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THE PRICE OF DEMOCRACY: EVALUATING THE EXCESSIVE FINES CLAUSE IN LIGHT OF FLORIDA FELON DISENFRANCHISEMENT

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INTRODUCTION

The Florida legislature is intent on disenfranchising felons in violation of the Eighth Amendment's Excessive Fines Clause.[1] Florida Statutes section 98.0751 (2021), which requires ex-felons to pay all "fines or fees" attributed to their sentence prior to restoration of their voting rights, constitutes an unconstitutionally excessive fine.[2] The Eighth Amendment's Excessive Fines Clause fails to protect the Florida electorate from unconstitutional and discriminatory policies and necessitates the creation of a new test better formulated to ensure the protections guaranteed within the Clause.[3] When utilizing the Clause, the current analysis of proportionality is insufficient.[4] Because proportionality is a subjective measure, any analysis of the Clause should not be limited solely to the fine's proportionality to the crime, but rather should consider: (1) the offender's ability to pay and (2), in instances of right forfeitures, the weight of the right infringed.[5]

The need for a more comprehensive excessive fines evaluation is illustrated by the story of Desmond Meade.[6] Following the completion of his prison sentence, successful reintegration into society, and graduation from law school, Meade was denied the right to vote for his own wife in her run for public office.[7] He was permanently disenfranchised by the State of Florida solely on the grounds that he is an ex-felon.[8] Thereafter, however, he defied all odds and led coalition members and ex-felons alike to a victory at the polls; wherein Amendment 4 passed with an overwhelming majority, ensuring the automatic restoration of ex-felon voting rights following successful completion of their sentence.[9] Yet the State of Florida, in an assault on

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[1] *See* discussion *infra* Sections II.A–C.

[2] *See* FLA. STAT. § 98.0751 (2021); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[3] *See* U.S. CONST. amend. VIII.

[4] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (citing Austin v. United States, 509 U.S. 602, 622–23 (1993)).

[5] *See id.* at 336–37 ("[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents. . . . If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional."); *see also* discussion *infra* Sections III.B, III.D.

[6] *See* Brit McCandless Farmer, *Florida Denies Amendment 4 Advocate Desmond Meade Full Pardon*, CBS NEWS (Sept. 27, 2020), https://www.cbsnews.com/news/florida-amendment-4-advocate-desmond-meade-pardon-2020-09-27/ [https://perma.cc/XMY5-5BPQ].

[7] *See* Chris Kromm, *Campaign Mounts for 'Second Chances,' Restoring Voting Rights in Florida*, FACING SOUTH (Mar. 24, 2017), https://www.facingsouth.org/2017/03/campaign-mounts-second-chances-restoring-voting-rights-florida [https://perma.cc/WJ63-JMCJ].

[8] *Id.*

[9] *Id.*

both the public will and private liberties, ensured the victory was short-lived, by subsequently passing Senate Bill 7066—an unconstitutionally excessive fine.[10] But now, for the first time in history, this assault will not go unanswered, as this Note proffers the Excessive Fines Clause is *finally* ready to speak.[11]

This Note aims to show how the current test of proportionality is insufficient in combatting excessive fines, especially considering the racist and discriminatory practices of felon disenfranchisement.[12] In Part I, this Note evaluates the background of the Eighth Amendment's Excessive Fines Clause and its recent incorporation against the states.[13] Part II will provide insight into the history of felon disenfranchisement in Florida and the fight for voter restoration through the passage of Florida Amendment 4.[14] This section will then tell of the subsequent implementation of Florida Statutes section 98.0751 requiring ex-felons to pay all fines and fees associated with their sentences.[15] Part III will provide the new and improved test for weighing the Excessive Fines Clause.[16] This section will evaluate the old test of proportionality before suggesting the test be adapted to include the ability to pay and the weight of the right infringed.[17] Finally, Part IV will apply the new test to Florida Statutes section 98.0751 and illustrate how the Court should rule in its evaluation of not only this bill but also in like circumstances.[18] While this Note focuses particularly on the weight of the right to vote as compared to the excessiveness of the fine, this test can be broadly applied to any infringement of a right via fines, through the lens of proportionality.

If the Excessive Fines Clause fails to protect citizens from the forfeiture of their most basic and fundamental right—the right to vote—through fines and fees implemented by the state, then this Clause is nothing more than an empty promise of equity.

I. BACKGROUND OF THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE

The Excessive Fines Clause was first enunciated in 1215, however, it was not incorporated against the states until 2019.[19] Now, any evaluation under the Clause

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[10] *See generally* S.B. 7066, Reg. Sess. (Fla. 2019) (enacted in FLA. STAT. § 98.0751 (2021)); U.S. CONST. amend. VIII ("nor excessive fines imposed").

[11] *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) (incorporating the Excessive Fines Clause against the states for the first time in history).

[12] *See* discussion *infra* Section II.A; s*ee generally* Sarah A. Lewis, *The Disenfranchisement of Ex-Felons in Florida: A Brief History*, 40 ECAN BULLETIN 10 (Dec. 2018).

[13] *See* discussion *infra* Part I.

[14] *See* discussion *infra* Part II.

[15] *Id.*

[16] *See* discussion *infra* Part III.

[17] *Id.*

[18] *See* discussion *infra* Part IV.

[19] Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

hinges on the sole factor of proportionality.[20] The current analysis, however, needs to be expanded in order to fully encompass the stated goal of proportionality.[21]

A. Historical Context of the Excessive Fines Clause

The Excessive Fines Clause traces its lineage to the Magna Carta.[22] The Clause is now formally codified in the Eighth Amendment of the U.S. Constitution, stating, "excessive fines [shall not be] imposed."[23] Despite the Clause's expansive history and codification in the Constitution, the Excessive Fines Clause has seen relatively minimal litigation—until recently.

The roots of the Excessive Fines Clause stem from the Magna Carta, written in approximately 1215.[24] It required that a fine must "not be so large as to deprive [an offender] of his livelihood."[25] However, despite the Magna Carta's guarantees, seventeenth-century Stuart kings continued to use excessive fines as a means of raising revenue, furthering political blackmail, and imprisoning citizens indefinitely for a failure to pay.[26] Further, the English Common Law recognized the right of the sovereign to seize property as a form of punishment.[27] In fact, a person convicted of treason could have his estate subjected to forfeiture.[28] The gravitas of the offense justified the forfeiture.[29]

When establishing both the American colonies and, eventually, the American nation, the American people reemphasized the importance of a limit on excessive fines.[30] In 1787, eight states comprising 70% of the U.S. population, constitutionally restricted excessive fines.[31] While the limitation was codified in the Eighth Amendment,

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[20] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) (holding that the Excessive Fines Clause hinges on the proportionality of the fine to the gravity of the offense).

[21] *See* discussion *infra* Part I.

[22] *Timbs*, 139 S. Ct. at 687.

[23] U.S. CONST. amend. VIII.

[24] *Timbs*, 139 S. Ct. at 687–88 (citing § 20, 9 Hen. III, ch. 14, *in* 1 Eng. Stat. at Large 5 (1225)).

[25] *Id.* at 688 (internal quotations omitted) (quoting Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 271 (1989)).

[26] *Id.* at 688.

[27] David Lieber, *Eighth Amendment—The Excessive Fines Clause*, 84 J. CRIM. L. & CRIMINOLOGY 805, 806 (1994).

[28] *Id.*

[29] *Id.*

[30] *See Timbs*, 139 S. Ct. at 688.

[31] *See id.* (Delineating the history of the limitation on excessive fines in the American colonies, the Court notes, "[a]n even broader consensus [was] obtained in 1868 . . . [when] constitutions of 35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines.").

the right to statutory *in rem* forfeitures, as was previously provided for in English Common Law,[32] remained incorporated into American Common Law.[33]

Despite the centuries-old tradition of restricting excessive fines, the first Supreme Court case evaluating limitations on excessive fines was not decided until 1989 in *Browning-Ferris Industries v. Kelco Disposal, Inc.*[34] In that case, the Court determined the Excessive Fines Clause is not triggered unless the government is a party, or the State receives a share of the damages awarded.[35] This has implicated state policies wherein their punitive damage schemes establish a "split-recovery" of plaintiff's punitive damages, such as the state sharing the plaintiff's damages awarded.[36] This has led state courts to look not only at the share received by the state, but also where the funds are allocated within the state.[37] Courts have routinely been split on the determination of whether these schemes provide a substantial enough interest in the punitive awards on the part of the government as to trigger the Excessive Fines Clause.[38]

Further, where the fees received through these schemes were utilized in the State's remedial funds, such as a tort victim fund, a majority of courts have ruled there was not enough of a punitive nature to the fees as to implicate the Clause.[39] In *Austin v. United States* in 1993, the Court held the Clause could apply in both a civil and criminal context, so long as the payment was, in fact, a fine.[40] *Austin* stated only where the fine is punitive, in some respect, does the Eighth Amendment apply.[41] Thus, recovery schemes that are siphoned to remedial sources are largely held as not punitive enough to trigger the clause.[42]

Still, this is a flawed analysis. The question is not and should not be where the funds *eventually* end up but, rather, whether at its origins the fine is punitive or remedial in nature. A plaintiff receiving awards for punitive damages is, in sum, *punitive*. The state is then receiving benefits from punitive fines. This should, inherently, implicate the Excessive Fines Clause—regardless of where the funds are siphoned or who initially sued. The Supreme Court in *United States v. Halper* determined a

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[32] Lieber, *supra* note 27, at 806.

[33] *Id.* at 805–06, 808.

[34] *See generally* 492 U.S. 257 (1989).

[35] *See id.* at 258.

[36] Vikram Amar & David Reis, *More on Large Civil Fines for Minor Violations: Might They be Limited by the U.S. Constitution's Excessive Fines Clause, and by State Constitutional Provisions*, FINDLAW.COM (Jun. 25, 2004), https://supreme.findlaw.com/legal-commentary/more-on-large-civil-fines-for-minor-violations.html [https://perma.cc/2R6W-AK2F].

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See* 509 U.S. 602, 602 (1993).

[41] *Id.* at 602–03 (holding that a fine need not be entirely punitive in nature and could be used for some remedial purpose and still implicate the Clause (citing United States v. Halper, 490 U.S. 435, 448 (1892))).

