CONSTITUTIONAL LAW — EQUAL PROTECTION — ELEVENTH CIRCUIT UPHOLDS STATUTE LIMITING CONSTITUTIONAL AMENDMENT ON FELON REENFRANCHISEMENT. — *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

Florida's legislature has a history of ignoring Florida's voters. When sixty-eight percent of voters chose to amend the state constitution to regulate polluters in the Everglades, the legislature "effectively neuter[ed]" the provision.[1] After seventy-one percent voted to amend the state constitution to legalize medical marijuana,[2] the legislature banned smoking it.[3] In 2018, this trend persisted when Florida voters chose to amend the state's constitution to allow most people with felony convictions to vote after completing their sentences.[4] In response, the legislature enacted a statute conditioning reenfranchisement on the payment of hundreds, sometimes thousands, of dollars in court fees — effectively barring from voting the vast majority of the 1.4 million people whom the constitutional amendment sought to reenfranchise.[5] Recently, in *Jones v. Governor of Florida*,[6] the Eleventh Circuit upheld that law against claims it violated the Fourteenth and Twenty Fourth Amendments.[7] In applying a highly deferential standard of review, the court failed to consider how the law's inconsistency with the electorate's wishes undermined the very reasons for its deferential posture.

For at least 175 years, Florida kept people convicted of felonies from voting for the rest of their lives.[8] In 2018, Floridians decided it was time

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[1] Mary Ellen Klas, *Sugar's Decades-Long Hold over Everglades Came with a Price*, MIA. HERALD (July 12, 2016, 3:19 PM), https://www.miamiherald.com/news/local/environment/article88992067.html [https://perma.cc/5TLL-8KRG].

[2] Samantha J. Gross, *Smokable Medical Pot Is Now Legal in Florida After Ron DeSantis Signs Bill*, TAMPA BAY TIMES (Mar. 18, 2019), https://www.tampabay.com/florida-politics/2019/03/18/smokable-medical-pot-is-now-legal-in-florida-after-ron-desantis-signs-bill [https://perma.cc/D575-ES6D].

[3] *Id.*

[4] *See* Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/AP8Z-8J4R]. This approach was not just the latest in a pattern for the Florida legislature; legislation nullifying or weakening policies enacted directly by voters is increasingly common around the country. *See* Timothy Williams, *First Came a Flood of Ballot Measures from Voters. Then Politicians Pushed Back.*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/us/referendum-initiative-legislature-dakota.html [https://perma.cc/4M9C-5GQF].

[5] *See* Michael Morse, *The Future of Felon Disenfranchisement Reform: How Partisanship and Poverty Shape the Restoration of Voting Rights in Florida*, 109 CALIF. L. REV. (forthcoming June 2021) (manuscript at 9, 49–50) (on file with the Harvard Law School Library).

[6] 975 F.3d 1016 (11th Cir. 2020).

[7] *Id.* at 1025.

[8] *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1290 (N.D. Fla. 2019), *aff'd*, 950 F.3d 795 (11th Cir. 2020) (per curiam). Until very recently, three other states had such a broad policy. German Lopez, *The State of Ex-Felons' Voting Rights, Explained*, VOX (Sept. 18, 2020, 10:40 AM),

for change.[9] Enacted through a statewide ballot initiative amassing nearly sixty-five percent of the vote,[10] Amendment Four to the constitution provides that disenfranchisement "from a felony conviction shall terminate . . . upon completion of all terms of sentence including parole or probation."[11] The next June, Governor Ron DeSantis signed into law Senate Bill (SB) 7066,[12] which defined "completion of all terms of sentence" to include legal financial obligations (LFOs) — including restitution to victims and "full payment of fines or fees ordered by the court."[13] Governor DeSantis asked the Florida Supreme Court whether it agreed with SB 7066's interpretation of the amendment, which it did.[14] Seventeen people formerly convicted of felonies, who would be able to vote if not for their inability to pay LFOs, sued state officials, claiming SB 7066 violated the Equal Protection and Due Process Clauses, constituted a poll tax, and was impermissibly vague.[15]

After a trial,[16] the district court ruled SB 7066's "pay-to-vote system . . . unconstitutional in part" and granted a permanent injunction.[17] Judge Hinkle held that prohibiting voting because of people's inability to pay LFOs violated the Equal Protection Clause[18] and conditioning the franchise on fees violated the Twenty Fourth Amendment.[19] He

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https://www.vox.com/voting-rights/21440014/prisoner-felon-voting-rights-2020-election [https://perma.cc/4YZB-J94U]. Now, none do. *Id.*

9 *See* Robles, *supra* note 4.

