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# **The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy**

*Jennifer L. Selin*\*

## ABSTRACT

*Despite significant literature on the electoral and democratic implications of laws that restore the right to vote to individuals with felony convictions, few scholars have explored whether these reforms result in practical changes. This Article examines the effect of administrative capacity and individual experience on policy implementation and finds that, even in the face of de jure felon rights restoration, policymakers can (knowingly or unwittingly) alter de facto restoration. Specifically, states have limited administrative capacity to absorb the costs of rights restoration. As a result, the burden of restoration falls onto citizens. Facing learning, compliance, and psychological hurdles to the right to vote, many individuals with felony convictions simply do not have the resources to restore their civil rights. Put simply, even the best laid plans often go awry when it comes to the burden of policy implementation.*

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## INTRODUCTION

In November 2018, almost 65% of Florida voters voted “Yes” on a citizen-initiated constitutional amendment to restore voting rights to citizens with felony convictions after they have completed their sentence (“Amendment 4”).<sup>1</sup> The vote is part of a national movement for disenfranchisement policy reform and citizen rights restoration. Estimates suggest that, since 1997, 1.4 million citizens in twenty three states have regained the right to vote as a result of legal changes to disenfranchisement policy.<sup>2</sup>

Yet, while reforms have provided the *legal* opportunity for rights restoration, questions remain about whether such reforms result in practical changes for citizens with felony convictions. For example, in the first three months after Amendment 4 became effective, less than 0.2% of the citizens affected by the Amendment registered to vote (2,000 of 1.4 million).<sup>3</sup> Part of this is due to questions among citizens and state officials regarding voter eligibility. Kelly Corder, director of communications for the Florida Commission on Offender Review (“FCOR”) – one of the agencies tasked with identifying individuals eligible for restoration – noted that the agency had “temporarily postponed consideration of pending applications for restoration of civil rights while the new framework required to implement the constitutional changes [wa]s defined.”<sup>4</sup> Similarly, many county elections supervisors implored the state legislature to

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1. *Florida Amendment 4*, CNN POLITICS, <https://www.cnn.com/election/2018/results/florida/ballot-measures/1> [perma.cc/D4SF-2T59]. The resulting constitutional language is as follows:

(a) No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability. Except as provided in subsection

(b) of this section, any disqualification from voting arises from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation.

(b) No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of rights.

FLA. CONST. art. VI, § 4.

2. Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, THE SENT’G PROJECT (Oct. 17, 2018), <https://www.sentencingproject.org/publications/expanding-vote-two-decades-felony-disenfranchisement-reforms/> [perma.cc/Z6ND-3MXK].

3. Kevin Morris, *Thwarting Amendment 4*, BRENNAN CTR. FOR JUST. 1–2 (May 9, 2019), <https://www.brennancenter.org/analysis/thwarting-amendment-4> [perma.cc/484F-M2AT].

4. Daniel Rivero, *No One Seems To Know How Amendment 4 Will Be Implemented To Restore Felon’s Right to Vote*, NAT’L PUB. RADIO (WLRN) (Nov. 29, 2018), <https://www.wlrn.org/post/no-one-seems-know-how-amendment-4-will-be-implemented-restore-felons-right-vote> [perma.cc/B8EM-2DHK].

provide them with guidance interpreting the Amendment.<sup>5</sup> Such guidance clarifying the parameters of the state's responsibilities for administering Amendment 4 did not become law until more than six months after Amendment 4 became effective.<sup>6</sup> Rights restoration likely will require implementing legislation and administrative action by, at minimum, the Florida Department of Corrections, the Department of Law Enforcement, the Department of State, and each of the county supervisors of elections.<sup>7</sup> In the meantime, local election administrators have little real guidance on voter eligibility, allowing for a potential of "67 supervisors of election interpreting" the law in different ways.<sup>8</sup>

Much of the debate and discussion surrounding felon disenfranchisement and reenfranchisement centers on the constitutionality of disenfranchisement or the passage of reform bills. Yet, as the example of Florida suggests, a major obstacle to rights restoration is administrative in nature. In most states, only a modest number of citizens achieve *de facto* restoration of rights because the procedures governing reenfranchisement are confusing and the burden of pursuing restoration falls on the citizen.<sup>9</sup> The lack of attention to administration of restoration policy is concerning because it provides little insight into the factors that determine whether citizens' votes are restored in practice.<sup>10</sup>

Despite the fact that most administrators operate in relative obscurity, their actions and decisions play a critical role in politics; the vast majority of conflict between governments and citizens tends to take place in the administrative, rather than public, political arena.<sup>11</sup>

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5. Lawrence Mower, *Ron DeSantis Signs Amendment 4 Bill, Limiting Felon Voting*, TAMPA BAY TIMES (June 28, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/06/28/ron-desantis-signs-amendment-4-bill-limiting-felon-voting/> [perma.cc/TG6Z-MAMN].

6. Letter from Ron DeSantis, Governor of Fla., to Laurel Lee, Fla. Sec. of State, *On Senate Bill 7066* (June 28, 2019), <https://www.flgov.com/wp-content/uploads/2019/06/6.282.pdf> [perma.cc/9KLU-GRUZ].

7. Rivero, *supra* note 4.

8. Daniel Rivero, *Is Florida's Amendment Restoring Felons' Voting Rights "Self-Executing"?*, NAT'L PUB. RADIO (Dec. 30, 2018), <https://www.npr.org/2018/12/30/680994515/is-floridas-amendment-restoring-felons-voting-rights-self-executing> [perma.cc/Z6DY-CQU2].

9. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*, THE SENT'G PROJECT 2-3 (2005), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Barred-for-Life-Voting-Rights-Restoration-in-Permanent-Disenfranchisement-States.pdf> [perma.cc/6T5T-YC56].

10. See Thessalia Merivaki, *Access Denied? Investigating Voter Registration Rejections in Florida*, 19 ST. POL. & POL'Y 53, 54 (2019) (noting that existing work on election administration has only just begun to understand the dynamics of voter registration processing).

11. Lael R. Keiser & Joe Soss, *With Good Cause: Bureaucratic Discretion and the Politics of Child Support*, 42 AM. J. POL. SCI. 1133, 1133 (Oct. 1988); Michael

To use a legal metaphor, citizens who interact with the state to access their rights find themselves in an administrative courtroom. In some cases, they are given the presumption of innocence, and little is required of them. “But in other cases, the citizen is treated with suspicion and must prove their [sic] innocence by negotiating a demanding set of administrative burdens.”<sup>12</sup>

Sweeping policy change without knowledge of the administrative hurdles imposed brings implementation risks, particularly in election administration where authority is decentralized and administrators have substantial discretion and limited resources.<sup>13</sup>

In order to help make sense of how the administration of voting rights restoration reforms influence citizens’ civil rights, this Article utilizes the concept of administrative burden. Put simply, administrative burden consists of the learning, compliance, and psychological costs citizens experience when interacting with government.<sup>14</sup> These costs make a difference in citizens lives, affect some groups more than others, and often reinforce inequities in society.<sup>15</sup> Furthermore, they are the product of deliberate choices made in the political arena.<sup>16</sup>

Administrative burden is particularly relevant when citizens exercise their democratic rights through voting.<sup>17</sup> When election administrators struggle to implement policy, often without any real guidance from their principals in the legislative or executive branches, they must make decisions about how much burden to absorb and what costs to pass on to citizens. Financial resources, expertise, and organizations within which administrators operate affect these decisions. With respect to the restoration of voting rights for citizens with felony convictions, there is limited administrative capacity to absorb the costs of policy implementation. Furthermore, even in the unlikely event that all administrators operate under the same conditions, individual experiences with the government condition the effects of policy change. Rights restoration requires that citizens have accurate information about eligibility, have the ability to allocate resources for compliance with eligibility requirements, and are able to overcome the frustration, stress, and sense of helplessness that often results from government interaction. These burdens often impede restoration reform.

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Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 5 (Mar. 1984).

12. Donald Moynihan & Pamela Herd, *Red Tape and Democracy: How Rules Affect Citizenship Rights*, 40 AM. R. PUB. ADMIN. 654, 658 (2010).

13. See Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Early Voting and Election Day Registration in the Trenches: Local Officials’ Perceptions of Election Reform*, 10 ELECTION L.J. 89, 89 (2011).

14. PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018)

15. *Id.* at 3.

16. *Id.*

17. Donald Moynihan, Pamela Herd & Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RES. THEORY 43, 45 (2014).

In Part I, this Article examines election administration in the context of public administration. Part I argues that, too often, policymakers and scholars conflate laws with the government's administration of and citizen experience with those laws. This is particularly true in the area of felon disenfranchisement and citizen rights restoration. The combination of decentralization and discretion in the American electoral system means that the implementation of policies designed to restore citizens' rights likely varies across jurisdictions.

Part II applies the concept of administrative burden to explain this variation. After defining the concept of administrative burden and making some assumptions about the policy process, Part II discusses the effect of administrative capacity and citizen experience on policy implementation. The context in which administrators operate and citizens' ability to advocate for their civil rights have consequences for the effectiveness of any legal regime of voting rights restoration. As a result, even in the face of *de jure* rights restoration, policymakers can alter *de facto* restoration with seemingly apolitical statutory language.