[42] *See* Amar & Reis, s*upra* note 36.

remedial purpose for the fine is not itself dispositive.[43] Rather, they acknowledged that fines could serve more than one purpose—both punitive and remedial—and still implicate the Eighth Amendment so long as the purpose was, *in part*, to punish.[44]

The Excessive Fines Clause, however, is not evaluated only under the privatization of the parties, but also in regard to the true excessiveness of the fine.[45] In 1998, the Court, in *United States v. Bajakajian*, ruled the Clause was implicated when the forfeiture was "grossly disproportionate" to the offense.[46] This ushered in a new era of evaluating the Excessive Fines Clause through the lens of proportionality. Proportionality, however, was not limited to merely the offense, but also applied to the facts of the case, the character of the defendant, and the harm caused by the offense.[47]

At present, the Excessive Fines Clause must be proffered by the government or the government must have a substantial interest in the fine,[48] must be largely punitive in nature,[49] and excessive in its totality.[50] Only the federal government was subjected to this analysis.[51] This was because the Excessive Fines Clause had not been incorporated against the states and, therefore, state law reigned supreme in the issuance of fines and fees within state borders.[52] This was finally challenged in *Timbs v. Indiana*, in 2019, wherein the Supreme Court for the first time incorporated the Clause against the states—thereby affirmatively mandating state compliance with the Clause.[53]

B. The Incorporation of the Excessive Fines Clause Against the States in Timbs v. Indiana

The Excessive Fines Clause was unanimously incorporated against the states by the Supreme Court in 2019.[54] While the justices were split on where the right was vested against the states, as in a battle between the Fourteenth Amendment's Due Process Clause or the Fourteenth Amendment's Privileges or Immunities Clause,[55] they wholly agreed that the Excessive Fines Clause should apply against the states.[56]

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[43] *See* 490 U.S. at 448.

[44] *See id.*

[45] *See generally* United States v. Bajakajian, 524 U.S. 321 (1998) (holding that the Excessive Fines Clause hinges on the proportionality of the fine to the gravity of the offense).

[46] *Id.* at 326.

[47] *See id.* at 336–40.

[48] *See id.* at 323.

[49] *See* Austin v. United States, 509 U.S. 602, 609–10 (1993).

[50] *Bajakajian*, 524 U.S. at 334–35, 337.

[51] *See* Scott Bomboy, *Supreme Court Confirms Excessive Fines Clause Applies to States*, CONST. DAILY (Feb. 20, 2019), https://constitutioncenter.org/blog/supreme-court-confirms-excessive-fines-clause-applies-to-states [https://perma.cc/P4M4-WD68].

[52] *See* 139 S. Ct. 682, 686–87 (2019).

[53] *See id.*

[54] *See id.*

[55] *Id.* at 691 (Gorsuch, J., concurring); *id.* at 691–92 (Thomas, J., concurring).

[56] *See id.* at 690–91.

In that case, Tyson Timbs purchased a Land Rover for approximately $42,000 and then proceeded to use the said vehicle to transport heroin within Indiana.[57] Timbs was subsequently arrested and charged with felony dealing in a controlled substance and conspiracy to commit theft.[58] Timbs was sentenced to one year of house arrest and five years of probation.[59] He also was required to pay all fees and costs associated with his sentencing, which totaled $1,203.[60] Shortly thereafter, the state of Indiana brought a civil suit to forfeit Timbs's Land Rover, asserting the vehicle had been used to violate the law by transporting heroin.[61] Although it found that the vehicle facilitated the commission of the crime, the trial court denied the forfeiture because it far exceeded the statutory maximum monetary penalty.[62] The statutory maximum was $10,000, whereas the vehicle approximated $42,000—nearly four times the maximum fine.[63] The court found this forfeiture would be grossly disproportionate to the gravity of the offense and, therefore, unconstitutional.[64]

On appeal, the Indiana Supreme Court rightfully noted the Excessive Fines Clause constrained only federal action and, thus, reversed.[65] The United States Supreme Court granted certiorari and unanimously decided that the Excessive Fines Clause shall apply to the states.[66] That decision effectively incorporated the Clause within the Fourteenth Amendment's Due Process Clause.[67]

The Supreme Court noted the Due Process Clause incorporates protections that are "'fundamental to our scheme of ordered liberty,' or 'deeply rooted in this Nation's history and tradition.'"[68] Evaluating the fundamental nature of the Excessive Fines Clause, the Court relied on the longstanding tradition of limiting excessive fines.[69] It also looked to the current state constitutions of the United States and noted that "all 50 States have a constitutional provision prohibiting the imposition of excessive fines either directly or by requiring proportionality."[70] This made the Clause both fundamental and deeply rooted and, therefore, necessitated its incorporation against the states.[71]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 686–87.
[67] *Id.* at 687.
[68] *Id.* at 686–87 (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010) (alterations omitted)).
[69] *Id.* at 688–89.
[70] *Id.* at 689.
[71] *See id.*

As the Excessive Fines Clause is now incorporated against the states, states must wholly comply with the provision.[72] The problem now lies in the interpretation of the substance of the Clause itself.

C. The Excessive Fines Clause as It Relates to Voting Rights

Generally, the Court has determined that the disenfranchisement of felons does not violate constitutional protections.[73] Justices took the express language in the Fourteenth Amendment excepting from the franchise those involved "in rebellion, or other crime" to mean the State may disenfranchise criminals,[74] even in ways that would not be permissible when applied to the ordinary citizen.[75]

The preeminent case on the constitutionality of felon disenfranchisement is *Richardson v. Ramirez*.[76] In that case, the Justices circumvented decades of constitutionally protected voter rights and determined felon disenfranchisement is treated differently than ordinary disenfranchisement.[77] The majority held felon disenfranchisement was afforded merely rational basis constitutional review—in which deference is given to the State to present a nondiscriminatory purpose on its face.[78] However, Justice Marshall, in his dissent, rejected the majority's opinion and opined that disenfranchisement laws should be evaluated under nothing short of strict scrutiny.[79] Under this evaluation, the state—in Justice Marshall's opinion—had failed to meet its burden.[80]

While *Richardson* sanctioned felon disenfranchisement generally, numerous scholars have argued the Court did not correctly interpret the language of the Fourteenth Amendment, in which it rooted its argument.[81] The "or other crime" language in the Eighth Amendment, as interpreted by the Court, expressly allowed for felon disenfranchisement.[82] But scholars have argued this language was not intended to

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[72] *Id.* at 698 (Thomas, J., concurring).

[73] Wilson v. Goodwyn, 522 F. Supp. 1214, 1216 (E.D.N.C. 1981) ("Provisions in state statutes and constitutions which deny convicted felons the right to vote and hold office do not violate the various rights guaranteed by the Constitution of the United States.").

[74] *See* Richardson v. Ramirez, 418 U.S. 24, 42–45 (1974).

[75] *See* Jones v. Governor of Florida, 975 F.3d 1016, 1025 (11th Cir. 2020).

[76] *See generally Richardson*, 418 U.S. 24 (1974).

[77] *See* Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-examining* Richardson v. Ramirez, 13 TULSA J. COMP. & INT'L L. 279, 280 (2006).

[78] *See id.* at 314–16.

[79] *Id.* at 292.

[80] *Id.* (citing *Richardson*, 418 U.S. at 74–76).

[81] *See generally, e.g.*, Morgan-Foster, *supra* note 77.

[82] *Richardson*, 418 U.S. at 54 ("We hold that the understanding of those who adopted the Fourteenth Amendment as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is

allow for overbroad disenfranchisement for every crime; rather, it was intended for the disenfranchisement of tyrannists.[83] An interpretation based on the quality of the offense is the globally accepted norm.[84] Compared to both other nation and state statutory continua, it is the Court that is an outlier in its interpretation.[85]

However, even still, the mere fact the Court has upheld the general principle of disenfranchising felons does not give states unfettered rein to implement violative policies. For instance, courts have repeatedly struck down state-implemented policies wherein they find them to be violative of the Equal Protection Clause.[86] Interestingly, the policies founded on financial obligations were seemingly held to be more likely to implicate constitutional protections than others.[87]

Consistent with its holding in *Richardson*, the Court has thus far been unwilling to find felon disenfranchisement violative of the Eighth Amendment.[88] The Court, however, in its Eighth Amendment evaluation did not look to the Excessive Fines Clause, but, rather, the Cruel and Unusual Punishment Clause,[89] determining that disenfranchisement on its face is a mere nonpenal exercise of regulation, rather than a form of punishment.[90]

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of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.").

[83] Morgan-Foster, *supra* note 77, at 285 ("[I]t is clear that the words 'or other crime,' when taken in their proper context, were meant to refer to crimes of rebellion and disloyalty, particularly treason.").

[84] *See id.* at 298–304, 311 (discussing the limitation of felon disenfranchisement in Canada, South Africa, and the European Court of Human Rights to certain crimes and factors rather than blanket disenfranchisement).

[85] *See id.* at 310–17 (discussing the various ways in which other nations and state legislatures have chosen to handle felon disenfranchisement on a case-by-case basis rather than an overbroad taking of the right).

[86] *See generally, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972) (holding Texas's primary election filing fee system violated the Equal Protection Clause in part because it absolutely required candidates for local office to pay fees as high as $8,900 to appear on the ballot and provided no option for write in candidacy); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (holding that New York's statute limiting the vote in school district elections to owners of taxable realty within the school district violated the Equal Protection Clause); Cipriano v. City of Houma, 95 U.S. 701 (1969) (holding that the giving of franchise only to property taxpayers was also violative of the Equal Protection Clause).

[87] *See supra* note 86 and accompanying text.

[88] *See* Amy Heath, *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, 347–48 (2017).

[89] *See generally* Thiess v. State Admin. Bd. of Election L., 387 F. Supp. 1038 (D. Md. 1974) (examining the Cruel and Unusual Punishment Clause); *see also* Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972); U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted").

[90] *See* Heath, *supra* note 88, at 348 n.152 (citing Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d. Cir. 1967)).

When a fine is at play it is not the Cruel and Unusual Punishment Clause that should trigger but the Excessive Fines Clause.[91] Thus far, courts have failed to properly evaluate felon disenfranchisement by fine under the correct Clause.