10 *See Florida Amendment 4*, CNN (Dec. 21, 2018, 2:06 PM), https://www.cnn.com/election/2018/results/florida/ballot-measures/1 [https://perma.cc/Q9BQ-KCSY].

11 FLA. CONST. art. VI, § 4. The amendment exempted individuals "convicted of murder or a felony sexual offense" from reenfranchisement. *Id.*

12 *See CS/SB 7066: Election Administration*, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2019/7066 [https://perma.cc/NEK9-XRYL].

13 FLA. STAT. § 98.0751 (2020).

14 *See* Advisory Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1072, 1084 (Fla. 2020) (per curiam).

15 *See* Jones v. DeSantis, 410 F. Supp. 3d 1284, 1289–90 (N.D. Fla. 2019), *aff'd*, 950 F.3d 795 (11th Cir. 2020) (per curiam); First Amended Complaint at 34–46, *Jones*, 410 F. Supp. 3d 1284 (No. 19-cv-00300).

16 Before the trial, the district court granted a preliminary injunction partially blocking SB 7066's enforcement against the plaintiffs. *See Jones*, 410 F. Supp. 3d at 1310–11.

17 Jones v. DeSantis, 462 F. Supp. 3d 1196, 1250 (N.D. Fla. 2020).

18 *See id.* at 1231.

19 *See id.* at 1234. The Governor and Secretary of State petitioned the Eleventh Circuit for an initial hearing en banc and moved to stay the injunction. *See* McCoy v. Governor of Fla., No. 20-12003, 2020 WL 4012843, at *1 (11th Cir. July 1, 2020). The court granted both requests. *Id.* The Supreme Court declined to vacate the stay. Raysor v. DeSantis, 140 S. Ct. 2600, 2600 (2020) (mem.). Excoriating the Court for "condoning disfranchisement," *id.* at 2603 (Sotomayor, J., dissenting), Justice Sotomayor noted that refusing to vacate the stay — imposed nineteen days before the voter-registration deadline — seemed inconsistent with the *Purcell* principle prohibiting lower courts from making last-minute election rule changes, *see id.* (citing Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam)). *See also* Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.").

wrote that the plaintiff's due process arguments "carr[ied] considerable force,"[20] although it is unclear whether the court ruled on those claims.[21]

The Eleventh Circuit reversed and vacated the injunction.[22] Writing for the en banc court, Chief Judge William Pryor[23] ruled that reenfranchising people with felony convictions only after LFOs are satisfied, regardless of ability to pay, is constitutional.[24] Chief Judge Pryor applied rational basis review to the plaintiffs' equal protection claim after determining that SB 7066 neither implicated fundamental rights nor employed a suspect classification.[25] Regarding fundamental rights, he wrote, "[s]tates may restrict voting by felons in ways that would be impermissible for other citizens," based on the "express provision for felon disenfranchisement" in the Fourteenth Amendment.[26] And the classification between returning citizens who have and have not paid their LFOs "does not turn on membership in a suspect class"[27] — *all* people with felony convictions must complete their sentences before voting. Moreover, "wealth is not a suspect classification."[28] SB 7066 satisfied rational basis review, as it advanced two legitimate state interests: "disenfranchising those who disregard the law and restoring those who satisfy the demands of justice."[29]

Turning to the Twenty Fourth Amendment, Chief Judge Pryor ruled that LFOs (including fees) were not taxes because they were meant not only to raise revenue, but also to punish.[30] Even if they were taxes, he wrote, there was no disenfranchisement "*by reason of* failure to pay"[31] them, because inability to pay was not the *reason* for SB 7066's requirements — reenfranchising "only fully rehabilitated felons" was.[32] Chief Judge Pryor added that the law was not impermissibly vague, as difficulty determining outstanding LFOs arose "not from a vague law but from factual circumstances that sometimes make it difficult to determine

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[20] *Jones*, 462 F. Supp. 3d at 1241.