Throughout Parts I and II, this Article discusses the application of a single legal framework across a range of jurisdictions but uses the example of Florida's Amendment 4 to illustrate key points. Part III explores more explicitly Amendment 4's implementing legislation and addresses the administrative complications that arise from the legislation. In doing so, that Part identifies concerns about administrative capacity and discusses individuals' likely experiences with the administration of that legislation. Finally, Part III identifies the political context in which administrators implement Florida's rights restoration policy and speculates on the likelihood of legislative, administrative, or judicial recourse.

## I. ELECTION ADMINISTRATION AS PUBLIC ADMINISTRATION

Public administration contemplates the relationship between administrators, political leaders, and citizens in the pursuit of sound governance.<sup>18</sup> Policymakers and citizens alike understand that government agencies play a key role in informing, guiding, and even coercing citizen behavior consistent with community goals.<sup>19</sup> In the context of elections, examples of how government agencies shape citizen behavior abound. For example, the Federal Election Commission administers and formulates policy with respect to campaign finance law,<sup>20</sup> the U.S. Election Assistance Commission exists to develop guidance on federal statutory requirements relating to voting systems and voter

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18. James H. Svara, *The Myth of the Dichotomy: Complementarity of Politics and Administration in the Past and Future of Public Administration*, 61 PUB. ADMIN. R. 176, 179 (2001).

19. BRIAN J. COOK, BUREAUCRACY AND SELF GOVERNMENT: RECONSIDERING THE ROLE OF PUBLIC ADMINISTRATION 11 (2d ed. 2014).

20. 52 U.S.C. § 30106(b)(1) (2018).

access,<sup>21</sup> each state has a chief election official or board that administers election law,<sup>22</sup> and local governments delegate to specific officials the authority to register voters and administer elections.<sup>23</sup> These examples suggest that “[e]lection administration is public administration.”<sup>24</sup>

Those who consider public administration in the law tend to focus on the external or statutory factors that govern the relationship between administrators and citizens.<sup>25</sup> Rich debate over statutory language and well-developed theories of judicial statutory interpretation are hallmarks of legal discussions on the subject.<sup>26</sup> However, how administrative agencies interpret their statutory mandates and implement policy in their day-to-day operations receives comparatively less attention.<sup>27</sup> This is problematic, as internal agency procedures and practices are the most powerful determinants of administrative action.<sup>28</sup>

Nowhere is this truer than in election administration. Policymakers and scholars alike focus less on understanding and improving the relationship between the administrative process and citizen participation in elections and more on the statutory and constitutional language designed to structure the dynamic.<sup>29</sup> Certainly, the legal framework that governs our electoral process is of tremendous importance. However, in the context of election administration generally and in citizen rights restoration specifically, it is all too common for policymakers and scholars to conflate laws with government implementation

21. 52 U.S.C. § 20922 (2018).

22. KAREN L. SHANTON, CONG. RESEARCH SERV., R45549, THE STATE AND LOCAL ROLE IN ELECTION ADMINISTRATION: DUTIES AND STRUCTURES 12–13 (Mar. 4, 2019), <https://fas.org/sgp/crs/misc/R45549.pdf> [perma.cc/8WFN-95WL].

23. See *Election Administration at State and Local Levels*, NAT’L CONF. OF ST. LEGIS. (June 15, 2016), <http://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx> [perma.cc/JQ4J-3QJM].

24. PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 18 (2014), <https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [perma.cc/R5KJ-EP63].

25. Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1518 (2015).

26. See Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U.L. REV. 871, 874 (2015).

27. Metzger, *supra* note 25, at 1520–21; Stack, *supra* note 27, at 874.

28. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 313 (2012).

29. R. Michael Alvarez & Thad E. Hall, *Controlling Democracy: The Principal-Agent Problems in Election Administration*, 34 POL. STUD. J. 491, 492 (2006); but see Charles R. Wise, *Election Administration in Crisis: An Early Look at Lessons from Bush versus Gore*, 61 PUB. ADMIN. R. 131, 137 (2001)

of and citizen experience with those laws.<sup>30</sup> This leads to a persistent lack of attention to the actual (not hypothesized) implications of the law<sup>31</sup> and puzzling management of our electoral system. As a result, it remains true that “[t]here is probably no other phase of public administration in the United States which is so badly managed as the conduct of elections.”<sup>32</sup>

Part of this is by design – uniformity and management were not fundamental considerations in modeling American electoral institutions.<sup>33</sup> Instead, a commitment to geographically based representation is the hallmark of American elections.<sup>34</sup> The decentralized process provided by the Elections Clause of the U.S. Constitution ensures that the regulation and administration of elections occur primarily at the state level.<sup>35</sup> This means the legal framework governing both federal and state elections varies across the country, as states administer and apportion responsibility between state and local governments in different ways.<sup>36</sup> Indeed, officials in approximately 8,000 different jurisdictions are responsible for administering American elections.<sup>37</sup> This incredible variation not only makes governing the electoral process complex but also has implications for how administrators implement and citizens experience that framework. Thus, any discussion of citizen rights restoration policy must include serious consideration of administration in addition to statutory text.

In order to understand the implications of public administration for rights restoration policy, this Article assumes that any legal framework governing the restoration of voting rights for citizens who have a felony conviction *applies* uniformly across all jurisdictions. For example, the mandate of Florida’s

30. See Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *The Effect of Administrative Burden on Bureaucratic Perception of Policies: Evidence from Election Administration*, 72 PUB. ADMIN. REV. 741, 742 (2012).

31. Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998).

32. JOSEPH P. HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES 1 (1934).

33. ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSIONS OF AMERICAN SUFFRAGE 11, 105 (2009)

34. *Id.*

35. U.S. CONST. art. 1 § 4 (“The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators”); see also Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 127 (2009).

36. Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 752–53 (2016).

37. PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 24, at 1. Kimball and Baybeck find the exact number of localities is 7,858. David C. Kimball & Brady Baybeck, *Are All Jurisdictions Equal? Size Disparity in Election Administration*, 12 ELECTION L.J. 130, 131 (2013) (but noting that just 462 jurisdictions serve more than two-thirds of all American voters).

Amendment 4 applies equally to all citizens in the state.<sup>38</sup> However, despite the claims of some, such legal mandates are not “self-executing.”<sup>39</sup> This means that there is variation in the *implementation* of the legal framework. State administrators must implement the mandate when interacting with citizens but often do so in different ways. In the case of Amendment 4, while statutory law guides administrators in their interactions with citizens who seek to register to vote, for a variety of reasons, those administrators may not implement the law in a uniform manner.

Two aspects of election administration are particularly relevant when thinking about how administrators implement legal mandates. First, the decentralized nature of our electoral process means that, even when faced with the same statutory text, efforts to restore citizens’ rights will likely vary across jurisdictions. Second, the amount of discretion built into election administration results in potential for differential implementation of the law.

#### A. Decentralization in Election Administration

The number of state and local jurisdictions that have authority over elections has led many to refer to election administration as “hyperfederalized.”<sup>40</sup> While the federal government does have power to regulate elections, state delegation constitutes the vast majority of election law and policy.<sup>41</sup> Most states vest a majority of election administration in local officials and retain some formal role for election oversight at the state level.<sup>42</sup> In addition to the allotment of authority from the federal to the state and local level, fragmentation also occurs across and within units.<sup>43</sup> State involvement in overseeing election administration differs across the country, and there is much variation in administration at the sub-state level.<sup>44</sup> Thus, the American electoral system is one that is classified by both vertical and horizontal decentralization.<sup>45</sup>

38. FLA. CONST. art. VI, § 4.

39. E.g., Patricia Mazzei, *Florida Felons Once Denied Rights Begin Registering to Vote*, N.Y. TIMES (Jan. 8, 2019) <https://www.nytimes.com/2019/01/08/us/florida-felons-voting-rights.html> [perma.cc/27P4-WDFN]; Press Release, ACLU of Fla., Statement on Senate Bill Restricting Amendment 4 (Mar. 25, 2019), <https://www.aclufla.org/en/press-releases/aclu-florida-statement-senate-bill-restricting-amendment-4> [perma.cc/6JJR-89VL].

40. E.g., EWALD, *supra* note 33, at 3 (2009); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 952 (2005).

41. Weinstein-Tull, *supra* note 36, at 753.

42. *Id.* at 779–80.

43. SHANTON, *supra* note 22, at 2.

44. Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2324 (2005).

45. Robert S. Montjoy, *The Public Administration of Elections*, 68 PUB. ADMIN. REV. 788, 789 (2008).

This decentralization affects the uniformity of the American electoral process and the capacity of governmental units to administer elections.<sup>46</sup> In a highly decentralized system, understanding the state and local factors that influence administration is essential.<sup>47</sup> With respect to felon disenfranchisement and reenfranchisement, this means one must examine closely whether administrators implement rules uniformly. If the factors that shape implementation vary across or within units, then the way administrators apply the law necessarily will differ depending upon locale as well.<sup>48</sup> The way administrators remove and restore citizens' rights will likely differ based upon organizational and other structural environments, even in the presence of a uniform set of standards.<sup>49</sup> For example, in her 2002-2003 interviews with county election boards, Professor Jessie Allen found that about half of New York counties required documentary proof of eligibility for citizens with felony convictions to register to vote despite there being no legal mandate for such documentation.<sup>50</sup> Even when the New York State Board of Elections attempted to impose uniformity by issuing a memo to all county commissioners, differences in county practices remained.<sup>51</sup> Little follow up by the State Board regarding policy implementation after the initial memo, combined with tremendous variation in commissioners' abilities to change routinized practices, resulted in many county commissioners continuing to operate as they did before the State Board's attempts at clarification.

