs' intentional discrimination claims even though Plaintiffs had presented substantial evidence that the challenged provision was initially motivated by improper intent. The court concluded, however, that re-enactment of the law in 1968, without any proven discriminatory intent, relieved the state of any liability for the discriminatory origins of the law.[66]

61 *Id.* at 184.

62 *Id.*

63 *Id.*

64 *Id.*

65 Johnson v. Bush, 214 F. Supp. 2d 1333, 1337-38 (S.D. Fla. 2002) aff'd in part, rev'd in part and remanded sub nom. Johnson v. Governor of State of Fla., 353 F.3d 1287 (11th Cir. 2003) reh'g en banc granted, opinion vacated sub nom. Johnson v. Governor of Florida, 377 F.3d 1163 (11th Cir. 2004) and aff'd sub nom. Johnson v. Governor of State of Florida, 405 F.3d 1214 (11th Cir. 2005)

66 *Id.* at 1337; *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974); *See also* Beachman v.

With regard to Plaintiffs' claim under Section 2 of the Voting Rights Act, the court found that no Section 2 violation could occur where racially-neutral factors caused the disparate impact on minority voters.[67] Essentially dismissing the role of bias in the criminal justice system, the court held that the African-American Plaintiffs were not deprived of the right to vote because of any immutable characteristic they possessed, but rather because they committed criminal acts.[68] Finally, Plaintiffs alleged that the requirement that disenfranchised ex-offenders needed to have paid all victim restitution in order to be eligible for restoration of civil rights was an impermissible poll tax.[69] The court rejected this claim because impermissible poll taxes directly burden the right to vote, and Plaintiffs had no right to vote (because the state had deprived them of it).[70]

When appealed to the Eleventh Circuit, a three-judge panel affirmed the district court's grant of summary judgment on the poll tax claim, but reversed the grant of summary judgment on Plaintiffs' equal protection and Voting Rights Act claims because there were disputed issues of fact.[71] The panel concluded, quite differently than the district court, that the "discriminatory purpose behind Florida's felon disenfranchisement provision establishes an equal protection violation that persists with the provision unless it is subsequently reenacted on the basis of an independent, non-discriminatory purpose."[72]

With regard to the Section 2 claims, the appellate panel rejected the district court's interpretation of the Act. The court noted that the conclusion that the disparate impact is caused by felon's poor decision-making begs the statutorily mandated question: "whether felon status interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[73] Specifically, the panel found that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kind of barriers to political participation on account of race that are prohibited by Section 2. Thus, rendering it simply another relevant

Braterman, 300 F. Supp. 192 (S.D Fla. 1969) aff'd, 396 U.S. 12 (1969).

67 *Id.* at 1341.

68 *Id.* at 1341-42.

69 *Id.* at 1342.

70 *Id.* at 1343.

71 Johnson v. Governor of State of Fla., 353 F.3d 1287 (11th Cir. 2003) reh'g en banc granted, opinion vacated sub nom. Johnson v. Governor of Florida, 377 F.3d 1163 (11th Cir. 2004).

72 *Id.* at 1301.

73 *Id.* at 1305 (internal quotations omitted).

social and historical condition to consider where appropriate."[74]

The state obtained *en banc* review from the Eleventh Circuit, which vacated the panel's judgment and affirmed in its entirety the ruling by the District Court.[75] The Eleventh Circuit concluded that in fact there was no evidence that the original 1868 constitutional disenfranchising provision was motivated by racial animus.[76] And even had the appeals court been satisfied that Plaintiffs had proven racial animus motivating the 1868 provision, it agreed with the district court that such improper motivation would not condemn the 1968 constitutional provision.[77] The appeals court also held that Section 2 of the Voting Rights Act could not be constitutionally read to apply to felony disenfranchisement laws because Section 2 of the Fourteenth Amendment expressly endorsed such laws.[78]

Plaintiffs sought review by the United States Supreme Court, but the Court denied the petition for writ of certiorari.[79] As such, the Eleventh Circuit ruling stands today as binding precedent, creating an inhospitable environment for facial challenges to Florida's felony disenfranchisement law. However, this reality does not mean all litigation solutions are off the table, and certainly does not mean that Floridians cannot obtain substantial relief through legislative and advocacy efforts.

IV. PROPOSALS FOR STRATEGIES TO AMELIORATE THE DEVASTATING IMPACT OF FLORIDA'S FELONY DISENFRANCHISEMENT RULES

As long as Florida, and indeed most of America, views exclusion from the political process as an acceptable or "traditional" punishment for criminal violations, citizens will be burdened and restricted from voting because of felony disenfranchisement law. But the failure of earlier legal challenges does not doom the effort as a whole. By adopting a multi-faceted approach to ameliorating the impact of Florida's felony disenfranchisement laws—including legislative, advocacy and litigation strategies—the situation facing an enormous number of Florida voters can be improved. Three such options are presented below.