[21] *Compare Jones*, 975 F.3d at 1027, *with id.* at 1090 (Jordan, J., dissenting) ("The majority says that the district court did not decide whether Florida's reenfranchisement scheme violates the Due Process Clause. In my view, the district court concluded that the LFO requirement violates due process." (citation omitted)).

[22] *Id.* at 1025 (majority opinion).

[23] Chief Judge Pryor was joined by Judges Newsom, Branch, Grant, Luck, and Lagoa.

[24] *See Jones*, 975 F.3d at 1028–37.

[25] *Id.* at 1029–30.

[26] *Id.* at 1029 (citing U.S. CONST. amend. XIV, § 2; Richardson v. Ramirez, 418 U.S. 24, 54–56 (1974)).

[27] *Id.* at 1030.

[28] *Id.*

[29] *Id.* at 1034.

[30] *Id.* at 1037–39.

[31] *Id.* at 1037 (emphasis added) (quoting U.S. CONST. amend. XXIV, § 1); *see id.* at 1046.

[32] *Id.* at 1046 (plurality opinion). This line of reasoning was the only section of Chief Judge Pryor's opinion that Judges Branch, Grant, and Luck declined to join.

whether an incriminating fact exists."[33] Finally, he held the plaintiffs were not denied procedural due process, as they lost their voting rights through legislative, not adjudicative, action and because Florida "provides adequate procedures to challenge . . . ineligibility."[34]

Judge Lagoa concurred to offer another reason why heightened scrutiny was unwarranted.[35] She wrote that because people with felony convictions might be granted clemency or have their LFOs modified or terminated, "indigent felons in Florida are not deprived of reenfranchisement solely because of inability to pay."[36]

Judge Martin[37] dissented, explaining that, by creating a pathway for reenfranchisement, Florida "created a due-process interest."[38] The state then maintained an impermissibly high risk of erroneously depriving people of that interest, evidenced by its inability to determine amounts of outstanding or paid LFOs, along with the years-long "administrative quagmire" of processing registrations.[39]

Judge Jordan dissented,[40] writing that the Equal Protection Clause requires heightened scrutiny where (a) the state disparately alleviates punishment on the basis of wealth,[41] (b) wealth determines political participation,[42] or (c) the "fundamental right" to vote extends to some but not others.[43] He reasoned that SB 7066 would fail even rational basis review, because ability to pay is unrelated to "intelligently exercis[ing] the franchise"[44] and requiring LFOs from people *unable* to pay could not incentivize them to do so.[45] Judge Jordan then turned to due process, explaining that Florida failed to establish adequate procedures for reenfranchisement, including putting those mistaken about their eligibility at risk of (another) felony prosecution.[46] Judge Jordan further wrote that SB 7066 was impermissibly vague due to its "inconsistent, unorderly, and nonsensical" implementation.[47] Finally, he contended that

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[33] *Id.* at 1047 (majority opinion) (citing United States v. Williams, 553 U.S. 285, 306 (2008)).

[34] *Id.* at 1049; *see id.* at 1048–49. Chief Judge Pryor, joined by Judge Lagoa, concurred separately to protest the dissent's prediction that the court's decision would not be "viewed . . . kindly by history," *id.* at 1049–50 (W.H. Pryor, C.J., concurring) (quoting *id.* at 1107 (Jordan, J., dissenting)), noting that such a consideration falls outside judges' constitutional role. *Id.* at 1050.

[35] *Id.* at 1050 (Lagoa, J., concurring).

[36] *Id.* at 1056 (citing Bearden v. Georgia, 461 U.S. 660, 674 (1983)).

[37] Judge Martin was joined by Judges Wilson, Jordan, and J.A. Pryor.

[38] *Jones*, 975 F.3d at 1059 (Martin, J., dissenting).

[39] *Id.* at 1064; *see id.* at 1063–64.

[40] *Id.* at 1065 (Jordan, J., dissenting). Judge Jordan was joined by Judges Wilson, Martin, and J.A. Pryor.