### *B. Election Administrators' Discretion*

Part of the variation in election administration results from the discretion granted to administrators. When regulating elections, the legislature inevitably delegates authority to election administrators and specifies the duties of different public officials. As discussed above, states vary with respect to the amount of discretion legislators delegate to administrators.<sup>52</sup> Yet any delegation of

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46. *Id.*

47. Merivaki, *supra* note 10, at 54.

48. See Keiser & Soss, *supra* note 11, at 1134.

49. See e.g., Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 57, 69 (2019); Comment, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly Over Voters and the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 96 (2012).

50. Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 417 (2011).

51. *Id.* at 419–20.

52. Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 356 (2008); Jocelyn Friedrichs Benson, *One Person, One Vote: Protecting Access to Franchise through the Effective Administration of Election Procedures and Protections*, 40 URB. LAW. 269, 270–73 (2008).

power grants some measure of discretion,<sup>53</sup> and even the relatively specific statutes that voting rights advocates view as accommodating can add procedural complications to administration.<sup>54</sup>

Interpretation and implementation of the law is inevitably a nuanced endeavor over which reasonable administrators can disagree.<sup>55</sup> While the legal restrictions placed on administrators by the Constitution, federal statutes, state constitutions, state legislators, and federal and state judges set the boundaries within which administrators operate, local administrators likely interpret and implement those policies in different ways.<sup>56</sup> This is particularly true with respect to voter eligibility, where the law is especially complex. Many states fail to develop administrative guidelines, and those that do often produce complicated, confusing, or conflicting procedures.<sup>57</sup>

Furthermore, felon disenfranchisement and rights restoration policies tend to be couched in vague language and involve far more administrative discretion than simple voter registration.<sup>58</sup>

As noted by Professor Beth Colgan,

[P]enal disenfranchisement and reenfranchisement practices are not neatly laid out in a discrete set of statutes . . . . Ascertain[ing] what [restoration processes] involve[s] an analysis of multiple layers of constitutional and statutory text, administrative rules, and departmental policies, and necessitates an understanding of not just voter registration procedures but also the intricacies of each jurisdiction's clemency, parole, and probation systems.<sup>59</sup>

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53. Note, *Toward a Greater State Role in Election Administration*, *supra* note 44, at 2316; *see also* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 23 (1994) (arguing that a proliferation in statutes afford executives substantial discretion as they coordinate policy and resolve conflicts).

54. Ben F. C. Wallace, *Charting Procedural Due Process and the Fundamental Right to Vote*, 77 OHIO ST. L.J. 647, 649 (2016).

55. Tokaji, *supra* note 35, at 133.

56. David C. Kimball & Martha Kropf, *The Street-Level Bureaucrats of Elections: Selection Methods for Local Election Officials*, 23 REV. POL'Y RES. 1257, 1257–58 (2006); *see also* Donald P. Moynihan & Carol L. Silva, *The Administrators of Democracy: A Research Note on Local Election Officials*, 68 PUB. ADMIN. REV. 816, 824 (2008) (noting that federal reform mandates not only make local election administration more complex, but also more scrutinized and constrained).

57. *See* EWALD, *supra* note 33, at 139.

58. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 83 (2006); Friedrichs Benson, *supra* note 52, at 372; Cherish M. Keller, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 CHI-KENT L. REV. 199, 225 (2006).

59. Colgan, *supra* note 49, at 65–66; *see also* Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, BRENNAN CTR. FOR JUST. 8–9 (2008),

Evidence suggests that administrators struggle to navigate these legal layers. In interviews with local administrators in ten states, Professor Alec Ewald found that more than a third of administrators in those states either were ignorant of or confused about their states' eligibility laws.<sup>60</sup> This confusion has real consequences. For example, in the 2000 elections, even the state of Florida's attempt to enforce its then constitutional mandate to disenfranchise citizens with a felony conviction was riddled with error.<sup>61</sup> With respect to rights restoration, administrative discretion and confusion tends to result in more exclusionary policies than legally required.<sup>62</sup>

## II. ADMINISTRATIVE BURDEN AND THE COSTS OF VOTING RIGHTS RESTORATION

As suggested in the previous section, the American federalist system of elections and the resulting administrative discretion affect the implementation of disenfranchisement and reenfranchisement laws. Even operating under the exact same legal mandate, election administrators' actions may vary as a result of a complex interaction of factors.<sup>63</sup> The decentralized and autonomous license under which election administrators operate tends to exacerbate the problem and may prevent citizens from voting rights restoration.<sup>64</sup> While the variation in election administration can seem random or unpredictable at first glance, the concept of administrative burden can help explain how administrators implement policy and why even statutes with the most generous rights restoration language may not result in *de facto* reenfranchisement.<sup>65</sup>

Administrative burden consists of the costs an individual might experience in her interactions with government.<sup>66</sup> The consideration of

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<https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> [perma.cc/8NW8-AUT9] (suggesting that laws are difficult to understand and require expertise in multiple fields).

60. EWALD, *supra* note 33, at 141.

61. Guy Stuart, *Databases, Felons, and Voting: Bias and Partisanship of the Florida Felons List in the 2000 Elections*, 119 POL. SCI. Q. 453, 474 (2004). These errors were the result of, *inter alia*, data quality problems and variation in local election supervisor administration. *Id.* at 461. The distribution of these errors was highest in high-purge Republican counties. *Id.* at 474.

62. EWALD, *supra* note 33, at 140.

63. See Evelyn Z. Brodtkin, *Inside the Welfare Contract: Discretion and Accountability in State Welfare Administration*, 71 SOC. SERV. REV. 1, 4 (1997); Patrick G. Scott, *Assessing Determinants of Bureaucratic Discretion: An Experiment in Street-Level Decision Making*, 7 J. PUB. ADMIN. RES. THEORY 35, 37–39 (1997).

64. See Allen, *supra* note 50, at 424; Melissa C. Chiang, *Some Kind of Process for Felon Disenfranchisement*, 72 U. CHI. L. REV. 1331, 1353 (2005).

65. See MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 3 (1980); Burden et al., *supra* note 30, at 749.

66. HERD & MOYNIHAN, *supra* note 14, at 22.

administrative burden begins with a few relatively uncontroversial assumptions. First, most can agree that citizens are better off when administrators implement policy in a fair, accessible, and respectful manner. However, all interactions between citizens and government generate some costs.<sup>67</sup> Government actors must invest time, financial resources, and energy in making and implementing policy.<sup>68</sup> Likewise, citizens invest time, financial resources, and effort into complying with government policy.<sup>69</sup> When acting in their capacity, public officials seek to minimize these costs while protecting important public values.<sup>70</sup> For example, in election administration, public officials often balance the need for accessibility, dependability, and security against the financial and political cost of doing so.<sup>71</sup>

Aspects of both government and its citizens affect these costs, or administrative burdens. Relative to other policies, policies that enable citizen participation or are targeted at specific groups are more likely to generate costs as administrators devote time and resources to implementation.<sup>72</sup> Additionally, because citizens' resources vary, administrative burdens affect some groups more than others.<sup>73</sup> This is particularly true with respect to election administration and rights restoration policy.<sup>74</sup> Yet, citizens are comparatively unaware of the effects of administration in this context. As a result, policymakers can and do adjust administrative burden to achieve political objectives.

#### A. Administrative Capacity and Policy Implementation Costs

Policy implementation is generally a repetitive and onerous process. Structural factors related to the organizations that implement policy influence

67. *Id.* at 21; Burden, et al., *supra* note 30, at 741.

68. Burden, et al., *supra* note 30, at 742.

69. *Id.*

70. HERD & MOYNIHAN, *supra* note 14, at 13.

71. *E.g.*, H.R. Res. 1, 116th Cong. (2019); CONG. BUDGET OFF., COST ESTIMATE, H.R. 1, FOR THE PEOPLE ACT OF 2019 (2019), <https://www.cbo.gov/publication/55003> [perma.cc/5JEN-ZC45]; Brian Pascus, *House Passes H.R. 1, A Sweeping Anti-Corruption and Voting Rights Bill*, CBSNEWS (March 8, 2019), <https://www.cbsnews.com/news/house-passes-hr-1-sweeping-anti-corruption-and-voting-rights-legislation-today-2019-03-08/> [perma.cc/CBW8-A6HP].

72. HERD & MOYNIHAN, *supra* note 14, at 21; Burden et al., *supra* note 30, at 742; Donald P. Moynihan, *Normative and Instrumental Perspectives on Public Participation: Citizen Summits in Washington, D.C.*, 33 AM. R. PUB. ADMIN. 164, 165 (2003).