II. FLORIDA AMENDMENT 4

An area of implementation and interpretation that has been especially difficult is the Clause's application to Florida Statutes section 98.0751. Fed up with extensive felon disenfranchisement laws in the state, citizens voted to overturn these repressive policies.[92] However, the state legislature shortly thereafter implemented Florida Statutes section 98.0751, an excessive fine, requiring the payment of all fines and fees associated with sentencing before voting restoration.[93] Florida's failure to address the excessiveness of these fines is both unconstitutional, following the incorporation of the Excessive Fines Clause against the states, and rooted in discriminatory practices—making these fines especially abhorrent.[94]

A. History of the Disenfranchisement of Felons in Florida

As of 2018, 1.7 million Florida felons or former felons were permanently disenfranchised.[95] This equated to nearly ten percent of Florida's electorate,[96] and thirteen percent of voting-aged Black citizens in Florida.[97] The problematic disenfranchisement of Florida felons, which disproportionately affects Black citizens, is neither new nor undocumented.[98] In fact, the disenfranchisement of felons originated specifically to disenfranchise Black men following the ratification of the Thirteenth Amendment.[99] The continuation of disenfranchisement, through the necessity to pay fees and fines to the State, is nothing more than a Black Code by a different name. Where the Fourteenth and Fifteenth Amendments have failed to adequately protect Black voters for decades, the modern solution—but not a permanent one—lies with the Excessive Fines Clause.[100]

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[91] *See* U.S. CONST. amend. VIII ("nor excessive fines imposed"); *cf.* U.S. CONST. amend. VIII ("nor cruel and unusual punishments inflicted") (comparing the differences between the Clauses; the Excessive Fines Clause deals with the imposition of fines, whereas the Cruel and Unusual Punishments Clause handles punishment).

[92] *See* discussion *infra* Section II.B.

[93] *See* FLA. STAT. § 98.0751 (2021).

[94] *See* Timbs v. Indiana, 139 S. Ct. 682 (2019) (incorporating the Excessive Fines Clause against the states); *see also* discussion *infra* Section II.A.

[95] Lewis, *supra* note 12, at 10.

[96] *Id.*

[97] *History of Florida's Felony Disenfranchisement Provision*, BRENNAN CTR. FOR JUST. 1 (Mar. 2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_38222.pdf [https://perma.cc/9TCU-X2EP].

[98] *See id.*; *see also* Lewis, *supra* note 12, at 10.

[99] Lewis, *supra* note 12, at 11.

[100] *See id.* at 10–11; U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any

In 1865, following the Civil War and amid Reconstruction, the Thirteenth Amendment was passed and ratified demanding the abolition of slavery.[101] Former Confederate states would not be so easily deterred.[102] The state of Florida, a former Confederate state, shortly thereafter enacted a series of laws known as the "Black Codes," aimed at criminalizing freedmen.[103] Freed Black men were arrested for vagrancy when they could not prove their gainful employment.[104] The punishments, equally abhorrent, included whipping, imprisonment, or being sold to the highest bidder.[105] By the 1870s, "[t]he Black Codes had their desired effect . . . more than [ninety-five percent] of the convicts in the Florida convict camps were black."[106] Further illustrating their odious purposes, rates of incarceration would increase before elections.[107] Racially charged incarcerations coupled with permanent felon disenfranchisement increasingly silenced the Black vote, despite a constitutional guarantee to the contrary.[108]

Upon re-entry to the Union, Confederate states were required to pass new constitutions—granting the right to vote to all males regardless of race.[109] Florida, dubiously complied by ratifying the amendment, as was required, but also adopted the provision of its 1868 Constitution which automatically disenfranchised all felons.[110] The same crimes which had been expanded by the Black Codes guided the disenfranchisement of voters.[111] Felony disenfranchisement, across the board, was enacted in states with higher Black populations and incarceration rates as a means to maintain racist policies and Black voter suppression.[112] The intent behind these policies was only further exemplified by the increase of incarceration rates before elections.[113]

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law which shall abridge the privileges or immunities of citizens of the United States."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged."). *But see id.* amend. VIII ("[E]xcessive fines [shall not] be imposed.").

[101] Lewis, *supra* note 12, at 11; U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . .").

[102] *See* Lewis, *supra* note 12, at 11 (discussing the adoption of the 1868 Constitution providing for automatic disenfranchisement of felons following the systemic incarceration of freedmen through the Black Codes).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *History of Florida's Felony Disenfranchisement Provision*, *supra* note 97, at 1.

[107] Lewis, *supra* note 12, at 12.

[108] U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[109] Lewis, *supra* note 12, at 11.

[110] *Id.*

[111] *See id.* at 10–11.

[112] *See History of Florida's Felony Disenfranchisement Provision*, *supra* note 97, at 1.

[113] *See* Lewis, *supra* note 12, at 12 ("Not surprisingly, larceny charges increased prior to elections.").

Florida felon voting policies, founded on the racism of the post–Civil War era, have remained largely unchanged.[114] The Florida Constitution was revised in 1968 and the revising committee found "no independent, nondiscriminatory reason for keeping permanent felony disenfranchisement in the constitution."[115] Yet, following this evaluation, the policy remained on the books for an additional fifty years.[116] The state never once even tried to articulate a logical rationale for the blatantly discriminatory practices of felon disenfranchisement.[117]

Felons' restitution of voting rights in the State of Florida, before the passage of Amendment 4, were dependent on the grace and goodwill of state governors.[118] Felons relied not on codified laws or checks and balances but on the whims of a political system, bound to change with the tide of the electorate.[119] Felon voting rights were determined by way of a partisan clemency board.[120] This board was made up of the Florida Governor and two of his cabinet members who received felon petitions for restoration and then held a brief five-minute hearing for the ex-felon to state his case.[121] Restoration rested solely on this system.[122] The standard was far from a universal and objective evaluation, however. The clemency board was rampant with partisan politicization and racism.[123] Former Florida Republican Governor Rick Scott even noted that "there's no [clemency] standard. We can do whatever we want."[124]

For example, when Republican former Florida Governor Charlie Crist was in office from 2007 to 2010, he restored 155,315 ex-felons' voting rights.[125] Comparatively, former Governor Scott restored only just over 3,000 ex-felons' voting rights during his eight years in office.[126] Further, Scott restored more Republican voting rights than Democrat and twice the number of White ex-felons when compared to their Black counterparts.[127] In fact, he restored fewer Black ex-felon voting rights

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[114] *See id.*

[115] *History of Florida's Felony Disenfranchisement Provision*, *supra* note 97, at 2.

[116] *See id.*

[117] *Id.*

[118] Greg Allen, *Felons in Florida Want Their Voting Rights Back Without a Hassle*, NPR (July 5, 2018), https://www.npr.org/2018/07/05/625671186/felons-in-florida-want-their-voting-rights-back-without-a-hassle [https://perma.cc/X62Q-9Z49] (discussing that the process for restoration, prior to the passage of Amendment 4, is dependent on the opinion of a clemency board and decided by a partisan state governor and his cabinet members).

[119] *See id.*

[120] *Id.*

[121] OFF. OF EXECUTIVE CLEMENCY, FLORIDA COMM'N ON OFFENDER REVIEW, RULES OF EXECUTIVE CLEMENCY, 2(C), 12(C).

[122] *Id.* at 1.

[123] Kromm, *supra* note 7.

[124] *Id.*

[125] *Id.*

[126] Allen, *supra* note 118.

[127] Lulu Ramadan et al., *Florida Felon Voting Rights: Here's Who Got Theirs Back Under*

than any of his predecessors for the past half-century—regardless of party affiliation.[128] Today, approximately twenty-one percent of Black Florida voters are disenfranchised by felony disenfranchisement regulations.[129] Black citizens were historically discriminated against—instigating the creation of felon disenfranchisement—and now they continue to face lasting relics of the Jim Crow era.[130]

B. Voting Rights Restoration for Felons Initiative (2018)

The push toward the restoration of Florida felon voting rights was spearheaded by a man named Desmond Meade.[131] Meade, a former addict, was convicted of felony drug and firearm possession.[132] He completed his sentence and was subsequently released from prison in 2004.[133] Upon release, Meade was determined to make a successful reintegration into society.[134] He moved into a homeless shelter, went to college, graduated at the top of his class, and later earned his law degree from Florida International University.[135] In the fall of 2016, Meade worked on his wife's run for the Florida House; however, due to permanent disenfranchisement laws, he could not vote for her.[136] Meade refused to accept this fate, instead leading a statewide campaign lobbying for the automatic restoration of ex-felons' right to vote following the successful completion of their sentences.[137]

Meade worked with numerous coalition groups and chaired both Floridians for a Fair Democracy and the Florida Rights Restoration Coalition to petition the Florida electorate to earn a spot on the 2018 ballot.[138] To succeed, Meade needed eight percent of the total voters in the previous election, a total of 753,603 signatories.[139] Just weeks before the deadline, Floridians for a Fair Democracy gathered more than 799,000 signatures and Amendment 4 earned its spot on Florida's 2018 ballot.[140]

Scott, PALM BEACH POST (Oct. 25, 2018, 12:00 PM), https://www.palmbeachpost.com/news/20181025/florida-felon-voting-rights-who-got-theirs-back-under-scott [https://perma.cc/H6J8-297B].

[128] *Id.*

[129] Kromm, *supra* note 7.

[130] *See* discussion *supra* Section II.A.

[131] McCandless Farmer, *supra* note 6.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] Kromm, *supra* note 7.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Steven Lemongello, *Floridians Will Vote This Fall on Restoring Voting Rights to Former Felons*, SUN SENTINEL (Jan. 23, 2018), https://www.sun-sentinel.com/news/florida/fl-reg-felon-voters-amendment-20180123-story.html [https://perma.cc/8QXZ-EWME].

In order to pass, the ballot initiative needed more than sixty percent of the total vote.[141] The initiative, labeled Amendment 4, passed favorably with nearly sixty-five percent or 5,148,926 total votes.[142] Meade, twelve years after applying for clemency, finally received restoration of the right to vote via Amendment 4.[143]

Florida Amendment 4 was designed to automatically restore ex-felons' right to vote.[144] It specifically denied this automated restoration, however, to those convicted of murder or felony sexual offenses.[145] Felons with these prior convictions would still have to undergo evaluation by the clemency board to receive the full restoration of their voting rights.[146] Additionally, Amendment 4 was specifically worded to grant restoration only after the successful "completion of all terms of sentence including parole or probation."[147] It is this language that has most starkly divided the creators, legislators, and judiciary alike.[148]

C. History and Enactment of SB 7066

Following the passage of Amendment 4, Governor Ron DeSantis signed Senate Bill 7066 into law.[149] SB 7066, introduced by Republican Senator Jeff Brandes, mandates that the language of the Amendment stating, "all terms of sentence" includes the full payment of any and all fines, fees, and costs associated with the conviction.[150] Specifically, the language of the Bill specified repayment, included "[f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole."[151]

Shortly after the enactment of SB 7066, numerous lawsuits were filed throughout the state,[152] one of the more notable of which was *Jones v. DeSantis*, determined on October 18, 2019.[153] *Jones* was filed by seventeen independent plaintiffs and three organizations.[154] It was heard by U.S. District Judge for the Northern District

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[141] *See id.*

[142] *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEDIA [hereinafter *Florida Amendment 4*], https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018) [https://perma.cc/3BYP-XCT2].