[41] *Id.* at 1075.

[42] *Id.* at 1076 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996)).

[43] *Id.* at 1078–79 (citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 629 (1969)).

[44] *Id.* at 1087 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966)).

[45] *Id.* at 1088.

[46] *Id.* at 1090–97.

[47] *Id.* at 1099; *see id.* at 1097–99.

requiring payment for reenfranchisement amounted to an unconstitutional poll tax,[48] because the fees' "primary purpose . . . is to raise revenue,"[49] and they "exact[] a price for . . . exercising the franchise."[50]

Judge Jill Pryor[51] also dissented, writing that, "seemingly by design,"[52] SB 7066 could "deny the franchise to virtually everyone who may have benefitted"[53] from Amendment Four — "a nullification of the will of the electorate."[54]

In adjudicating the plaintiffs' Equal Protection claim, the Eleventh Circuit — emphasizing the "low bar"[55] the law needed to clear — assumed invalidating SB 7066 would mean flouting the public's will. This idea reflected a well-established justification for rational basis review: respect for the legislature as a politically accountable branch. But in *Jones*, the statute in question — which passed in a gerrymandered legislature and restricts political participation — *undermined* the electorate's will to expand political participation. Instead of recognizing the challenge these circumstances posed to the underpinnings of rational basis review, the court conflated the legislature's will with the people's and mechanically applied a highly deferential standard.

Rational basis review originates partly with the idea that courts should defer to branches reflecting popular will.[56] Justices and scholars have explained that deferential review does not arise from the Fourteenth Amendment itself.[57] Instead, courts intentionally "underenforce" its protections,[58] so that the range of activity *ruled* unconstitutional is smaller than what might actually violate the Constitution.[59]

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48 *See id.* at 1106–07.

49 *Id.* at 1101.

50 *Id.* at 1106 (quoting Harman v. Forssenius, 380 U.S. 528, 539 (2020)).

51 Judge Pryor was joined by Judges Wilson, Martin, and Jordan.

52 *Jones*, 975 F.3d at 1109 (J.A. Pryor, J., dissenting).

53 *Id.*

54 *Id.* at 1112.

55 *Id.* at 1035 (majority opinion).

56 For examples of related but distinct reasons courts should defer, see Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1155–68 (1999); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 205 (1988) (legislature's superior fact-finding capabilities); and Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323 (1987) (difficulty of delineating workable judicial standards).

57 *See* Oregon v. Mitchell, 400 U.S. 112, 247 (1970) (Brennan, J., dissenting from the judgments in part and concurring in the judgments in part) ("[A]s we have consistently held, [rational basis review] is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review."); Robert C. Post & Reva B. Siegel, Essay, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 464 (2000); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 65 n.51 (1997).

58 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216–18 (1978); Ross, *supra* note 56, at 322 & n. 54.

59 Post & Siegel, *supra* note 57, at 465; Strauss, *supra* note 56, at 206.

Why? For one: "in a democratic republic, unelected judges should tread carefully before overruling the judgments of elected representatives."[60] To mitigate the concern that judicial scrutiny is countermajoritarian,[61] rational basis review assumes that respect for the people requires respect for what their representatives do.[62]

In *Jones*, this assumption fails, because the statute undermines what voters likely meant for the amendment to do.[63] Proponents' public campaign and the press repeatedly indicated "at least 1.4 million people would have their right to vote immediately restored."[64] Instead, around four-fifths of those otherwise eligible Floridians with felony convictions were still disenfranchised due to outstanding LFOs a year after Amendment Four passed[65] — a number unlikely to drop.[66] Even if voters knew about the median $1,141 in costs facing a person with one or more felony convictions[67] and intended every cent to be paid before reenfranchisement,[68] it seems even less likely they meant for just *finding out* how much one owes to be "sometimes hard, sometimes impossible."[69] Admittedly, one of the amendment's drafters said he understood it to require fee payment,[70] and the Florida Supreme Court reasoned that voters meant "all terms of sentence" to include even non-punitive costs.[71]

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60 Ross, *supra* note 56, at 323.

61 *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–17 (1962).