74 *Id.* at 1306 (citing Farrakhan v. Locke, No. 96-0076, 2000 U.S. Dist. LEXIS 22212 (E.D. Wash. 2000) ("Farrakhan II").

75 Johnson v. Bush, 405 F.3d 1214, 1214 (11th Cir. 2005).

76 *Id.* at 1219.

77 *Id.* at 1225-26.

78 *Id.* at 1233-34.

79 Johnson v. Bush, 546 U.S. 1015, 126 S. Ct. 650, 651, 163 L. Ed. 2d 526 (2005).

1. Criminal Justice Reform

Perhaps the most important, and least intuitive for voting rights litigators and advocates, solution is reducing the opportunity for Florida's felony disenfranchisement rules to apply to its citizens in the first place. Florida's criminal code is particularly harsh, and as of 2009, Florida had the highest rate among all states of current and estimated former felons as a percent of the adult population—over 14%.[80]

Florida's drug laws are an enormous contributor to the number of its citizens who are prohibited from participating in the political process. A 2009 state-by-state analysis indicated that Florida more severely and more routinely punishes minor marijuana crimes than any other state. And that situation is unlikely to change, because in recent years, state legislators have elected to *enhance* Florida's criminal punishments each time they revisited the state's marijuana penalties[81]

Looking at what specifically constitutes a felony with regard to marijuana is enlightening and frustrating. Possession alone of more than 20 grams of marijuana is a felony punishable by a maximum sentence of 5 years imprisonment and a maximum fine of $5,000.[82] Possession of fewer than 25 plants—including the possession of just a single marijuana plant—is a felony punishable by a maximum sentence of 5 years imprisonment and a maximum fine of $5,000.[83] The sale of more than 20 grams but less than 25 lbs. or less is a felony punishable by a maximum sentence of 5 years imprisonment and a maximum fine of $5,000.[84] Sale or delivery within 1,000 feet of a school, college, park, or other specified areas is a felony punishable by a maximum sentence of 15 years imprisonment and a maximum fine of $10,000.[85]

Hashish and other such concentrates are considered schedule I narcotics in Florida.[86] Possession of hashish or concentrates is a felony in the third degree.[87] Possessing more than 3 grams of hash, selling, manufacturing, delivering, or possessing with intent to sell, manufacture or deliver, hashish or concentrates is also a third-degree felony. Moreover, the offense is

80 Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948-2010*, POPULATION ASSOCIATION OF AMERICA (Arp. 18, 2011), http://paa2011.princeton.edu/papers/111687.

81 Paul Armentano, *The 5 Worst States to Get Busted With Pot*, ALTERNET (May 13, 2011), *available at* http://www.alternet.org/story/150935/the_5_worst_states_to_get_busted_with_pot.

82 FLA. STAT. §§ 775.082(3)(e), 775.083(1)(c), *See* 893.13(6) (2014).

83 FLA. STAT. §§ 775.082(3)(e), 775.083(1)(c), *See* 893.13(6), 893.135(1)(a) (2014).

84 FLA. STAT. §§ 775.082(3)(e), 775.083(1)(c), *See* 893.13(1)(a)(2), 893.135(1)(a) (2014).

85 FLA. STAT. §§ 775.082(3)(d), 775.083(1)(b), 893.03(1)(c), 893.13(1)(c) (2014).

86 FLA. STAT. ANN. § 893.03(1)(c) (West 2014).

87 FLA. STAT. ANN. § 893.13(1)(a)(2) (West 2014).

charged as a second-degree felony if the offense occurred within 1,000 feet of a child care facility between 6 A.M. and 12 midnight, a park or community center, a college, university or other postsecondary educational institute, any church or place of worship that conducts religious activities, any convenience business, public housing, or an assisted living facility.[88]

Of course, drug laws are not the only part of the Florida criminal justice system that imposes felony sentences and potential lifetime disenfranchisement for absurdly minor offenses. For example, in Florida, any property taken that carries a value of more than $300 can be considered grand theft in certain circumstances, which is classified as a third-degree felony.[89] In one case, a couple was convicted of felonious grand theft for stealing razors from a store.[90] In some circumstances, "removing a shopping cart, with intent to deprive the merchant of possession, use, benefit, or full retail value" can constitute a third-degree felony.[91] The idea that a person might be disenfranchised for life for stealing razors or absconding with a shopping cart should should offend the sensibilities of anyone considering the collateral consequences of a criminal justice system with such stiff sentencing structures.