[143] Kromm, *supra* note 7.

[144] *Florida Amendment 4*, *supra* note 142.

[145] *Id.*

[146] *Id.*

[147] FLA. CONST. art. VI, § 4.

[148] *See* discussion *infra* Section II.C.

[149] *Florida Amendment 4*, *supra* note 142.

[150] S.B. 7066, Reg. Sess. (Fla. 2019), FLA. STAT. § 98.0751 (2021).

[151] *Id.*

[152] *See, e.g.*, Order Denying the Motion to Dismiss or Abstain and Granting a Preliminary Injunction, Jones et al. v. DeSantis, No. 4:19cv300-RH/MJF (N.D. Fla. Oct. 18, 2019).

[153] *Id.*

[154] *Id.* at 2.

of Florida, Robert Hinkle.[155] Hinkle held that wherein the only reason for denial of the right to vote is the plaintiffs' inability to pay, they must be granted their constitutional right to vote.[156] This ruling, however, applied solely to those seventeen plaintiffs.[157] In a further consolidated lawsuit in May of 2020, Hinkle reinforced the idea that the state cannot prohibit the right to vote merely on the individual's inherent inability to pay.[158] However, he noted, that the state can prohibit those able to pay the fines from voting, prior to fulfilling their financial obligations to the state.[159] Hinkle went further to insist that SB 7066 was an unconstitutional "pay-to-vote system" and that those with civil liens arising from conviction could register to vote.[160] This ruling, however, was subsequently stayed by the Eleventh Circuit Court of Appeals.[161]

In July of 2020, the plaintiffs applied to the Supreme Court to vacate the Eleventh Circuit's stay and to reinstate Hinkle's ruling.[162] However, the justices declined to intervene, and it was remanded to the Eleventh Circuit for argument.[163] Justice Sotomayor authored a dissent and was joined by Justices Ruth Bader Ginsburg and Elena Kagan wherein they emphasized the payment obligation as a "pay-to-vote scheme" and criticized the Court for its failure to intervene when the rights of the electorate, especially on the eve of a presidential election, stood in the balance.[164]

The Eleventh Circuit Court of Appeals insisted, on September 11, 2020, that the plaintiffs failed to offer a showing of constitutional infringement, hinging its argument not on the excessiveness of the fine but rather on a previously rejected "vagueness argument."[165] The failure of the court to even evaluate this bill under the

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[155] *See generally id.*

[156] *See id.* at 29–30, 51–52.

[157] *See* Associated Press, *Florida Governor Loses Latest Bid to Curtail Felon Voting*, BAY NEWS 9 (Mar. 31, 2020), https://www.baynews9.com/fl/tampa/ap-online/2020/03/31/florida-governor-loses-latest-bid-to-curtail-felon-voting [https://perma.cc/K6SM-4W79].

[158] *See* Lawrence Mower, *Federal Judge: Florida Can't Stop Poor Felons From Voting*, TAMPA BAY TIMES (May 24, 2020), https://www.tampabay.com/florida-politics/buzz/2020/05/24/federal-judge-florida-cant-stop-poor-felons-from-voting/ [https://perma.cc/7MXY-XG8N].

[159] *Id.* ("'This order holds that the State can condition voting on payment of fines restitution that a person is able to pay but cannot condition voting on payment of amount a person is unable to pay.'" (quoting U.S. District Judge Robert Hinkle)).

[160] *See id.*

[161] Steven Lemongello, *Ex-Felons' Voting Rights on Hold in Florida after Court Agrees to Hear DeSantis's Amendment 4 Appeal*, ORLANDO SENTINEL (July 1, 2020), https://www.orlandosentinel.com/politics/2020-election/os-ne-amendment-4-stay-20200701-r5gjfmv27jfe5fm5xuvjtgfeua-story.html [https://perma.cc/7FMG-8VER].

[162] Amy Howe, *Justices Decline to Intervene in Florida Voting Dispute*, SCOTUSBLOG (July 16, 2020), https://www.scotusblog.com/2020/07/justices-decline-to-intervene-in-florida-voting-dispute/ [https://perma.cc/6PUX-TTC9].

[163] *Id.*

[164] *See generally* Raysor v. DeSantis, 140 S. Ct. 2600, 2600 (2020) (Sotomayor, J., dissenting).

[165] Jones v. DeSantis, No. 20-12003, 52–55 (11th Cir. Sept. 11, 2020).

Excessive Fines Clause serves as an affront to the Constitution and the Clause's guaranteed protections.[166]

D. Felon Disenfranchisement Is Not Limited to Florida

Generally, almost every state in the United States has some restriction on felon voting rights.[167] As of 2002, ten states permanently disenfranchised ex-felons unless they received restoration by a clemency board.[168] Over the last several decades, the growing trend, however, has been toward restoring the right to vote to ex-felons.[169] In 2020 alone, California, Washington, D.C., Iowa, New Jersey, and Nevada enacted more favorable legislation aimed at restoring ex-felon voting rights, in some way.[170] However, Arizona, Florida, Iowa, Kentucky, Virginia, and Washington still require repayment of fines or fees before restoration of voting rights.[171]

While felon disenfranchisement was once the norm across the nation, the growing trend now demonstrates a path away from permanent disenfranchisement and toward automatic restoration following release from prison.[172] The lingering fear of permanent disenfranchisement is now limited only to a few outlying states.[173] As of 2020, 5.17 million people were disenfranchised due to a felony conviction, approximately two percent of the total U.S. voting-age population.[174] While this is still an inordinate number of disenfranchised persons, it is down by almost fifteen percent since 2016, due to sweeping state restoration policies.[175] Maine and Vermont remain the only states that never revoke the right to vote for felons, even while in prison.[176] While Florida, in stark contrast to both those states and the rest of the country, remains the leader in the nation's overall disenfranchisement by pure numbers.[177]

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[166] *See* U.S. CONST. amend. VIII.

[167] Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781–82 (2002).

[168] *Id.* (For clarity, at the time of this article Florida was still included in mandated clemency board procedures, as well as: Alabama, Iowa, Kentucky, Mississippi, Nevada, Tennessee, Virginia, Washington, and Wyoming.).

[169] *Felon Voting Rights*, NCSL (Jan. 8, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/54HD-HJWY].

[170] Id.

[171] *State Voting Laws & Policies for People with Felony Convictions*, PROCON.ORG (Nov. 4, 2020), https://felonvoting.procon.org/state-felon-voting-laws/ [https://perma.cc/2H2Y-32FG].

[172] *See id.*

[173] *Id.* (discussing Florida, Alabama, Mississippi, Tennessee, Kentucky, Iowa, Wyoming, and Arizona).

[174] *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (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/742W-L7ZY].

[175] *Id.*

[176] *Id.*

[177] *Id.*

Florida alone has 1.1 million disenfranchised persons—largely caused by the individuals' inability to pay obligated fines and fees.[178]

While the push toward restoration is on the rise, the current Excessive Fines Clause analysis is not sufficient to meet the needs of the disenfranchised.[179] Therefore, as more progressive policies are implemented, there needs to be a better and more comprehensive analysis when evaluating the relation between fines and the taking of the fundamental right to vote.[180] This Note proposes a new test modeled after the issues found in Florida, but contemplates wide-ranging application across the nation in the coming years.

III. ESTABLISHMENT OF A NEW TEST

Currently, the Excessive Fines Clause is rooted in proportionality of the fine to the crime.[181] However, if the Court's main goal is to ensure overall proportionality, this lackluster approach cannot exist in solitude.[182] There must be an additional evaluation of the ability to pay, as proportionality is a subjective measure. Further, when the fine implicates a forfeiture of a civil liberty, the weight of the right infringed upon should be evaluated to ensure the forfeiture is not grossly disproportionate to the crime. The addition of these subsequent prongs is not incongruent with the Court's stated goal of proportionality.[183] Rather, they aid in developing a *more proportional* and comprehensive evaluation that guides the principle of proportionality.

A. Evaluation of the Old Test: "Grossly Disproportionate to the Crime"

Forfeitures under the Excessive Fines Clause are currently evaluated under only one test: their proportionality to the crime.[184] The test was first announced in 1998, in *Bajakajian*, in which the Court dictated a fine is excessive "if it is grossly disproportional to the gravity of the defendant's offense" and therefore violates the Eighth Amendment.[185] While the Court failed to offer clear guidance on the understanding of the language "grossly disproportionate," it did identify factors that could serve as guideposts when evaluating the excessiveness of a fine.[186] These factors were

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[178] *See id.*

[179] *See id.*

[180] *See supra* notes 173–78 and accompanying text.

[181] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998) ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." (citing Austin v. United States, 509 U.S. 602, 622–23 (1993))).

[182] *See* discussion *infra* Section III.A.

[183] *See Bajakajian*, 524 U.S. at 334 (explaining the principle of proportionality).

[184] *Id.*

[185] *Id.*; Daniel S. Harawa, *How Much is Too Much? A Test to Protect Against Excessive Fines*, 81 OHIO ST. L.J. 65, 85 (2020).