73. HERD & MOYNIHAN, *supra* note 14, at 13.

74. *See, e.g.*, EWALD, *supra* note 33, at 146 (reasoning that variation in policy implementation leads to practical disenfranchisement); RONALD HAYDUK, GATEKEEPERS TO THE FRANCHISE, SHAPING ELECTION ADMINISTRATION IN NEW YORK 7 (2005) (arguing that practical disenfranchisement occurs for those who have the greatest difficulty in overcoming disparate election practices and technology (low-income citizens, first-time voters, minority populations, etc.)); Allen, *supra* note 50, at 430–31 (discussing how administrative costs impose different levels of disenfranchisement).

this implementation.<sup>75</sup> As election administrators perform their jobs, these administrators face competing factors that influence how they make decisions.<sup>76</sup> Because election administrators rarely operate in a centralized organization, under clear decision rules, or with effective training, they vary in their implementation of the law and interaction with citizens.<sup>77</sup> For example, local jurisdictions repeatedly and consistently report administrative challenges in registering voters, and these challenges – exacerbated by the tremendous variation in jurisdictional resources and composition<sup>78</sup> – make it hard to ensure uniform implementation of enfranchisement.<sup>79</sup>

This means that considerations of rights restoration policy are complicated by the fact that even if reenfranchisement is legally possible, administrative capacity may prevent effective administration.<sup>80</sup> As utilized in this Article, the concept of administrative capacity is simply the ability of administrators to perform the tasks the law and political principals assign to them.<sup>81</sup> When enacting legislation to restore voting rights to citizens with felony convictions, lawmakers should consider three aspects of administrative capacity: financial resources, administrative expertise, and organizational structure.

### 1. Financial Resources

First, financial resources affect an administrative agency's ability to take on administrative burden and to shift the costs of policy implementation from

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75. Evelyn Z. Brodtkin & Malay Majmunder, *Administrative Exclusion: Organizations and the Hidden Costs of Welfare Claiming*, 20 J. PUB. ADMIN. RES. THEORY 827, 828–29 (2010); Burden et al., *supra* note 30, at 742; *see also* Joe Soss, Richard Fording & Sanford F. Schram, *The Organization of Discipline: From Performance Management to Perversity and Punishment*, 21 J. PUB. ADMIN. RES. THEORY 203, 205–06 (finding that performance management pressures affect how decentralized case managers interact with their clients).

76. *See* Keiser & Soss, *supra* note 11, at 1152; Soss et al., *supra* note 75, at 219.

77. *See* R. Michael Alvarez & Thad E. Hall, *Building Secure and Transparent Elections through Standard Operating Procedures*, 68 PUB. ADMIN. REV. 828, 830 (2008).

78. Compare, for example, the City of Los Angeles to a town in Missouri with 500 residents.

79. U.S. GOV'T ACCOUNTABILITY OFF., VIEWS OF SELECTED LOCAL ELECTION OFFICIALS ON MANAGING VOTER REGISTRATION AND ENSURING ELIGIBLE CITIZENS CAN VOTE 11, 16 (2005), <https://www.gao.gov/assets/250/247944.pdf> [perma.cc/L36Y-UHG8]; Kimball & Baybeck, *supra* note 37, at 141; Merivaki, *supra* note 10, at 71; Tokaji, *supra* note 35, at 130–31.

80. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 376 (2012).

81. *See* John J. Gargan, *Consideration of Local Government Capacity*, 41 PUB. ADMIN. R. 649, 651–52 (1981).

citizens.<sup>82</sup> Research demonstrates that the resources provided to the administrators who interact most often with citizens are often inadequate and only become more deficient as demands for administrators' services increase over time.<sup>83</sup> This is certainly true in election administration, where the most universal complaint from those on the front-lines concerns a lack of resources.<sup>84</sup>

Furthermore, like with most other aspects of elections, federalism and the complexity of the electoral process make it very difficult to determine the financial cost of voter education and registration, election regulation and legislation, and results certification. As put by researchers at the National Conference of State Legislators, "No one knows how much it costs to run elections in the United States."<sup>85</sup> The total cost is likely astronomical. For example, in 2018, Congress approved \$380 million in grants simply for states to improve election security – administrators referred to the money as a "a 10-cent solution to a \$25 problem."<sup>86</sup>

Like with most other aspects of election administration, states fund their electoral systems differently. In some states, local governments bear the entire financial burden of election administration, and in others, state governments reimburse localities for electoral costs.<sup>87</sup> As an increasing number of state and local governments face financial crises, election administration often suffers;<sup>88</sup> when public officials face fiscal pressure, election administration does not rank

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82. HERD & MOYNIHAN, *supra* note 14, at 31; *see also* Bryan D. Jones, Saadia R. Greenberg, Clifford Kaufman & Joseph Drew, *Bureaucratic Response to Citizen-Initiated Contacts: Environmental Enforcement in Detroit*, 71 AM. POL. SCI. REV. 148, 164 (1977) (ability of administrators to process claims is inversely related to number of clients and social well-being).

83. LIPSKY, *supra* note 65, at 27.

84. Robert S. Montjoy, *The Changing Nature . . . and Costs . . . of Election Administration*, 70 PUB. ADMIN. REV. 867, 868 (2010).

85. Katy Owens Hubler & Wendy Underhill, *Election Costs: Who Pays and With Which Funds?*, 26 LEGISBRIEF 1 (2018), <http://www.ncsl.org/LinkClick.aspx?fileticket=y7G5AApY0KI%3d&tabid=32195&portalid=1> [perma.cc/CCK9-8CUY].

86. Ashley Lopez, *Local Officials Call Federal Election Funds "A 10-Cent Solution to a \$25 Problem"*, NAT'L PUB. RADIO (Aug. 4, 2018), <https://www.npr.org/2018/08/04/634707340/local-officials-call-federal-election-funds-a-10-cent-solution-to-a-25-problem> [perma.cc/9GZB-ZK74].

87. SHANTON, *supra* note 22, at 9–11; Note, *Toward a Greater State Role in Election Administration*, *supra* note 44, at 2324–25.

88. Montjoy, *supra* note 84, at 868.

high on the priority list.<sup>89</sup> Furthermore, the allocation of those resources that public officials do have tends to be influenced by political factors.<sup>90</sup>

This means that most states and localities are not well situated financially to administer rights restoration.<sup>91</sup> For example, in its assessment of the financial impact of Florida's Amendment 4, the Office of Economic and Demographic Research – the research agency of the Florida state legislature – found that the Amendment would result in increased costs to local governments, to the Florida Departments of State and Corrections, and to state circuit courts.<sup>92</sup> Even if one accounted for revenues obtained by requiring citizen payments of court-ordered restitution, fines, and court costs before voter registration, state and local governments would still need significant additional financial resources in order to implement restoration policy; “Florida has no system to track restitution, and creating one could cost millions of dollars.”<sup>93</sup>

## 2. Administrative Expertise

In addition to financial resources, administrative expertise affects capacity. Administrators develop skills and knowledge, which, when granted

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89. PRESIDENTIAL COMM’N ON ELECTION ADMIN., THE AMERICAN VOTING EXPERIENCE: REPORT AND RECOMMENDATIONS OF THE PRESIDENTIAL COMMISSION ON ELECTION ADMINISTRATION 10 (2014), <https://www.eac.gov/assets/1/6/Amer-Voting-Exper-final-draft-01-09-14-508.pdf> [perma.cc/AWG3-PLHA].

90. Zachary Mohr, JoEllen V. Pope, Martha E. Kropf & Mary Jo Shepherd, *Strategic Spending: Does Politics Influence Election Administration Expenditure*, 63 AM. J. POL. SCI. 427, 434 (2019).

91. MANZA & UGGEN, *supra* note 58, at 90.

92. STATE OF FLA., OFFICE OF ECON. & DEMOGRAPHIC RESEARCH, FIN. IMPACT ESTIMATING CONF., COMPLETE INITIATIVE FINANCIAL INFORMATION STATEMENT VOTING RESTORATION AMENDMENT (2016), [http://edr.state.fl.us/Content/constitutional-amendments/2018Ballot/VRA\\_Report.pdf](http://edr.state.fl.us/Content/constitutional-amendments/2018Ballot/VRA_Report.pdf) [perma.cc/S4DY-5ZZR]; *see also* Mike Schneider, *Official Tells Florida Democrats to Expect Recount in 2020*, ASS’N PRESS (June 8, 2019), [https://www.washingtonpost.com/national/official-tells-florida-democrats-to-expect-recount-in-2020/2019/06/08/91d0b66a-8a16-11e9-9d73-e2ba6bbf1b9b\\_story.html?utm\\_term=.704c8b14bbc6](https://www.washingtonpost.com/national/official-tells-florida-democrats-to-expect-recount-in-2020/2019/06/08/91d0b66a-8a16-11e9-9d73-e2ba6bbf1b9b_story.html?utm_term=.704c8b14bbc6) [perma.cc/4YK7-7LPN] (Florida Democrats hope to employ 15,000 lawyers and volunteers around the state to help monitor election administration); *c.f.* Marl Schlakman, Walt McNeil, & Ion Sancho, *Here’s What You Haven’t Heard About Restoring Ex-Felon’s Voting Rights*, ORLANDO SENTINEL (Oct. 8, 2018), <https://www.orlandosentinel.com/opinion/os-op-felon-rights-restoration-florida-analysis-20181009-story.html> [perma.cc/6CT7-P7V2] (suggesting that, during the 1970s, Governor Reubin Askew’s restoration regime reduced costs to taxpayers).