Until politicians and the general public start appreciating the connection between voting rights and criminal justice policy, hundreds of thousands of Floridians will be face a lifetime of exclusion from the political process. Opponents of felony disenfranchisement have the opportunity to make important strides in the advocacy realm by encouraging dialogue about how the over-criminalization of Florida society creates absurd results, particularly in the voting rights arena.

2. *Statewide Constitutional Initiative*

Florida is uniquely situated because its citizens are empowered to amend their state constitution fairly easily and directly through the initiative process. The initiative process is a mechanism that has been utilized to protect voting rights in the past, and could be used now to ease the effects of Florida's felony disenfranchisement rules.

Florida voters can use the constitutional initiative process by gathering petitions signed by a number of voters equal to eight percent of votes cast in the last presidential election. Those signed petitions are not required

88 *Id.*
89 FLA. STAT. ANN. § 812.014(2)(c)(1) (West 2014).
90 Rimondi v. State, 89 So. 3d 1059, 1060 (Fla. Dist. Ct. App. 2012).
91 FLA. STAT. ANN. tit. 46, § 812.015 (West 2012) (effective July 1, 2012).

simply on a statewide basis—they must come from at least one half of the state's congressional districts. To begin the initiative petition process, an individual or group, wishing to propose an amendment must register as a political committee with the Division of Elections.[92] The political committee is then required to submit the proposed initiative amendment petition form to the Division of Elections. Then, the petitions are circulated for signatures. The division only reviews the initiative petition form for sufficiency of its format.[93]

The political committee must pay the Supervisor of Elections for each signature that the Supervisor's office checks, which is either ten cents or the actual cost of checking the signature (whichever is less). The sponsoring political committee pays that fee at the time of submitting the petitions. If the political committee cannot pay for the signature-checking without creating an undue burden on the organization, the organization can seek to have those charges waived by submitting a written certification of that inability to pay. However, if the committee pays any person to solicit signatures, an undue burden affidavit may not be filed in lieu of paying the verification fee.[94]

Once a political committee secures signatures from 10% of the voters required, from at least 25% of the congressional districts, the Division of Elections will send the petition to the Attorney General. The Attorney General then, within thirty days of receipt of that petition, must request from the Supreme Court an advisory opinion regarding the compliance of the text of proposed amendment with Art. XI, Section 3, of the State Constitution and the compliance of the proposed ballot title and summary with Section 101.161 of the Florida Statutes.

The process does not end there, though. Any constitutional amendment brought through the citizen initiative process needs 60% of the vote to pass.[95] The cost of such direct democracy is substantial as well—recent examples attest to that. As of October 2010, the Fair Districts Florida campaign to establish constitutional criteria for redistricting had raised 6.9 million dollars to ensure the petition requirements were met and the electorate was educated on the amendments before voting on them.[96] The Floridians for Youth Tobacco Education, Inc. citizen initiative campaign

92 FLA. STAT. ANN. tit. 9, § 106.03 (West 2013) (effective Nov. 1, 2013).

93 *See* FLA. CODE § 1S-2.009 (effective: May 21, 2014).

94 *See* FLA. STAT. ANN. tit. 9, § 106.191 (West 2014).

95 FLA. CONST. art. 11 § 3.

96 *See Campaign Finance Activity*, FLORIDA DEPT. OF STATE, DIVISION OF ELECTION, http://election.dos.state.fl.us/committees/ComDetail.asp?account=43605 (last visited Mar. 1, 2015).

recently spent over $5.3 million to ensure that the legislature was forced to use tobacco lawsuit settlement money to fund a statewide tobacco education and prevention program.[97]

Despite the cost and procedural hurdles for pursuing a legislative solution to the felony disenfranchisement problem, the current state of public opinion on felony disenfranchisement laws is encouraging, which makes direct democracy quite appealing. Recent public polling efforts indicate that approximately 80% of those polled (and the polls embrace a variety of methodologies) believe that disenfranchisement should end after an individual with a felony conviction completes his or her sentence, including parole and probation.[98]

Fortunately, the effort to utilize this strategy is already underway. A proposed measure that would amend Section 4 of Article VI of the Florida Constitution has already reached the stage where signatures are being collected. The language of the proposed amendment would add the underlined text:

Article VI, Section 4. Disqualifications—

No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection (b) of this section, any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.