[186] *Bajakajian*, 524 U.S. at 338–39.

prevalent in the Court's consideration of Bajakajian's case: (1) whether or not he was within "the class of persons for whom the statute was principally designed," (2) the statutory maximum penalties which could be imposed, and (3) the extent of the harm suffered by the government (or injured party).[187]

The Court looked especially toward its prior and similar jurisprudence arising out of the Cruel and Unusual Punishments Clause—where it recognized the importance of reverting to the legislature for developing appropriate punishments.[188] It was under this evaluation the Court determined the Legislature must maintain deference in the creation of proportional punishments.[189] Consequently, the Court decided to interfere only when the punishment is exceptionally disproportionate to the crime, "meaning that if a punishment is within the range set by the legislature, there is a presumption of constitutionality."[190]

Following *Bajakajian*, lower courts were left with little to guide their impending Excessive Fines litigation. The majority of circuits agreed on a four-factor test to guide the proportionality of a fine to the crime:

> (1) The essence of the crime of the defendant and its relation to other criminal activity, (2) whether the defendant fits into the class of persons for whom the statute was principally designed, (3) the maximum sentence and fine that could have been imposed, and (4) the nature of the harm caused by the defendant's conduct.[191]

Other circuits consider similar factors with little variation.[192] For example, the Ninth Circuit explicitly states the listed factors are not exhaustive, while both the Eighth and First Circuits consider a defendant's financial circumstances and his ability to pay.[193] The Eleventh Circuit, however, not only fails to consider the "essence of the crime" but also "the characteristics of the offender."[194] The vagueness delivered by the Supreme Court's "grossly disproportionate" test has rippled amongst the lower

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[187] Kristen M. Haight, Note, *Paying for the Privilege of Punishment*: *Reinterpreting Excessive Fines Clause Doctrine to Allow State Prisoners to Seek Relief from Pay-to-Stay Fees*, 62 WM. & MARY L. REV. 287, 305 (2020); *Bajakajian*, 524 U.S. at 338–39.

[188] Haight, *supra* note 187, at 313.

[189] *See id.* at 314.

[190] *See* Harawa, *supra* note 185, at 84.

[191] *Id.* at 86 (quoting United States v. Mora, 644 F. App'x 316, 317 (5th Cir. 2016)).

[192] *See id.*

[193] *Id.* at 87.

[194] *Id.* (citing United States v. Sperrazza, 804 F.3d 1113, 1127 (11th Cir. 2015) ("We determine whether a fine is 'grossly disproportional' by considering '(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm cause by the defendant.'")).

courts, creating various methods of interpretation.[195] And while no one-factor test is wrong, the culmination of these tests fails to capture the true intricacies of the Excessive Fines Clause and its motivations, thereby wrongfully limiting the scope of the Clause when the Clause was never meant to be limited.[196]

B. Previously Proposed Test: Ability to Pay

Bajakajian made clear a fine is only excessive when disproportional to the crime.[197] The Court, however, failed to articulate what exactly constitutes "grossly disproportional."[198] While proportionality, generally, is certainly a step in the right direction, it is not a uniform code for every offender. What may be proportional for one offender may be ruinous for another, depending on his fundamental ability to pay.

> [I]n other words, if it is constitutionally vital that the financial punishment fit the crime—then it is imperative to consider that the same financial sanction punishes different people differently for *identical crimes*. One's degree of suffering when faced with a fine will, of course, depend entirely on their personal access to wealth.[199]

The Court explicitly left open the question of whether personal financial circumstances should factor into the consideration of excessive fines.[200] The answer, however, ought to include looking to historic and court precedent as well as the stated goals of proportionality through a review of one's ability to pay.[201]

In *Timbs*, the Court emphasized that, since the Magna Carta in 1215, there has been a belief that fines "should not deprive a wrongdoer of his livelihood."[202] Further, the Excessive Fines Clause stems from the English Bill of Rights which long maintained the principle that "no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear."[203] Therefore, for centuries, it has been understood that a fine is excessive when the imposition of it would be ruinous for the offender.[204] The Court regularly relies upon historical evaluations when determining the scope of the Excessive Fines Clause.[205] If courts regularly use these very

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[195] *See id.* at 88.
[196] *See* Harawa, *supra* note 185, at 88–89.
[197] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).
[198] *See* Harawa, *supra* note 185, at 67 n.12.
[199] Haight, *supra* note 187, at 313 (emphasis in the original).
[200] Harawa, *supra* note 185, at 93.
[201] *See id.* at 92–94.
[202] Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019).
[203] *Id.* at 688 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 372 (1769)).
[204] *See id.* at 688–89.
[205] *See id.* at 687–89; United States v. Bajakajian, 524 U.S. 321, 335–37 (1998); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 264–68 (1989).

historical works to evaluate the scope of the Excessive Fines Clause, then they should commit themselves to develop a full and complete analysis consistent with the history they cite. To do so would be to look not only to the proportionality of the fine to the crime but also to the defendant's personal financial circumstances.

C. Counterarguments

1. Deterrence

Some argue that financial penalties provide a substantial deterrent effect on would-be prisoners/recidivists.[206] These proponents believe that fines and forfeitures specifically result in even greater deterrence, regardless of sentencing length.[207] The basis of these findings is founded in economics.[208] The theory is that criminals, even when acting irrationally, are "rational economic beings."[209] As economic beings, they are said to inherently understand the diminishing return of committing crimes in light of increasing financial penalties.[210] Therefore, on the aggregate level, the use of financial obligations should deter the desire to commit crime and, even further, decrease recidivation rates.[211] In a study on property crimes in North Carolina, one researcher found the implementation of fines and forfeitures decreased the property crime rate by about 3.32%–3.38%.[212]

However, this Note does not attempt to suggest the dissolution of the use of fines and forfeitures generally. It only attempts to set forth a level of proportionality to the offender's ability to pay. Even the very research that sets forth fines and forfeitures as an effective deterrent effect accounts for varying levels of offender income.[213] This research looks to the practices of Austria, Germany, and Finland, wherein courts calculate the offender's daily income and implement fines based on an offender's ability to pay.[214] This practice both eliminates the worry of poorer offenders who might be ruined by financial obligation and removes the unfair advantage of the wealthy, who are not punished severely enough.[215] The research concludes that the utilization of "day-fines," as they are called, addresses those policy concerns without diminishing the deterrent effects of said policies.[216]

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[206] Todd L. Cherry, *Financial Penalties as an Alternative Criminal Sanction: Evidence from Panel Data*, 29 ATL. ECON. J. 450, 451 (2001).
[207] *See id.* at 455.
[208] *Id.* at 451.
[209] *Id.*
[210] *Id.*
[211] *See id.* at 451–52.
[212] Cherry, *supra* note 206, at 455.
[213] *Id.*
[214] *Id.* at 455–56.
[215] *Id.* at 455.
[216] *Id.*

In contrast, other researchers have found very little correlation between fines and deterrent effects.[217] In Australia, researchers examined the relationship between fines and driving offenses.[218] While fines are the most common penalty in New South Wales for criminal offenses, they show only marginal effects on criminal deterrence.[219] Further, longer licensing revocation periods also did not reduce any likelihood of recidivism.[220] Rather, the greatest indicator of potential recidivism was the individual's characteristics, like age, race, or gender.[221] In general, it has been shown that increasing the severity of the punishment does very little to affect deterrence.[222]

Here the revocation of voting rights mirrors the revocation of driver's licenses. The attempt to punish and deter criminals through the taking of their rights and privileges has no empirical effect on recidivism.[223] Further, there is very little evidence that associated fines with creating a deterrence effect; where there is evidence of deterrence, however, these fines were adjusted for individual income.[224] This Note does not attempt to persuade legislatures to completely abandon financial obligations, but rather to merely account for the offender's personal circumstances.

2. Difficult Implementation

One of the greatest barriers to pay scales is their difficult implementation. When Amendment 4 was passed, it was thought to have restored the right to vote to the 1.4 million felons who had been disenfranchised.[225] However, after the State attached financial obligations to the restoration, only approximately 10,000 people achieved restoration.[226] This was not only because of the felons' inability to pay, but also the administrative nightmare that ensued.[227]

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[217] *See* Steve Moffatt & Suzanne Poynton, *The Deterrent Effect of Higher Fines on Recidivism: Driving Offences*, 106 CRIME AND JUST. BULL.: SYDNEY 1, 1 (2007).

[218] *See generally id.*

[219] *Id.* at 1.

[220] *Id.* at 9.

[221] *Id.* at 10.

[222] *Id.* at 9–10.

[223] *See id.* at 9–10.

[224] Cherry, *supra* note 206, at 455.

[225] Lesley Stahl, *The Legal and Political Fight over Amendment 4, Granting as Many as 1.4 Million Florida Felons the Right to Vote*, CBS NEWS (Sept. 27, 2020), https://www.cbsnews.com/news/amendment-4-florida-felony-voting-rights-60-minutes-2020-09-27/ [https://perma.cc/K45E-8JFD].

[226] NPR Morning Edition, *Floridians with Felony Convictions Must Pay Fines Before They Can Vote*, NPR (Oct. 6, 2020), https://www.npr.org/2020/10/06/920642796/floridians-with-felony-convictions-must-pay-fines-before-they-can-vote [https://perma.cc/B99T-HRXU].

[227] Nina Totenberg, *Supreme Court Deals Major Blow to Felons' Right to Vote in Florida*, NPR (July 17, 2020), https://www.npr.org/2020/07/17/892105780/supreme-court-deals-major-blow-to-ex-felons-right-to-vote-in-florida [https://perma.cc/VR5T-DJRU].

Due to the decentralized process of accounting for felon restitution, it is left solely to individual counties to determine what is owed.[228] Each of Florida's 67 counties has its own process for determining the level of dues owed, none of which are consistent or accurate.[229] In fact, "[t]here is no way of tracking who [has] paid what for the last 40 years."[230] Rather, it will likely take another six years before any comprehensive system is put into place to determine the amounts owed.[231]

While these issues present significant difficulties as to how we determine fines and fees owed to the state, they do more to persuade in favor of pay scales than they do to dissuade. The mere fact an individual *could* have the ability to pay but *cannot* fulfill his obligations because of a failed system demonstrates the very need for a better and more centralized process.

Further, many lower courts already consider a defendant's ability to pay when applying the Excessive Fines Clause.[232] Both the First and Eighth Circuits have held that the fines' impact on a defendant's livelihood is an important consideration.[233] The First Circuit has even insisted that the consideration of whether a defendant's livelihood is impacted is "deeply rooted in the history of the Eighth Amendment."[234] Moreover, various courts already require the evaluation of a defendant's personal financial circumstances when assessing: fines levied in addition to a criminal sentence,[235] bail,[236] civil penalties,[237] tax liens,[238] and sanctions.[239]

If the driving force behind an Excessive Fines Clause evaluation is that of proportionality, then there can be no other option than to consider a defendant's ability to pay.[240] For instance, a relatively minimal fine for one offender can be ruinous to another and, additionally, grossly disproportionate to the punishment the sanction

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[228] *See* Stahl, *supra* note 225.