93. Lawrence Mower & Emily L. Mahoney, *House Passes Amendment 4 Bill Requiring Felons to Pay Up Before They Can Vote*, MIAMI HERALD (Apr. 24, 2019) <https://www.miamiherald.com/news/politics-government/state-politics/article229619604.html>.

discretion in policy implementation, they can use to make decisions.<sup>94</sup> This notion of expertise is inherent when it comes to almost every aspect of administrative action – from decisions about whether or not (and how) to regulate, an agency’s creation of procedures, and an agency’s interpretation of its own policy.<sup>95</sup>

However, administrative expertise is complex and multifaceted.<sup>96</sup> Due to a wide array of individual and institutional factors, administrators vary in their acquisition of subject-matter and institutional knowledge.<sup>97</sup> Expertise is costly to acquire, and even those administrators who serve in their agencies for long periods of time may only obtain experience with routines, as opposed to gaining policy skills.<sup>98</sup> Administrators who lack institutional and policy knowledge may shift the cost of implementation to citizens. Furthermore, those administrators who acquire policy expertise may use their knowledge to administer policy in a way that differs from the preferences of the legislature or the public.<sup>99</sup>

A consistent problem in election administration is that many administrators (a) lack the expertise to understand fully their states’ electoral laws and regulations and (b) are incapable of navigating the labyrinth of administrative organizations involved in any one policy.<sup>100</sup> Election administrators have little

94. See Generally ANTHONY DOWNS, *INSIDE BUREAUCRACY* (1967).

95. E.g., *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1207 (2015); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 612–14 (2013); *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 544–45 (1978).

96. Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1105 (2015).

97. E.g. Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 876 (2007); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1426 (2011).

98. James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 371 (1976).

99. E.g., D. RODERICK KIEWIET AND MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* (1991); Francis E. Rourke, *Variations in Agency Power*, in *BUREAUCRATIC POWER IN NATIONAL POLITICS* (Francis E. Rourke ed., 1976). Administrators who have more experience can use their skills to overcome or increase burden. HERD & MOYNIHAN, *supra* note 14, at 32.

100. Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q.J. POL. SCI. 41, 43 (2015); Alec Ewald, *A “Crazy-Quilt” of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law*, THE SENT’G PROJECT 8 (2005), <https://www.sentencingproject.org/wp-content/uploads/2016/01/A-Crazy-Quilt-of-Tiny-Pieces-State-and-Local>

training or access to educational material and face confusing and contradictory laws and policies.<sup>101</sup> In their discussions with about 100 election administrators, Professors Kathleen Hale, Robert Montjoy, and Mitchell Brown found that an increase in professionalism, a decrease in the number of organizational layers involved in elections, and more streamlined procedures would significantly improve the elections administration landscape.<sup>102</sup> This is particularly true in the area of felon disenfranchisement and reenfranchisement as scholars, citizens, and administrative officials alike puzzle over the parameters of rights restoration.<sup>103</sup>

### 3. Organizational Structure

Finally, organizational differences influence administrative capacity. Because agencies are organized to address specific problems, their structures and processes shape policy implementation by prioritizing and organizing administrative action.<sup>104</sup> Over time, these organizational schemes can generate a culture that recognizes some tasks as more important than others and can enhance administrators' autonomy in performing those tasks.<sup>105</sup>

Adding a new policy mandate to an agency's mix of responsibilities makes administrators' tasks more complex.<sup>106</sup> It can become difficult, if not impossible, for administrators to follow all laws and policies in their entirety.<sup>107</sup> While statutory law may occasionally provide guidance, most agencies have freedom to determine which tasks to prioritize.<sup>108</sup> This means that

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Administration-of-American-Criminal-Disenfranchisement-Laws.pdf.  
[perma.cc/5FQP-TAG].

101. MANZA & UGGEN, *supra* note 58, at 89; Erika Wood, *Restoring the Right to Vote*, BRENNAN CTR. FOR JUST. 14 (2d ed. 2009), <https://www.brennan-center.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf> [perma.cc/X2MK-FMZZ]; Wood & Bloom, *supra* note 59, at 1–6.

102. KATHLEEN HALE, ROBERT MONTJOY & MITCHELL BROWN, ADMINISTERING ELECTIONS: HOW AMERICAN ELECTIONS WORK 144 (2015).

103. MANZA & UGGEN, *supra* note 58, at 84; Christopher Uggen, Angela Behrens & Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCI. 307, 318 (2005).

104. SAMUEL WORKMAN, THE DYNAMICS OF BUREAUCRACY IN THE U.S. GOVERNMENT 38 (2015).

105. DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 15–25 (2001).

106. Robert S. Montjoy & Laurence O'Toole, Jr., *Toward a Theory of Policy Implementation: An Organizational Perspective*, 39 PUB. ADMIN. REV. 465, 465 (1979) (noting that new tasks likely compete with old ones).

107. Keiser & Soss, *supra* note 11, at 1138.

108. Young Han Chun & Hal G. Rainey, *Goal Ambiguity and Organizational Performance in U.S. Federal Agencies*, 15 J. PUB. ADMIN. RES. THEORY 529, 529 (2005); Chan Su Jung, *Extending the Theory of Goal Ambiguity to Programs: Examining the*

administrators' choices about how to direct their attention becomes a decision not just about policy prioritization but also about the areas on which *not* to focus energy.<sup>109</sup> In this way, structural factors influence the administration of elections.<sup>110</sup>

While communication of policy priorities and procedures can alleviate some of these concerns, such communication is often lacking in election administration.<sup>111</sup> Despite the fact that, in most states, the Secretary of State oversees, implements, and interprets election directives from all authorities – federal and state legislative, executive, and judicial – few states have centralized procedures for rights restoration.<sup>112</sup> This leaves lower level administrators with a great deal of discretion and responsibility.<sup>113</sup> How administrators act in the face of such discretion can be the result of organizational features that affect the administrators' work environments and can lead to variation in how different administrators implement the same law.<sup>114</sup>

Another organizational consideration is the number of agencies or bureaus involved in implementing a single policy. Challenges can arise when multiple units are involved in administration. While examples of administrative redundancy abound in the American political system, involving several agencies in the same policy can reduce the chances of successful implementation.<sup>115</sup> Like with other aspects of organizational structure, coordination tools such as consultation requirements, interagency agreements, and centralized gubernatorial review can help alleviate some of these challenges.<sup>116</sup> Yet it is often

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*Relationship Between Goal Ambiguity and Performance*, 74 PUB. ADMIN. REV. 205, 206 (2014); Hal G. Rainey, *A Theory of Goal Ambiguity in Public Organizations*, in RESEARCH IN PUBLIC ADMINISTRATION, vol. II (J.L. Perry ed., 1993).

109. See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); see also Amber E. Boydston, Shaun Bevan, & Herschel F. Thomas III, *The Importance of Attention Diversity and How to Measure It*, 42 POL. STUDIES. J. 173, 176 (2014).

110. Note, *Toward a Greater State Role in Election Administration*, *supra* note 46, at 2325.

111. See SHANTON, *supra* note 22, at 15–17 (2019) (discussing variation in the relationship between state and local election administrators and in agency size and structure).

112. Benson, *supra* note 52, at 344; Ewald, *supra* note 101, at 3.

113. Ewald, *supra* note 100, at 12. Empirical studies raise concern that, in the face of such discretion, conscious or unconscious ideological views will influence administrators' decision-making. Tokaji, *supra* note 35, at 133.

114. HERD & MOYNIHAN, *supra* note 14, at 32–33.

115. Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 274–76 (2003).

116. Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1155–81 (2012).

up to agency heads to coordinate overlapping jurisdictions and to determine organizational forms.<sup>117</sup>

This is particularly true with respect to rights restoration, where there is little to no communication between election administrators and members of the criminal justice system.<sup>118</sup> The interaction required between election officials, state courts, corrections officers, and probation systems poses administrative barriers to rights restoration.<sup>119</sup> For example, after Florida passed Amendment 4, the Secretary of State failed to update voter registration forms for eight months.<sup>120</sup> This left potential voters, county supervisors, and corrections and probation officers to make decisions about eligibility that contradicted forms provided by the state. In response to this procedural and similar confusion, the state legislature considered allocating \$2 million to hire more administrators on the Florida Commission on Offender Review to help evaluate applications and provide information to local supervisors of elections.<sup>121</sup>

### *B. Individual Experience with the Administrative State*

Just as election administration imposes costs on administrators, policy implementation imposes burdens on individual citizens. State and local governments' construction and implementation of voting and election rules and processes affect how citizens experience administrative burden.<sup>122</sup> Even in the unlikely event all administrators implement such rules equally, the effects of administration will be different depending upon citizen characteristics.<sup>123</sup> A citizen's decision whether to seek public benefits or to engage with government officials depends in part on that individual's resources and interpretation of the people and processes that control the encounter.<sup>124</sup> Accounting for the citizen

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117. See Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 427 (2015).

118. Wood & Bloom, *supra* note 59, at 9.

119. Wallace, *supra* note 54, at 680–81.

120. See, e.g., Patricia Mazzei, *Their Rights Restored, Felons in Florida Begin Registering to Vote*, N.Y. TIMES, Jan. 9, 2019, at A10.

121. Lawrence & Mahoney, *supra* note 93. The final text of the Voting Rights Restoration Act, passed by the legislature and sent to the governor for signature on May 3, 2019, mandates change to the uniform statewide voter education application. SB 7066, 2019 Cong., 1st Sess. (Fla. 2019) (amending Fl. St. § 97.052 (2019)).