No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.[99]

Based on prior election results, supporters will need to collect a minimum of 683,149 valid signatures by February 1, 2016, in order to qualify the measure for the November 2016 ballot.[100]

While the financial and procedural burdens of pursuing a constitutional amendment to revise Florida's felony disenfranchisement laws may seem daunting, the benefits may be equally large. Firstly, this strategy bypasses the courts and legislature that historically have been unfriendly to re-enfranchisement efforts. Secondly, such a campaign would create an opportunity for grassroots organization on a large scale, and would

97 Curry, Christopher, *Tobacco suit amendment on the ballot*, OCALA STAR BANNER, *available at* http://www.ocala.com/article/20061010/NEWS/210100333 (last updated Oct. 10, 2006, 12:00 AM).

98 Chiricos, *supra* note 45, at 16.

99 FLA. CONST., art. VI, § 4 (West 2014).

100 See *Collecting Signatures*, BALLOTPEDIA, http://ballotpedia.org/Laws_governing_the_initiative_process_in_Florida#Collecting_signatures (last visited Mar. 1, 2015).

facilitate public dialogue about the right to vote being worthy of constitutional protections. That type of conversation would likely have ancillary benefits in the broader voting rights struggle because one of the field's greatest challenges has been convincing the general public that voting is a right, not a privilege.

3. Strategic Litigation

Facial challenges to felony disenfranchisement laws brought under the Constitution or the Voting Rights Act have been minimally successful. While certainly not a novel suggestion, the use of strategic litigation bringing as-applied challenges to these laws has a strong appeal as part of a multi-pronged strategy in the overall effort to re-enfranchise Floridians who have had been involved in the criminal justice system.[101] And while this strategy has long been contemplated, its effectuation has been absent or excruciatingly slow in most instances.

A 2002 Harvard Law Review article recommended the use of strategic litigation, aiming at undermining felony disenfranchisement laws in small ways, particularly given the minimal success litigators have had in obtaining judicial invalidations of state disenfranchisement laws.[102] Certainly no one could argue that *Richardson* read in light of *Hunter* precludes all challenges to the administration of a state's clemency or restoration of civil rights process if that process can be shown to discriminate on the basis of race.

The Harvard Law article suggested two particular avenues of targeted attack.[103] First, the article recommended challenges to the choice of disqualifying crime, arguing that "*Richardson* did not address directly whether a state might choose among disqualifying crimes in a way that violates the Constitution."[104] Such an approach seems more suited to states that still attach disenfranchisement to the commission of "infamous" crimes (i.e., it is unclear exactly what crimes are disqualifying), but the arbitrary classification of felonies in Florida could provide some opportunity to test this strategy. Second, the article pointed to susceptibility of restoration conditions to constitutional and Voting Rights Act challenges.[105] Particularly in Florida, challenges might be promising where restoration is

101 *See IV. One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HAR. L. REV. 1939, 1959 (2002).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

granted on arbitrary basis, or where the restoration process is so long or so opaque as to constitute a due process violation. Given the judiciary's resistance to striking down felony disenfranchisement laws on their face, the article astutely noted that "[r]estricting the manner in which a state restores a felon's voting rights does not limit that state's power to take away the right to vote."[106]

So why have such targeted litigations efforts failed to materialize? In Florida, the lack of transparency with which the clemency process operates, along with the failure of the Board to offer reasons for its actions, certainly hamstrings the ability of challengers to mount an attack. For example, the Office of Executive Clemency refuses to release racial data on the restoration of civil rights applications it receives, despite such data being requested by the application form itself.[107] Often times, during clemency hearings, the Governor announces that restoration of civil rights application is denied without any explanation to the public viewing those hearings.[108] A first step in creating an environment more hospitable to such strategic litigation would be vigorous public record requests and litigation, if necessary, to obtain data that would support arbitrariness allegations. When litigators are fully informed of all relevant data they will be able to evaluate whether strategic litigation really is a strategy likely to provide any relief.

CONCLUSION

While voting rights advocates and litigators frequently find themselves mired in frustration and failure in their battle to ensure that every Floridian, even those who have been involved with the criminal justice system, is afforded his or her constitutional right to vote, the battle is not lost. Judicial rejections of facial challenges to felony disenfranchisement laws do not mean that there are no tools left to resist disenfranchisement efforts. By replacing broad legal challenges with advocacy and strategic litigation approaches, felony disenfranchisement challengers might find themselves with an enthusiastic base of grassroots support and with improvements in the political exclusion of hundreds of thousands of Floridians.

106 *Id.* at 1962.

107 *Id.* at 1944-46.

108 Bryan Lee Miller and Joseph Spillane, *Governing the Restoration of Civil Rights For Ex-Felons: An Evaluation of the Executive Clemency Board in Florida*, 15 CONTEMP. JUST. REV. 413, 423-24 (2012).