[229] *Id.*

[230] *Id.*

[231] *See* Raysor v. DeSantis, 140 S. Ct. 2600, 2601 (2020) (Sotomayor, J., dissenting).

[232] Harawa, *supra* note 185, at 95.

[233] *Id.*

[234] United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008).

[235] *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (U.S. SENTENCING COMM'N 2018).

[236] *See* Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018) ("To satisfy the Due Process principles articulated by Supreme Court precedent, [a judge] must conduct an inquiry into criminal defendants' ability to pay prior to pretrial detention.").

[237] *See* United States v. J. B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974) ("As the court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay.").

[238] *See* Mathews v. Comm'r, 110 T.C.M. (CCH) 483 (T.C. 2015) (noting that I.R.S. regulations set forth the relevant considerations for determining ability to pay).

[239] Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Loc. Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009) ("A district judge therefore should take the sanctioned party's resources into account when setting the amount of a Rule 11 sanction.").

[240] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

intended to inflict. Thus, the evaluation of a defendant's ability to pay should be added as the second prong of a proportionality-driven test when evaluating the Excessive Fines Clause.

D. New Proposed Test: Weight of the Right Infringed

The proposed first and second prongs of the new test for evaluating the Excessive Fines Clause, (1) proportionality and (2) ability to pay, still do not fully account for the problems faced in Florida regarding Senate Bill 7066. The Excessive Fines Clause has dealt minimally with the taking of liberties; however, one should be dubious when a state's revenue scheme can rebuke a citizen's fundamental rights for the mere failure to pay already exorbitant fines. Thus, it is imperative that when fundamental liberties are at stake, due to the imposition of a fine, the Excessive Fines Clause includes a third prong balancing the weight of the right infringed. While most citizens would generally agree that the continued protection of constitutionally guaranteed rights is of the utmost importance, it is clear that the government and the people revere some rights more than they do others.[241] This leads to the subjective balancing of the weight of the right infringed through its regarded value in American society.

Right balancing tests are not new or uncommon.[242] Citizens balance the need for security with their enshrined constitutional rights daily.[243] Further, it is not unusual for Americans to prioritize certain rights over others.[244] For example, in a national survey ranking enumerated constitutional rights, 30% of Americans regarded their freedom of speech rights as the most important fundamental right.[245] While the results differed amongst various demographics, such as age and gender, the survey makes clear that, while all rights are vital, Americans have no quarrels with finding some rights more fundamental than others.[246]

Additionally, despite freedoms of speech being recognized as fundamental to Americans' scheme of liberty, citizens are willing to allow the government to infringe on that right to secure their safety.[247] This fact is exhibited by freedom of speech restrictions such as the popularized analogy delivered by Justice Holmes in

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[241] *Americans Say Freedom of Speech is the Most Important Constitutional Right, According to FindLaw.com Survey for Law Day, May 1*, PR NEWSWIRE (Apr. 30, 2015) [hereinafter *Freedom of Speech Survey*], https://www.prnewswire.com/news-releases/americans-say-freedom-of-speech-is-the-most-important-constitutional-right-according-to-findlawcom-survey-for-law-day-may-1-300074847.html [https://perma.cc/4UHR-PUBT].

[242] *See id.*

[243] *See* William Twomey, *A History of Privacy Rights in America: From the Fourth Amendment to the Patriot Act*, 2 COLLOQUIUM: POL. SCI. J. OF B.C. 18, 18–22 (2018).

[244] *See Freedom of Speech Survey*, *supra* note 241.

[245] *Id.*

[246] *See id.*

[247] *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (discussing the holding that freedoms of speech are not unfettered, especially when the safety of the public is at issue).

Schneck v. United States.[248] Holmes, in that case, when upholding a conviction under the Espionage Act for distributing flyers opposed to the draft, wrote "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[249] Holmes further balanced the weight of the right at stake, freedom of speech, with the need for safety, and suggested that all speech was subjected to the clear and present danger test.[250]

Further, following the terror attacks of September 11, 2001, Americans made extensive concessions to their protected fundamental right to privacy in the name of security.[251] This fact is exhibited by the implementation of the USA Patriot Act of 2001.[252] While the Fourth Amendment to the Constitution ensures individual privacy, especially in one's own home, without government oversight,[253] the Fourth Amendment has seen significant adaptations in a post 9/11 world.[254] The Patriot Act severely undercut Fourth Amendment privacy protections by dismissing the need to describe "the place to be searched, and the persons [or] things to be seized."[255] It is further alleged by constitutional scholars that the USA Patriot Act of 2001 serves as a loophole for officials to conduct searches without probable cause or notification to the party searched.[256]

What these examples aim to illustrate is that despite the theoretical ideal that each constitutional right is of equal importance, rights are routinely weighed and ranked against one another.[257] Therefore, when a fine forfeits a civil liberty—such as the right to vote—there needs to be a comprehensive evaluation of the weight of the right infringed as understood in American society. The failure to evaluate the weight of the right infringed *is a failure to evaluate proportionality*.[258] To revoke someone's most fundamental rights for the mere inability to pay a fine, especially in instances of benign crimes, cannot be said to be proportional.[259]

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[248] *Id.*

[249] *Id.* at 52; Carlton F.W. Larson, *"Shouting 'Fire' in a Theater": The Life and Times of Constitutional Law's Most Enduring Analogy*, 24 WM. & MARY BILL RTS. J. 181, 182 (2015).

[250] *Schenck*, 249 U.S. at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

[251] *See* U.S. CONST. amend. IV; Twomey, *supra* note 243, at 18–22.

[252] USA Patriot Act of 2001, 107 Pub. L. No. 56, 115 Stat. 272 (2001).

[253] U.S. CONST. amend. IV ("The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

[254] *See* Twomey, *supra* note 243, at 23–26.

[255] *Id.* at 23.

[256] *See id.* at 24–25.

[257] *See Freedom of Speech Survey*, *supra* note 241.

[258] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).

[259] *See id.* (explaining the excessiveness of a fine is judged by its proportionality between the punishment and the gravity of the offense).

IV. APPLYING THE NEW TEST TO SENATE BILL 7066

A. Is SB 7066 an Excessive Fine Under the Gross Proportionality Test?

SB 7066 is undeniably an excessive fine. To trigger the Excessive Fines Clause, the fine or fee must be created by the state (or the state must have a substantial interest in the fine),[260] must be largely punitive in nature,[261] and must be excessive in its totality.[262]

SB 7066 is proffered directly by the state and siphoned directly to state funds; therefore, the first element of the test is not in question.[263] Rather, one must evaluate whether the fine is punitive enough to trigger the Clause and, if so, if it is excessive in proportion to the offense—i.e., the gross proportionality test, as discussed *supra* Section III.A.[264]

The fines and fees mentioned in SB 7066 refer to two separate payments.[265] There is (1) the fine imposed as part of the sentencing (i.e., a $10,000 fine for a felony of the first or second degree in the state of Florida),[266] and (2) fees associated with the cost of litigation (i.e., court costs and attorney's fees, generally referred to as user fees).[267] As SB 7066 mentions payment of both fines and fees,[268] one must wholly evaluate each under the Excessive Fines Clause.

The first evaluation is that of fines imposed as a matter of sentencing. The state of Florida has a graduated pay scale for the gravity of the offense.[269] It starts at $5,000 for a third-degree felony and increases to $15,000 for conviction of a life felony.[270] These fines are instituted as part of the punishment of the sentencing and are, therefore, as required to trigger the Excessive Fines Clause, punitive in nature.[271]

The second and more complex evaluation is that of fees imposed during proceedings. Fees are regularly understood as court costs or reasonable attorney fees and are presumed to be remedial in nature.[272] A remedial finding, however, as noted

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[260] Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[261] Austin v. United States, 509 U.S. 602, 603 (1993).

[262] *Bajakajian*, 524 U.S. at 337–38.

[263] *See* discussion *supra* Sections I.A, II.C.

[264] *See* discussion *supra* Section III.A.

[265] S.B. 7066, Reg. Sess. (Fla. 2019); FLA. STAT. § 775.083(1)(b) (2021).

[266] § 775.083(b).

[267] *Id.*; Rebekah Diller, *The Hidden Costs of Florida's Criminal Justice Fees*, BRENNAN CTR. FOR JUST. 1, 7, https://www.brennancenter.org/sites/default/files/legacy/Justice/Florida F&F.pdf [https://perma.cc/A2Y5-XD9V].

[268] S.B. 7066, Reg. Sess. (Fla. 2019).

[269] FLA. STAT. § 775.083(1)(a)–(e) (2021).

[270] § 775.083(1)(a)–(c).

[271] *See* Austin v. United States, 509 U.S. 602, 603 (1993).

[272] *Definition of Remedial Costs*, L. INSIDER, https://www.lawinsider.com/dictionary/remedial-costs [https://perma.cc/A4Q4-Q42S].

supra, is not dispositive in denying the implication of the Clause—so long as the purpose of the fee, in some part, is to punish.[273] While fees may have potentially originated for a remedial purpose, the state of Florida has made them punitive. Florida is now coined the "cash register justice"[274] system in large part because of the state's excessive fee gathering practices.[275] Florida relies heavily on the collection of fees to run its judiciary; whereby courts are continually encouraged to increase fees.[276] Coupled with aggressive collection practices, discussed more *infra*, Florida has effectively created a state-sponsored debtor's prison—by punishing indigent defendants for their inability to pay.[277]

Florida, since 1996, has added more than 20 new categories of legal financial obligations (LFOs).[278] Further, the state's aggressive collection practices have resulted in heightened arrests for the failure to pay and the subsequent suspension of driver's licenses.[279] Going further, the State transfers unpaid fees to private debt collection agencies who subsequently impose up to 40% surcharges on unpaid debts.[280] Not only does the state allow for such a transfer, but rather, they require it.[281] Additionally, individuals who have failed to repay the system may be repeatedly incarcerated for contempt—creating a debtor's prison.[282]

The state further includes the payment of any court-mandated private treatments within the meaning of the term "fee".[283] Private institutions charge for treatment services, and these fees are passed down to the criminal offender.[284] Often these individuals' probation is conditioned upon attendance to these treatments.[285] Lastly, the only consideration the State allows for inability to pay lies in a statute that allows the trial court to assess the fee as part of sentencing or as a condition of probation[286]—thereby incorporating the remedial fees into the punitive fines of sentencing.