62 *See* Fallon, *supra* note 57, at 88–90 (explaining that "the most plausible explanation for . . . highly deferential review," *id.* at 88, is John Hart Ely's theory that "courts, in interpreting the Constitution's more open-ended provisions, should generally defer to the judgments of politically accountable decisionmakers," *id.* at 89); Ross, *supra* note 56, at 318–19.

63 *See Jones*, 975 F.3d at 1110–11 (J.A. Pryor, J., dissenting).

64 Morse, *supra* note 5, at 46; *see, e.g.*, David C. Adams, *Debt Paid? Former Florida Felons Seek Restoration of Right to Vote*, UNIVISION (Oct. 9, 2018 9:35 AM), https://www.univision.com/univision-news/politics/debt-paid-former-florida-felons-seek-restoration-of-right-to-vote [https://perma.cc/3PN3-S6GL].

65 Morse, *supra* note 5, at 9–10.

66 *Id.* at 9; REBEKAH DILLER, BRENNAN CTR. FOR JUST., THE HIDDEN COSTS OF FLORIDA'S CRIMINAL JUSTICE FEES 8 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf [https://perma.cc/Z89W-GQSY] (noting that "[s]tatewide performance standards" anticipate collection of only nine percent of LFOs in felony cases).

67 Morse, *supra* note 5, at 9.

68 Chief Judge Pryor denied that Florida voters believed it "unjust to tell some criminals that they have incurred debts to society that will never be repaid" on the basis of Amendment Four's explicit exclusion of people convicted of murder or sex offenses. *Jones*, 975 F.3d at 1037. But the fact that Amendment Four explicitly excluded certain groups seems to just as easily suggest that *other* groups were *not* excluded. *See id.* at 1108 & n.4 (J.A. Pryor, J., dissenting).

69 *Id.* at 1063 (Martin, J., dissenting) (quoting Jones v. DeSantis, 462 F. Supp. 3d 1196, 1224, 1227 (N.D. Fla. 2020)).

70 Morse, *supra* note 5, at 48–49.

71 Advisory Opinion to the Governor re: Implementation of Amendment 4, the Voting Restoration Amendment, 288 So. 3d 1070, 1081, 1083 (Fla. 2020) (per curiam). The Florida Supreme Court reasoned that the "natural and popular," *id.* at 1081 (quoting Wilson v. Crews, 34 So. 2d 114,

It is still hard to imagine the Floridians who voted to amend their constitution did so intending to benefit almost no one.[72]

Despite the evidence of popular preference the initiative supplied, the Eleventh Circuit conflated the legislature's actions with the public's to justify its deference. Chief Judge Pryor repeatedly suggested that invalidating SB 7066 would interfere with the will of voters, attributing both the statute and Amendment Four directly to the people.[73] For example, to show that no "animus . . . motivated Florida *voters and legislators* to condition reenfranchisement" on LFOs,[74] Chief Judge Pryor wrote that "the voters . . . made it *easier* for the vast majority of felons . . . to regain their voting rights."[75] Identifying a rational basis for SB 7066, the court again fused the statute with the amendment, explaining they together advanced the "twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of justice."[76] This reasoning treated voters and legislators as one policymaker — and Amendment Four and SB 7066 as one policy — ignoring the possibility that the amendment and statute differed in substance or purpose.

Applying "the most deferential form of . . . review"[77] to statutes undermining express popular will is especially dangerous where, as in Tallahassee, other conditions raise doubts that "improvident decisions will eventually be rectified by the democratic process."[78] Like many state legislatures, Florida's is gerrymandered to favor Republicans,[79] who supported SB 7066 on a strict party line[80] and many of whose party leaders opposed Amendment Four.[81] At the dawn of modern equal

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118 (Fla. 1948)), understanding of "all terms of sentence" meant not only punitive measures, but "all obligations imposed *in conjunction* with an adjudication of guilt," *id.* at 1081–82 (emphasis added). The district court termed the state's similar argument "fanciful." *Jones*, 462 F. Supp. 3d at 1247.

[72] *See Jones*, 975 F.3d at 1108 & n.4 (J.A. Pryor, J., dissenting).

[73] *See, e.g.*, *id.* at 1037 (majority opinion).