122. HERD & MOYNIHAN, *supra* note 14, at 21–22.

123. Brodtkin & Majmunder, *supra* note 75, at 832, 843.

124. Carolyn Y. Barnes & Julia R. Henly, "They Are Underpaid and Understaffed:" *How Clients Interpret Encounters with Street-Level Bureaucrats*, 28 J. PUB. ADMIN. RES. THEORY 165, 165 (2018).

characteristics that affect this interpretation, particularly for the socially and economically disadvantaged, is a key aspect of policy implementation.<sup>125</sup>

Individual experience is especially important with respect to voting and rights restoration. Temporary voting bans may be permanent in practice as informal obstacles bar citizens from regaining rights.<sup>126</sup> The individual experiences of disenfranchised citizens illustrate this point. For example, in most cases, an overwhelming majority of citizens with felony convictions do not register to vote even after their rights are restored.<sup>127</sup> Through their interactions with government and public officials, citizens learn lessons about how citizens and governments interact; public programs communicate information about citizen status and government process.<sup>128</sup> For many citizens, the criminal justice system is the most frequent, visible, and direct government contact.<sup>129</sup> The civic education provided by that contact can place learning, compliance, and psychological burdens on individuals who seek to engage with other aspects of government.

### 1. Learning Costs

Individuals who wish to engage in some sort of civic activity must spend time and effort learning about the activity, identifying access points, ascertaining eligibility, and satisfying procedural requirements.<sup>130</sup> With respect to voting, citizens must collect information about how, where, and when to register and vote.<sup>131</sup> A lack of or inaccurate information about voting rights and

125. James Fossett & Frank J. Thompson, *Administrative Responsiveness to the Disadvantaged: The Case of Children's Health Insurance*, 16 J. PUB. ADMIN. RES. THEORY 369, 371 (2005).

126. Allen, *supra* note 50, at 389; Cammett, *supra* note 80, at 353.

127. E.g., Marc Meredith & Michael Morse, *Why Letting Ex-Felons Vote Probably Won't Swing Florida*, VOX (Nov. 2, 2018), <https://www.vox.com/the-big-idea/2018/11/2/18049510/felon-voting-rights-amendment-4-florida> [perma.cc/JPS2-FTZX]; Editorial, *Virginia Makes Every Voter Count*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/opinion/virginia-makes-every-voter-count.html> [perma.cc/4K2F-9TYL].

128. Joe Soss, *Lessons of Welfare: Policy Design, Political Learning, and Political Action*, 93 AM. POL. SCI. REV. 363, 364, 376 (1999).

129. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010).

130. HERD & MOYNIHAN, *supra* note 14, at 23; Henry E. Brady, Sidney Verba & Kay Lehman Schlozman, *Beyond SES: A Resource Model of Political Participation*, 89 AM. POL. SCI. REV. 271, 272 (1995); Moynihan et al., *supra* note 17, at 48.

131. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 8 (1980) ("These are not costless acts; at the very least they require forfeiting or postponing the opportunity to do something else that might be more pleasurable."); Ethan Porter & Jon C. Rogowski, *Partisanship, Bureaucratic Responsiveness, and Election Administration: Evidence from a Field Experiment*, 28 J. PUB. ADMIN. RES. THEORY 602, 602 (2018).

registration is a real concern among citizens with felony convictions.<sup>132</sup> In Florida, citizens with felony convictions struggle to interpret the conditions for registration, even after the passage of legislation designed to clarify the process.<sup>133</sup>

Given the limitations related to administrative capacity outlined above, many states shift the burden of ascertaining eligibility and satisfying the procedural requirements for rights restoration to citizens. For example, in budget negotiations following the passage of Amendment 4, Florida State Senator Jeff Brandes said, “Obviously, the individual is responsible for determining whether they’ve completed all the terms of their own sentence. If they have questions, they should go to the local supervisors of elections.”<sup>134</sup> Not only do Florida citizens with felony records likely have to check with local supervisors of elections regarding rights restoration, but citizens must check their official case status online with the county court and, for cases at least twenty years old, may need to travel to the courthouse to view their case file in person.<sup>135</sup> Learning costs such as these, combined with the recognized costs associated with registering to vote generally, discourage legally eligible voters from registering.<sup>136</sup>

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132. Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT’G REP. 248, 251 (2000); Meredith & Morse, *supra* note 100, at 43; Wallace, *supra* note 54, at 681; Ernest Drucker & Ricardo Barreras, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio*, THE SENT’G PROJECT 8–9 (2005), [https://www.prisonpolicy.org/scans/sp/fd\\_studiesvotingbehavior.pdf](https://www.prisonpolicy.org/scans/sp/fd_studiesvotingbehavior.pdf) [perma.cc/L3ND-QGX4].

133. Elina Shirazi, *Florida’s Felons Face Unexpected Obstacles Before Voting in 2020*, FOX NEWS (July 31, 2019), <https://www.foxnews.com/politics/after-new-bill-floridas-former-felons-face-unexpected-obstacles-before-voting-in-2020> [perma.cc/3TQH-Z4H6].

134. Mower & Mahoney, *supra* note 93. In another example, Virginia’s governor announced rights restoration in 2016, but the state gave priority to those individuals who specifically requested such restoration. Press Release, Governor McAuliffe’s Restoration of Rights Policy (Aug. 22, 2016), <https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826606-en.html> [perma.cc/8SP3-5ZNB].

135. Langston Taylor, *How Felons Can Register to Vote in Florida Under New Amendment 4 Bill*, TAMPA BAY TIMES (May 26, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/05/26/how-felons-can-register-to-vote-in-florida-under-new-amendment-4-law/> [perma.cc/C779-2LD8].

136. Estelle H. Rogers, *Restoring Voting Rights to Former Felons*, PROJECT VOTE 1 (2014), <http://www.projectvote.org/wp-content/uploads/2014/03/POLICY-PAPER-FELON-RESTORATION-MARCH-2014.pdf> [perma.cc/UF8V-42Y5].

Conversely, information outreach can increase registration. Alan S. Gerber, Gregory A. Huber, Marc Meredith, Daniel R. Biggers & David J. Hendry, *Can Incarcerated Felons Be (Re)integrated into the Political System? Results from a Field Experiment*, 59 AM. J. POL. SCI. 912, 913, 915–17 (2015) (discussing effects of packet of information about registering to vote ex-offenders receive when leaving prison).

Administrators, purposefully or not, can increase or decrease the costs associated with acquiring this information.<sup>137</sup> An increase in these costs is particularly problematic if administrators have some discretion in the performance of their jobs, as that discretion may result in differential treatment across specific groups of citizens.<sup>138</sup> Discretion can allow individual level factors to influence administrative decision-making. For example, the discretion built into voter identification laws allows for election administrators to, consciously or subconsciously, act upon racial stereotypes.<sup>139</sup> Evidence suggests that local election officials provide different information about voter ID laws to potential voters of different ethnicities.<sup>140</sup> If similar patterns exist with respect to the provision of information about voter eligibility, then the racial or other biases of administrators may lead to differential treatment of citizens with felony convictions. Classification of citizens as “felons” reinforces social stereotypes by making status a salient factor in decision-making.<sup>141</sup> These stereotypes are only exacerbated by the fact that citizens who have extended contact with the criminal justice system tend to come from lower socio-economic backgrounds<sup>142</sup> and from ethnic minorities.<sup>143</sup>

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137. Sebastian Gilke, Wouter Van Dooren & Sabine Rys, *Discrimination and Administrative Burden in Public Service Markets: Does a Public-Private Difference Exist*, 28 J. PUB. ADMIN. RES. THEORY 423, 424 (2018); Porter & Rogowski, *supra* note 131, at 603.

138. Lonna Rae Atkeson et al., *A New Barrier to Participation: Heterogeneous Application of Voter Identification Policies*, 29 ELEC. STUD. 66, 71 (2010); Katherine Levine Einstein & David M. Glick, *Does Race Affect Access to Government Services? An Experiment Exploring Street-Level Bureaucrats and Access to Public Housing*, 61 AM. J. POL. SCI. 100, 101 (2017); Rose Ernst, Linda Nguyen & Kamilah C. Taylor, *Citizen Control: Race at the Welfare Office*, 94 SOC. SCI. Q. 1283, 1305 (2013); Gilke et al., *supra* note 137, at 424–25; Keiser & Soss, *supra* note 11, at 1134; Sanford F. Schrom, Joe Soss, Richard C. Fording & Linda Houser, *Deciding to Discipline: Race, Choice, and Punishment at the Frontlines of Welfare Reform*, 74 AM. SOC. REV. 398, 401 (2009); *see also* Lipsky, *supra* note 11, at 3–6 (describing how largely obscure administration of social policy through routine activity can attenuate the relationship between the state and its citizens); Ariel R. White, Noah L. Nathan & Julie K. Faller, *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. REV. 129, 130 (2015) (finding that differences in resource constraints or professionalization of administrators cannot explain bias in providing information about voting procedures).

139. Atkeson et al., *supra* note 138, at 70.

140. White et al., *supra* note 138, at 130.

141. *See* Cecilia L. Ridgeway, *Why Status Matters for Inequality*, 79 AM. SOC. REV. 1, 4–5 (2014).

142. *E.g.*, Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, ECON. STUDIES AT BROOKINGS 8–10; 12–16 (2018), [https://www.brookings.edu/wp-content/uploads/2018/03/es\\_20180314\\_looneyincarceration\\_final.pdf](https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf) [perma.cc/V4T4-CVZ4].