Thus, while fees have been historically understood as remedial in nature, the State of Florida has created punitive purposes for them. The state's justice system relies heavily on the institution of criminal fees.[287] These fees are often wholly unrelated to their 'remedial' purposes.[288] A remedial purpose of a court fee may be the

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[273] *See* United States v. Halper, 490 U.S. 435, 448 (1892); *see also supra* Section I.A.
[274] Diller, *supra* note 267, at 1.
[275] *See id.*
[276] *Id.* at 1–2.
[277] *Id.* at 1.
[278] *Id.* at 5.
[279] *Id.* at 14.
[280] *Id.* at 2.
[281] *See id.* at 6.
[282] *Id.* at 1, 15.
[283] *Id.* at 7.
[284] *Id.* at 7.
[285] *Id.* at 6–7.
[286] *Id.*
[287] *Id.* at 1.
[288] *Id.* at 8.

cost of operation and administration of justice.[289] However, these fees, like a $500 penalty for solicitation of prostitution, go not to the courts (or even to a prostitution-related cause) but rather to the "administrative costs of treatment-based drug court programs."[290] It cannot be stated that these fees, at present, are not—*at least in part*—punitive. Even Judge William Pryor, the presiding judge, insisted that these fines and fees are a "criminal penalty."[291]

SB 7066 requires the complete payment of all fines and fees before restoration.[292] "SB 7066 makes a clear distinction: Those wealthy enough to pay these debts are deemed sufficiently rehabilitated to vote, and those too poor are not and are thus unworthy of the franchise."[293] While on their face, these fines and fees may not be grossly disproportionate to the crime, it is when one evaluates the fees in relation to an individual's ability to pay and the weight of the right infringed that the fines imposed by Senate Bill 7066 transform into an exceptionally disproportionate excessive fine.

B. SB 7066 Under the Ability-to-Pay Test

Ex-felons, upon release from prison, see dramatically decreased rates of employment and future earning capacities.[294] Further, felons are largely from lower socio-economic classes, with little access to capital or education.[295] Therefore, upon release, they have limited opportunity for successful earning capacity due to a lack of social mobility.[296] The SB 7066 approximate owed fine is about $1,500 per ex-felon.[297] In a class of persons with limited access to funds, generally, and even lesser ability to advance, imputing a fee with no consideration of their ability to pay is nothing short of excessive.

Approximately twenty-seven percent of ex-offenders are unemployed.[298] This percentage is "higher than the total U.S. unemployment rate during any historical

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[289] *See id.* at 8, 27–29; *see also* FLA. STAT. § 938.07 (2020) (describing the usage of the fee towards operational expenses); FLA. STAT. § 939.185(1)(b) (2020) (describing the usage of teen court fees towards administrative costs).

[290] Diller, *supra* note 267, at 8.

[291] Perry Grossman & Mark Joseph Stern, *The Decision Upholding Florida's Jim Crow-Style Poll Tax Is an Affront to Democracy*, SLATE (Sept. 14, 2020), https://slate.com/news-and-politics/2020/09/florida-felony-disenfranchisement-pryor-decision.html [https://perma.cc/RA43-BBXB].

[292] S.B. 7066, Reg. Sess. (Fla. 2019).

[293] Grossman & Stern, *supra* note 291.

[294] *See* Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, AM. ACAD. ARTS & SCIS. 8, 8 (2010).

[295] *Id.*

[296] *Id.*

[297] Stahl, *supra* note 225.

[298] Steve Horn, *With 27 Percent Unemployment, Jobs Crisis Hits Ex-Prisoners the Hardest*, PRISON LEGAL NEWS (Sept. 4, 2018), https://www.prisonlegalnews.org/news/2018/sep/4/27-percent-unemployment-jobs-crisis-hits-ex-prisoners-hardest/#:~:text=Titled%20%E2%80%9COut%20of%20Prison%20%26%20Out,rate%20of%20around%20four%20percent [https://perma.cc/8CS3-NZUD].

period, including the Great Depression."[299] Further, these statistics stem not from a lack of desire to work but from structural employment barriers.[300] The state has failed to offer felons an achievable path to success following incarceration.[301] Rather, any interaction with the criminal justice system (as an offender) diminishes chances for success and increases the potential for poverty.[302] Even when ex-felons obtain employment, they frequently are employed "in the most unstable and lowest-paying jobs, perpetuating a cycle of poverty."[303] The penalties flowing from incarceration, however, are cumulative because they are accrued by those with already minute economic opportunities.[304]

The State of Florida restricts ex-felons from a wide array of potential jobs or careers.[305] The legislature has decided to implement lifetime restrictions based on occupation (bartenders, security guards, real estate agents), place of employment (seaports, schools, nursing homes), and both (nurses and teachers).[306] Notably, the more menial and lower-paying positions do not require the same level of restriction.[307] By way of state policies, forcing ex-felons into reduced waged occupations, Florida has effectively sanctioned ex-felon poverty.

The national poverty guidelines dictate that a single-person household making $12,490 or less a year, falls below the poverty line.[308] That is approximately $1,041 per month. However, the average imposed fine, per ex-felon, approximates $1,500.[309] That means the fine, imposed by the state, equates to nearly forty-four percent above the average ex-felon's monthly income levels. It is a cruel joke that the State chose to restrict ex-felon opportunities for social advancement and increased earning capacities, then *subsequently required* repayment of an exorbitant fee that has no consideration for their ability to pay.

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[299] *Id.*

[300] *See* Western & Pettit, *supra* note 294, at 13–14.

[301] *See id.*

[302] *See* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/73QX-ZM6S].

[303] Horn, *supra* note 298.

[304] Western & Pettit, *supra* note 294, at 8.

[305] *See* GOVERNOR'S EX-OFFENDER TASK FORCE, FLORIDA'S EMPLOYMENT RESTRICTIONS BASED ON CRIMINAL RECORDS: KEY FINDINGS AND RECOMMENDATIONS BASED ON GOVERNOR'S EXECUTIVE ORDER REQUIRING AN INVENTORY OF FLORIDA'S EMPLOYMENT RESTRICTIONS 4 (2007), https://www.aecf.org/resources/floridas-employment-restrictions-based-on-criminal-records/ [https://perma.cc/9Y7R-4NH5].

[306] *Id.*

[307] *See* Darren Wheelock & Christopher Uggen, *Race, Poverty and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality*, NAT'L POVERTY CTR. 1, 40 (2006).

[308] U.S. DEP'T HEALTH & HUM. SERVS., OFF. OF THE ASSISTANT SEC'Y FOR PLAN. AND EVALUATION, 2019 POVERTY GUIDELINES.

[309] Stahl, *supra* note 225.

C. SB 7066 as an Excessive Fine When Forfeiting the Right to Vote

SB 7066 by way of imposing fines and fees and requiring their complete repayment prior to the restoration of ex-felon voting rights, effectively serves as a taking of the right to vote. Therefore, as proposed earlier, when civil liberties are implicated via the Excessive Fines Clause, one must evaluate the proportionality of the weight of the right infringed.[310]

The right to vote is fundamental to American democracy.[311] It is often denoted as "the most fundamental right."[312] Courts have recognized this and have determined that when laws affect the right to vote they should be met with heightened scrutiny.[313] The right to vote "is regarded as a fundamental political right, because [it is] preservative of all rights."[314] Further, the Supreme Court has routinely held that voting is a fundamental right and that a state may not arbitrarily abridge that right.[315] Therefore, the Court articulated a sliding scale of scrutiny when the right to vote is affected.[316] The Court stated that the more severe the burden on the right to vote the stricter the scrutiny.[317] Thus, where the burden on the right to vote is great, and strict scrutiny applies, there must be a showing of a narrowly drawn law to support a compelling state interest.[318] However, when there is a mere minimal burden on the right to vote the Court will defer to the legislature while also noting the importance to maintain "precision of regulation . . . in an area so closely touching our most precious freedoms."[319]

The right to vote, however, like most fundamental rights, is not without regulation.[320] It is, rather, the sliding scale of the burden that determines the validity of such regulations.[321] For instance, the Court has allowed state requirements of the production of identification documents when voting, as it has been determined to be

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[310] *See supra* Part III.

[311] *See* Morgan-Foster, *supra* note 77, at 279 (quoting COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1316 (Dorsen et al., eds. 2003)).

[312] *Id.*

[313] Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1872, 1875 (2009).

[314] Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[315] Heller, *supra* note 313, at 1876.

[316] *Id.*

[317] Heller, *supra* note 313, at 1876; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("[T]he rigorousness of [the court's] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens [the right to vote].").

[318] Heller, *supra* note 313, at 1876; *Burdick*, 504 U.S. at 434.

[319] Heller, *supra* note 313, at 1876–77 (quoting Anderson v. Celebrezze, 460 U.S. 780, 806 (1983)).

[320] *See id.* at 1877–80.

[321] *Id.* at 1876.

a mere indirect impact.[322] However, the Court remains vigilant in the evaluation of restrictions of *who can enjoy the franchise* and afford these restrictions nothing short of strict scrutiny.[323]

The Fifteenth Amendment, and later the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, codified who could enjoy the right to vote.[324] The Fifteenth Amendment stated, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."[325] Since then, the Court has taken extreme measures to ensure the continuation of voting rights to those constitutionally provided the privilege.[326] In 1965, President Lyndon B. Johnson signed into law the first iteration of the Voting Rights Act.[327] This was intended to enforce the Fifteenth Amendment and restrict voter suppression and discrimination in the South.[328] The Act primarily focused on six southern states: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and various counties in North Carolina.[329] For the first time in history, the United States usurped enforcement power over voting rights to protect those who could enjoy the franchise.[330] However, despite both constitutional and congressional guarantees protecting the right to vote the states have remained undeterred in their plight to disenfranchise.[331]

1. SB 7066's Unintended Disproportionate Consequences

SB 7066 has and likely will cause a true and disparate impact among Florida felons.[332] Despite the passage of Amendment 4, of the 1.4 million disenfranchised

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[322] Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J. L. & PUB. POL'Y, 143, 145, 155 (2008).

[323] *Id.* at 145. This Note does not concern itself with the differing review levels of felony versus ordinary disenfranchisement. However, one should note that felony disenfranchisement is subjected to mere rational basis review while other forms of disenfranchisement are afforded strict scrutiny. In this analysis, the standard applied is not important as it is the weight of the right as it relates to proportionality rather than an Equal Protection analysis. For greater insight into the varying levels of scrutiny and why felony disenfranchisement should be afforded a higher basis of review look to: Morgan-Foster, *supra* note 77.