[74] *Id.* at 1034 (emphasis added).

[75] *Id.* (emphasis added).

[76] *Id.*

[77] *Id.* at 1083 (Jordan, J., dissenting).

[78] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

[79] *See Partisan Gerrymandering Historical Data*, PLANSCORE, https://planscore.org/#!2018-statesenate [https://perma.cc/Z2MD-YLBM]; *Florida*, PLANSCORE, https://planscore.org/florida [https://perma.cc/QL9U-88QD]. Three measures of partisan gerrymandering suggest the Florida House strongly favors Republicans and show a milder Republican advantage in the Senate. *See id.*

[80] Jones v. DeSantis, 462 F. Supp. 3d 1196, 1236 (N.D. Fla. 2020). All Democratic members opposed the bill. *Id.*

[81] *See* Anthony Man, *Republicans, Donald Trump Club Urge Opposition to Felon Voting-Rights Proposal*, S. FLA. SUN SENTINEL (Oct. 10, 2018, 2:25 PM), https://www.sun-sentinel.com/news/politics/fl-ne-donald-trump-club-felon-voting-20181010-story.html [https://perma.cc/Z7WH-DTQ3]; Steve Bousquet, *Diverse Donors Fund Final Push in Campaign to Win Voting Rights for Florida Felons*, MIA. HERALD (Nov. 7, 2018, 7:19 PM), https://www.

protection doctrine, the Supreme Court suggested that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . be subjected to more exacting judicial scrutiny."[82] *Jones* abandons this principle on two counts, upholding a measure that (a) excludes hundreds of thousands from the political process by (b) crippling a popular effort to do the opposite. Moreover, deference could facilitate "entrenchment"[83]: legislators might want to make voting harder for those they think would vote against them,[84] such that judicial intervention would have *protected* majority rule.[85]

A spate of legislative attempts to annul voter initiatives — often by gerrymandered assemblies — portends more judicial consideration of such laws.[86] When, for example, a statute restricts the franchise in response to voters' expanding it, judicial review would vindicate, rather than constrain, the majority's will. In that case, courts' reasons for "underenforcing" the Constitution's commands dissipate. Deference to political branches is undoubtedly often necessary for "judicial review [to] achieve some measure of consonance . . . with the theory and practice of democracy."[87] But when the people's agents "substitute their will to that of their constituents"[88] and deference conflicts with the "practice of democracy"[89] itself, courts should ask whether deference has any rational basis left.

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miamiherald.com/news/politics-government/state-politics/article220614240.html [https://perma.cc/UWB9-4Z65].

82 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

83 Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–98 (1997).

84 Legislators might "feel threatened by [the] prospective participation" of the people Amendment Four could have reenfranchised. *Id.* at 535; *see* Shaila Dewan, *In Alabama, a Fight to Regain Voting Rights Some Felons Never Lost*, N.Y. TIMES (Mar. 2, 2008), https://www.nytimes.com/2008/03/02/us/02felons.html [https://perma.cc/BM9N-CZYV] (quoting the Alabama Republican Party Chair explaining his party opposed reenfranchisement "because felons don't tend to vote Republican"). *But cf.* Morse, *supra* note 5, at 8–9 (noting the partisan impact of reenfranchisement may be smaller than many think).

85 *See* Klarman, *supra* note 83, at 534–35.

86 *See* Williams, *supra* note 4; Sarah Holder & Kriston Capps, *The Conservative Backlash Against Progressive Ballot Measures*, BLOOMBERG: CITYLAB (Feb. 11, 2019, 5:17 PM), https://www.bloomberg.com/news/articles/2019-02-11/progressive-ballot-measures-face-conservative-backlash [https://perma.cc/KH6D-F4TQ].

87 BICKEL, *supra* note 61, at 27–28.

88 THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (emphasis omitted) (describing judicial review as addressing this problem in Congress). Even if legislatures "refine and enlarge the public views," not just reflect them, THE FEDERALIST NO. 10, *supra*, at 76 (James Madison), the need to "underenforce" the Constitution might still decrease as the legislative deviation from the popular will increases, however benevolent such "refinement" may be.

89 BICKEL, *supra* note 61, at 28.