143. *E.g.*, Kevin Morris, *Thwarting Amendment 4*, BRENNAN CTR. FOR JUST. 2 (2019),

## 2. Compliance Costs

Even if individuals overcome the learning costs associated with rights restoration, there are compliance burdens as well. Compliance costs include the provision of documentation to demonstrate eligibility and the financial cost of accessing services.<sup>144</sup> The compliance costs associated with voting are well documented.<sup>145</sup> The institutional requirement of first registering to vote and then voting creates two separate processes that differ in time, place, and kind to which citizens must dedicate resources.<sup>146</sup> Just as with learning costs, citizens vary in their ability to allocate resources to registration and voting, and as a result, reforms designed to lower compliance costs often have dissimilar effects on different groups of citizens.<sup>147</sup> Empirical evidence suggests that registration reforms often have disparate impacts because of variation in citizens' ability to assume the costs of voting.<sup>148</sup>

With respect to the restoration of voting rights for citizens with a felony conviction, one particular aspect of compliance cost has received the most attention. Many states require citizens to complete payment of restitution, court costs, and other judicial debt to regain voter eligibility.<sup>149</sup> The implementing legislation related to Amendment 4 provides an example. The law requires that citizens must complete all terms of the sentence related to their felony convictions, including (a) release from imprisonment; (b) termination of probation, community control, or any term ordered by a court as part of the sentence; and (c) termination of any supervision, including full payment of restitution, fines,

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[https://www.brennancenter.org/sites/default/files/analysis/2019\\_05\\_FloridaAmendment\\_FINAL-3.pdf](https://www.brennancenter.org/sites/default/files/analysis/2019_05_FloridaAmendment_FINAL-3.pdf) [perma.cc/484F-M2AT] (finding that over 40 percent of individuals released from prison in Florida were black).

144. HERD & MOYNIHAN, *supra* note 14, at 23.

145. *E.g.*, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 36–50; 260–276 (1957); William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 *AM. POL. SCI. REV.* 25, 26 (1968).

146. WOLFINGER & ROSENSTONE, *supra* note 131, at 8–9 (1980); G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 *AM. POL. SCI. R.* 17, 26 (1986); Richard J. Timpone, *Structure, Behavior, and Voter Turnout in the United States*, 92 *AM. POL. SCI. REV.* 145, 145 (1998). As of January 2019, sixteen states and the District of Columbia allow qualified citizens to register and vote on the same day. *Same Day Voter Registration*, NAT'L CONF. OF ST. LEGIS. (Apr. 17, 2019), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [perma.cc/4UCD-MFC3]. An additional state (North Carolina) permits same day registration for some early voting, but not on Election Day. *Id.*

147. *See, e.g.*, Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 *POL. BEHAV.* 29, 41 (2000).

148. *Id.*

149. *E.g.*, Cammett, *supra* note 80, at 387–91; Colgan, *supra* note 49, at 66–85; Keller, *supra* note 58, at 212–16 (2006); Jill E. Simmons, *Beggars Can't be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 *WASH. L. REV.* 297, 318–20 (2003).

and fees.<sup>150</sup> Opponents of the legislation argue that the requirement creates compliance costs that run contrary to the spirit of the Amendment and that the legislation will have a disparate impact on those who lack the resources to pay such costs.<sup>151</sup>

### 3. Psychological Costs

In addition to learning and compliance costs, a well-discussed aspect of the administrative burden of felon disenfranchisement and rights restoration is psychological cost. In the context of burden, psychological costs result from the stigma that comes from applying for and/or participating in a particular government program, the frustration that often results from interaction with public officials, the stresses that arise from negotiating complex processes, and the loss of individual autonomy that can accompany intrusive administrative procedures.<sup>152</sup> Citizens can see government as a pervasive presence in their lives, particularly if they have limited resources.<sup>153</sup> Citizen-government interaction can reinforce an individual's perception that she lacks political power and social standing.<sup>154</sup> In response, regardless of want or need, citizens may opt out of government participation to avoid the psychological burden.<sup>155</sup>

Administrative practices can become degrading, intrusive, and directive, erode citizen autonomy, and create the perception that interaction with the government only goes one way.<sup>156</sup> Through experience, citizens can view administrators as sovereign actors who are unresponsive to individual needs and who render objections to policy both futile and unwise.<sup>157</sup> As a result, citizens' limited options are compliance or exit.<sup>158</sup>

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150. SB 7066, 2019 Cong., 1st Sess. (Fla. 2019) (amending Fl. St. § 97.052 (2019)).

151. Daniel A. Gross, *The Fight for Voting Rights in Florida Isn't Over*, NEW YORKER (May 10, 2019), <https://www.newyorker.com/news/news-desk/the-fight-for-voting-rights-in-florida-isnt-over> [perma.cc/3VS5-2J73]; P.R. Lockhart, *Florida Legislature Approves Bill Requiring Felons to Pay Fines and Fees Before Voting*, VOX (May 3, 2019), <https://www.vox.com/policy-and-politics/2019/5/3/18528564/amendment-4-florida-felon-voting-rights-fees> [perma.cc/K4L5-M6EF]; Lawrence Mower, *Florida Republicans Reach Amendment 4 Deal: Felons Must Pay, but Judges Can Waive Costs*, TAMPA BAY TIMES (May 2, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/05/03/florida-republicans-reach-amendment-4-deal-felons-must-pay-but-judges-can-waive-costs/> [perma.cc/5KEG-72UK].

152. HERD & MOYNIHAN, *supra* note 14, at 13.

153. Soss, *supra* note 128, at 366.

154. Moynihan et al., *supra* note 17, at 50.

155. Jones et al., *supra* note 82, at 151; Moynihan, et al., *supra* note 17, at 49.

156. HERD & MOYNIHAN, *supra* note 14, at 25 (2018); Moynihan et al., *supra* note 17, at 49.

157. Soss, *supra* note 128, at 367 (1999).

158. *Id.* at 366.

The stigma of a felony conviction and the accompanying loss of the right to vote reinforce these psychological costs.<sup>159</sup> Interactions with the criminal justice system often influence a citizen's perception of her own autonomy and political standing; government becomes a place where officials make decisions affecting citizens' lives without their input and where process can objectify and alienate.<sup>160</sup> Indeed, the legal and political justification of disenfranchisement policy hinges on categorization of citizens and reinforces the idea of felons as a separate class or group.<sup>161</sup> Given this, and the fact that the right to vote is itself a social convention,<sup>162</sup> the psychological cost of a felony record likely inhibits voting registration.<sup>163</sup> As put by one individual with a felony conviction when asked about his ability to vote, "I don't even think about it actually . . . I mean I've been failing at that kind of stuff for so long, I just assume I can't vote. I don't think I can have that right ever again."<sup>164</sup>

### C. Policymaking Through Administration

The combination of the influence of administrative capacity and individual experience on policy implementation suggests that administrative burden is "policymaking by other means."<sup>165</sup> Changes in administrative burden can generate behavioral responses in both administrators and citizens that result in specific policy outcomes.<sup>166</sup> Yet administrative burden is poorly understood

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159. MANZA & UGGEN, *supra* note 58, at 151–55; Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311, 312 (2019); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 163 (2010) ("My felony conviction has been like a mental punishment, because of all the obstacles . . ."); Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 3006 (2015) ("Because of their stigmatizing effects, the collateral legal consequences of criminal conviction have come to represent a modern day scarlet letter . . .").

160. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818–19 (2010); Rogers, *supra* note 136, at 5.

161. KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA* 127 (2005); Cammett, *supra* note 80, at 370–75; Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI 281, 299–303 (2006).

162. EWALD, *supra* note 33, at 9.

163. ALEXANDER, *supra* note 159, at 160–64; MANZA & UGGEN, *supra* note 58, at 9.

164. David S. McCahon, *Combating Misinformation in the Ex-Felon Population: The Role Probation and Parole Agencies Can Play to Facilitate Civic Reintegration in the United States*, 63 PROBATION J. 9, 16 (2016).

165. HERD & MOYNIHAN, *supra* note 14, at 33; Moynihan et al., *supra* note 17, at 52.

166. HERD & MOYNIHAN, *supra* note 14, at 35; Porter & Rogowski, *supra* note 131, at 603.

by the public, making it extremely valuable as a policy tool.<sup>167</sup> Policymakers can alter administrative burden with seemingly neutral statutory or regulatory language presented as apolitical procedural fixes.<sup>168</sup> For example, Florida State Senator Dennis Baxley, chair of the Florida Senate Ethics and Elections Committee, stressed that there is a role for politicians in rights restoration because “procedures are needed.”<sup>169</sup>

There are few policy areas where considerations of administrative burden are of more consequence than in election administration. Election law and administration tends to be couched in neutral language and promoted as designed to improve managerial goals such as efficiency or to pursue democratic values.<sup>170</sup> However, “[e]lections are contests for power and, as such, it is natural that politics will influence every part of the contest, including the administration of elections.”<sup>171</sup> Political self-interest is the predominant motivation behind most election legislation,<sup>172</sup> and attitudes towards administrative burden are relatively predictable; the policy preferences of political actors correlate with stances on the nature of burden and the distribution of cost across citizens and government.<sup>173</sup>

Certainly, this is true when it comes to felon disenfranchisement and rights restoration policy. Discussion of the topic inevitably leads to speculation about the partisan leanings of citizens with felony convictions and the electoral consequences. For example, in the debate surrounding the passage of Amendment 4, Professors Marc Meredith and Michael Morse estimated that, if all Florida citizens with felony convictions had been eligible to vote in the 2016 elections, there would have been approximately 102,000 additional votes for the Democratic Party, 54,000 more votes for the Republican Party, and 40,000 surplus votes that could have been cast for either party.<sup>174</sup> If correct, these estimates signal meaningful differences in a state where about 100,000 votes decided the last presidential election (2016), 10,000 votes the last Senate election (2018), and 30,000 votes the last governor’s election (2018).<sup>175</sup> This

167. Moynihan et al., *supra* note 17, at 52–53.

168. HERD & MOYNIHAN, *supra* note 14, at 35–36.

169. Rivero, *supra* note 4.

170. See Weinstein-Tull, *supra* note 36, at 762.

171. COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 49 (2005), <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> [perma.cc/3RCF-PVR8].