[324] U.S. CONST. amend. XV, § 1.

[325] *Id.*

[326] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1).

[327] Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING, THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 16–17 (Bernard Grofman & Chandler Davidson eds., 1992).

[328] *Id.* at 17.

[329] *Id.* at 19.

[330] *See id.* at 19–21.

[331] *See* discussion *supra* Section I.C.

[332] *See infra* notes 355–71 and accompanying text.

felons in Florida, 774,000 remain unable to vote due to an inherent inability to pay.[333] To combat this, Mike Bloomberg, a former New York City Mayor, and billionaire raised $16 million to be donated to the Florida Rights Restoration Coalition (FRRC), headed by Desmond Meade.[334] The monies donated to FRRC, despite party affiliations of the donor, are not aimed at any particular party's voters.[335]

However, regardless of the State's vigorous argument during litigation that this Bill was intent merely on the collection of debts rather than voter suppression, the true intent is clear. Upon Bloomberg's donation to the FRRC, by request of the Florida Governor, Attorney General Ashley Moody insisted the donations were against state law and ordered an investigation.[336] Moody, in a letter to the Federal Bureau of Investigations, asserted the donations constituted an illegal voter bribe.[337] She cited various state statutes that criminalize paying voters for their vote.[338] Of note, however, is the fact these statutes criminalize the attempt to sway voters on the basis of compensating them for their vote.[339] These donations, however, do not target any particular party or voter, nor do they attempt to sway the vote.[340] Desmond Meade, the leader of FRRC, stated, "[w]e are concerned with people from all walks of life, from all sorts of politics."[341] American Civil Liberties Union attorney Julie Ebenstein emphasized the disconnect between the purported goal of the State—to collect debts—with the reality—to suppress voters: "Florida created an unconstitutional system that prohibits people from voting until their debts are paid. Now the state is objecting to those debts being paid. The state seems intent on preventing voting, rather than collecting payment."[342] As evidenced, the true intent behind SB 7066 was not to collect unpaid debts but to suppress a class of voters—who primarily are unaligned with the Republican stronghold in Florida.[343]

Felon disenfranchisement erodes the Democratic Party's voting base through the reduction of likely Democratic voters.[344] African Americans, who make up a large

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[333] Sam Levine, *Florida's Attorney General Requests Inquiry into Mike Bloomberg's Voting Effort*, THE GUARDIAN (Sept. 24, 2020), https://www.theguardian.com/us-news/2020/sep/24/florida-inquiry-michael-bloomberg-voting-effort [https://perma.cc/T5MW-BHNR].

[334] *Id.*

[335] *Id.*

[336] *Id.*

[337] Letter from Ashley Moody, Fla. Att'y Gen., to Michael McPherson, Special Agent in Charge, Federal Bureau of Investigation, & Richard Swearingen, Comm'n, Fla. Dep't of L. Enf't (Sept. 23, 2020) (on file with author) [hereinafter Letter from Ashley Moody]; *see also* Levine, *supra* note 333.

[338] *See, e.g.*, Letter from Ashley Moody, *supra* note 337; FLA. STAT. § 104.012(1) (2020); FLA. STAT. § 104.061(1)–(2) (2020).

[339] *See* FLA. STAT. § 104.012(1) (2020); FLA. STAT. § 104.061(1)–(2) (2020).

[340] Levine, *supra* note 333 (quoting Desmond Meade).

[341] *Id.* (quoting Desmond Meade).

[342] *Id.* (quoting Julie Ebenstein).

[343] Uggen & Manza, *supra* note 167, at 780–81.

[344] *Id.*

percentage of the disenfranchised, are overwhelmingly more likely to vote Democratic than Republican.[345] Further, White felons are primarily of lower socioeconomic classes who are also more likely to vote blue.[346] Therefore, this type of voter suppression has real effects on electoral outcomes.[347]

In a sociological study, researchers determined, if given the opportunity to vote, approximately 35% of disenfranchised felons would have exercised the franchise.[348] Due to strong Democratic Party preferences, in this group, that would equate to a Democratic candidate vote of 7 out of every 10 felon/ex-felon votes.[349] The data suggests that when states intentionally disenfranchise this population, the Republican party sees a more than marginal advantage in electoral outcomes.[350] In an evaluation of the 1978 U.S. Senate, the restoration of ex-felon voter rights would have shifted the Democratic majority "from 58:41 to 60:39."[351] Further, if ex-felons were permitted to vote, Democratic candidates were more likely to have prevailed over their Republican counterparts in Florida (1988), Georgia (1992), Kentucky (1998), and Wyoming (1988).[352]

Voter suppression creates real and disproportionate consequences for disenfranchised felons.[353] As evidenced above, if felons were granted their constitutional right to vote, voting outcomes would likely be very different.[354] In turn, as would the rights and privileges these very individuals are afforded. For example, the Florida Gubernatorial race in 2018 presented varying criminal justice platforms by the Democratic and Republican candidates.[355] Democratic candidates called for the decriminalization of marijuana laws, abolition of private prisons, and the reform of mandatory minimum sentencing laws.[356] Meanwhile, Republican candidates defended tougher sentencing guidelines for felony offenses.[357] Following Republican Governor Ron DeSantis's victory at the polls, he did sign into law a criminal justice reform bill.[358] However, it was argued by many Democrats that this bill did not go

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345 *Id.*
346 *Id.*
347 *See id.* at 786–87.
348 *Id.* at 786.
349 *Id.* at 786.
350 *Id.* at 786–87.
351 *Id.* at 789.
352 *Id.* at 789–90.
353 *See id.* at 780–81.
354 *See id.*
355 *See* Daniel Nichanian, *Candidates for Florida Governor Lay Out Criminal Justice Platforms*, THE APPEAL (Aug. 23, 2018), https://theappeal.org/politicalreport/governor-fl-primary/ [https://perma.cc/S9FJ-PMCM].
356 *Id.*
357 *Id.*
358 Ryan Nicol, *Criminal Justice Reform Package Signed into Law*, FLA. POL. (June 29, 2019), https://floridapolitics.com/archives/300081-desantis-signs-criminal-justice-package.

far enough to address the problems in Florida's criminal justice system.[359] The disenfranchisement of felons creates a domino effect: they are unable to vote, which grants Republican candidates more than marginal advantages in election outcomes, Republican candidates thereby win offices, and policies are subsequently enacted that detriment the ex-felon population. Had felons been given the right to vote, many policies that affect their daily lives would likely look very different. Therefore, through voter suppression, not only is their fundamental right to vote forfeited but the later consequences of not being able to exercise the right (which affects charges, sentencing, and employment) are grossly disproportionate to the crime.[360]

Something as seemingly menial as a court fine or fee has a disparate impact on the rights of the disenfranchised, leaving them at the whims of their political enemy. SB 7066 not only infringes a fundamental right, but it unilaterally denies the right to vote to those unable to pay fines and fees of sentencing. In other words, not only does the bill infringe on a fundamental right, but it does so in the worst way possible. The Bill discriminates against who can enjoy the franchise and ultimately fails to represent the full breadth of the electorate; "[m]ass incarceration has been a key instrument in voter suppression . . . since poor and Black people suffer from mass incarceration disproportionately, they will be underrepresented in our electorate."[361]

Therefore, if the stated goal is one of proportionality when evaluating excessive fines, there can be no way a fine or fee—which not only severely burdens the fundamental right to vote but completely denies it—can be anything but grossly disproportional.[362] The failure to evaluate the weight of the right infringed in cases of right forfeitures via the Excessive Fines Clause affords legislatures an unconstitutional loophole into the taking of otherwise constitutionally protected rights.

CONCLUSION

For the first time in history, the Excessive Fines Clause has been incorporated against the states.[363] This recent incorporation coupled with both inconsistent applications of the doctrine and the likely increase of litigation involving the Clause necessitates a more comprehensive test that takes into full consideration the stated goal of proportionality.[364] Because proportionality is a subjective measure it should not be evaluated solely by the fine's proportionality to the crime but also to the offender's ability to pay and, in instances of right forfeitures, the weight of the right infringed.

Senate Bill 7066 undeniably constitutes an excessive fine.[365] It is not only administered directly by the state, but the state also receives benefit from the collection

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[359] *Id.* (quoting Greg Newburn & Rep. Anna Eskamani).
[360] *See supra* notes 351–57 and accompanying text.
[361] Craigie et al., *supra* note 302.
[362] *See* United States v. Bajakajian, 524 U.S. 321, 334 (1998).
[363] *See generally* Timbs v. Indiana, 586 U.S. 1, 1–2 (2019).
[364] *Bajakajian*, 524 U.S. at 334.
[365] *See* U.S. CONST. amend. VIII.

(so much so the State of Florida has been coined the cash-register justice system) and the fines are imposed for largely punitive purposes.[366] While it could be argued the fines and fees themselves are not excessive on their face, it is the fines' effect on the individual offender that should be of note.[367] A perfectly proportional fine for one offender has the potential to be completely ruinous for another.[368] Additionally, when comparing the purpose of the fine with the right it has infringed, the right to vote, there is no doubt the fine itself is grossly disproportionate. If the stated goal of Excessive Fines Clause evaluations is truly proportionality, then the Court must fully evaluate the proportionality of the fine to the individual and the weight of the taking (in this case, the right to vote).[369] Under these evaluations, one would determine that if Senate Bill 7066 were fully evaluated under this Note's proposed prongs, then the bill would be ruled grossly disproportionate and excessive in totality.

The right to vote is fundamental to the American ordered scheme of liberty.[370] It must be preserved. And wherein a restriction by the legislature aims to circumvent a fundamental right altogether, via the outright denial of the right to vote for the failure to pay fines and fees, the fine should be deemed nothing short of excessive. Senate Bill 7066 should fail under the Excessive Fines Clause and be ruled unconstitutional. In the future, similar fines, when implicating the taking of a civil liberty, should consider both the offender's ability to pay and the weight of the right infringed; to do any less is an empty promise of proportionality.[371]

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366 *See supra* text accompanying notes 272–75.
367 *See* discussion *supra* Section III.B.
368 *Id.*
369 *Bajakajian*, 524 U.S. at 334; *see also* discussion *supra* Section III.B.
370 *See* discussion *supra* Section III.D.
371 *Bajakajian*, 524 U.S. at 333–34; *see also* discussion *supra* Section III.B.