172. Claire Foster Martin, *Block the Vote: How a New Wave of State Election Laws is Rolling Unevenly over Voters and the Dilemma of How to Prevent It*, 43 CUMB. L. REV. 95, 125 (2012).

173. HERD & MOYNIHAN, *supra* note 14, at 36; Moynihan, *supra* note 17, at 52.

174. Meredith & Morse, *supra* note 127.

175. *Florida Results*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/elections/2016/results/florida> [perma.cc/Q4FZ-AHTK]; *Florida Results*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/interactive/2018/11/06/us/elections/results-florida->

suggests that adjusting the statutory language that influences administrative burden can have real political consequences.

### III. ADMINISTRATIVE BURDEN IN ACTION: FLORIDA'S AMENDMENT 4

The implementation of Florida's Amendment 4 provides an example of the implications of administrative burden for the restoration of voting rights for citizens with felony convictions.<sup>176</sup> Like all states, Florida has limited resources and therefore the State and its local governments must balance the use of these resources and the protection of important public values. Because Amendment 4 is targeted to address the needs of a subset of the population and to enable the participation of that population, implementation is administratively costly.

Amendment 4 went into effect on January 8, 2019.<sup>177</sup> However, questions arose among policymakers and administrators regarding interpretation and implementation of the Amendment.<sup>178</sup> On May 3, 2019, the Florida State Legislature passed a bill designed to address some of the administrative challenges posed by Amendment 4.<sup>179</sup> Governor Ron DeSantis signed the bill into law on June 28, 2019.<sup>180</sup> An examination of the law's provisions and consideration of the state's administrative capacity, citizen experiences, and political circumstances illuminates the potential effects of the legislation.

#### A. Provisions of Implementing Legislation

First, the law addresses voter applications and requires that the Secretary of State change the uniform statewide voter registration application to include three different categories into which a citizen must place herself: applicant has never been convicted of a felony; applicant has been convicted of a felony and her rights have been restored by the Board of Executive Clemency; or applicant has been convicted of a felony and her rights have been restored by

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elections.html?mtr-ref=www.google.com&gwh=6145C264CE0AF08981E94397F45F69E1&gwt=pay [perma.cc/ZL9F-SS97].

176. See Lawrence Mower, *Amendment 4: The House is Hearing the First Bill Tomorrow. Here's What's In It*, TAMPA BAY TIMES (Mar. 18, 2019), <https://www.tampabay.com/florida-politics/2019/03/18/amendment-4-the-house-is-hearing-the-first-bill-tomorrow-heres-whats-in-it/> [perma.cc/9KH8-5ZKM].

177. Emily L. Mahoney & Langston Taylor, *Amendment 4: Is Attempted Murder the Same As Murder?*, TAMPA BAY TIMES (Mar. 12, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/03/12/amendment-4-exception-may-deny-voting-rights-for-felons-sentenced-for-attempted-murder/> [perma.cc/6PD9-XJ9D].

178. *E.g., id.*; Mower, *supra* note 176.

179. Voting Rights Restoration Act, SB 7066, 2019 Cong., 1st Sess. (Fla. 2019) [hereinafter Voting Rights Restoration Act] (amending Fl. St. § 97.052 (2019)).

180. DeSantis, *supra* note 6.

Amendment 4.<sup>181</sup> Once the citizen places herself into one of the three categories, the supervisor of elections for the county in which the citizen resides must determine whether the applicant is eligible to vote.<sup>182</sup> With respect to felony convictions, a citizen is not eligible unless she has completed all terms of her sentences as contained in the four corners of her sentencing document.<sup>183</sup> This includes release from imprisonment; termination of probation or community control; fulfillment of any term as ordered by the court as part of her sentence; termination from any supervision; and full payment of restitution, fines, or fees.<sup>184</sup> In order to aid each county supervisor of elections in determining eligibility, the law provides for the Department of State to compare “information received from, but not limited to, a clerk of the circuit court, the Board of Executive Clemency, the Department of Corrections, the Department of Law Enforcement, or a United States Attorney’s Office.”<sup>185</sup>

The law also requires administrators to provide information to citizens. The Department of Corrections shall inform and educate inmates and offenders on community supervision about the restoration of rights and notify citizens of outstanding sentence terms upon release from incarceration, probation, or community control.<sup>186</sup> Additionally, the Florida Commission on Offender Review must notify a citizen of all the outstanding terms of her sentence at the time of termination of Commission supervision.<sup>187</sup> To assist the Commission with this task, the Department of Corrections must send the Commission a monthly electronic list of the names of individuals who may be eligible for rights restoration.<sup>188</sup>

Recognizing that the changes provided by the new law likely will result in unforeseen complications to the restoration process, the legislature mandated the creation of a Restoration of Voting Rights Work Group within the Department of State.<sup>189</sup> This Work Group, comprised of individuals from the Departments of Corrections, Law Enforcement, and State, the Florida Commission on Offender Review, state circuit courts, and county supervisors of elections, shall conduct a comprehensive review of the process of verifying potential voters who may be eligible for restoration of voting rights.<sup>190</sup> The Work Group must submit a report to the legislature by November 1, 2019, providing recommendations related to the consolidation of data relevant to the implementation of Amendment 4 and the process of informing citizens about eligibility.<sup>191</sup>

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181. Voting Rights Restoration Act § 21 (amending Fl. St. § 97.052 (2019)).

182. *Id.* at § 23 (amending Fl. St. § 98.045(a) (2019)).

183. *Id.*

184. *Id.* at § 25 (creating Fl. St. § 98.0751 (2019)).

185. *Id.* at § 24 (amending Fl. St. § 98.075) (2019)).

186. *Id.* at §§ 27, 29, 31 (amending Fl. St. §§ 940.061, 944.705, 948.041 (2019)).

187. *Id.* at § 30 (amending Fl. St. §947.24 (2019)).

188. *Id.* at § 27 (amending Fl. St. § 940.061 (2019)).

189. *Id.* at § 33.

190. *Id.* at § 33(1).

191. *Id.* at § 33(4).

### B. Administrative Complications

While the law does provide some procedural framework for the implementation of Amendment 4, administrators still have considerable latitude in creating the formal rules and procedures that will govern rights restoration. This leeway, combined with the informal rules and norms that will inevitably develop as a result, can influence the *de facto* restoration of rights.<sup>192</sup> In the face of discretion, administrators who perceive a higher administrative burden reduce the chances of policy implementation.<sup>193</sup> For example, the Secretary of State can determine whether to offset some of the burdens created by the statutory requirements for voting eligibility and registration with efforts to promote participation.<sup>194</sup> Yet, this creates additional burden for administrators. Therefore, it is equally possible that the Secretary of State may increase citizen costs by administering statutory requirements in a way that increases barriers to access.<sup>195</sup> An examination of the law's likely impact on administrative capacity, individual factors, and political implications suggests that administrative burden will likely impede voting rights restoration in Florida.

#### 1. Administrative Capacity

First, the law involves three different types of administrative agencies – those in charge of the coordination of election policy (e.g., Department of State); those in charge of election administration (e.g., county election supervisors and offices); and those that are part of the criminal justice system (e.g. Florida Commission on Offender Review).<sup>196</sup> If all agencies do not have the same capacity, or capacity is unevenly distributed across or within units, then problems with policy implementation will likely arise as administrators who perceive a higher burden will oppose new policy adoption and support shifting administrative tasks to other units.<sup>197</sup> While coordination between the agencies can help alleviate some concern, the law largely leaves communication up to agency heads. For example, the law requires various units to share information relating to voter eligibility but does not mandate a procedure for doing so.<sup>198</sup>

Each of these agencies has a finite amount of financial resources, and it is unlikely that future budget allocations will reflect the additional tasks the law requires of the agencies. At a minimum, the Secretary of State must change voter registration forms to reflect new statutory language and ensure the use of those new forms. This is no small task, as the state has a history of problems

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192. See Keiser & Soss, *supra* note 11, at 1138.

193. Burden et al., *supra* note 30, at 749.

194. Benson, *supra* note 52, at 367–68.

195. *Id.* at 367.

196. Voting Rights Restoration Act § 33.

197. Burden et al., *supra* note 30, at 749.

198. Voting Rights Restoration Act § 25.

resulting from county supervisors' of elections delay in the implementation of policy changes.<sup>199</sup> In addition to adopting the new voter registration materials, county supervisors of elections will also have to invest resources in processes to determine voter eligibility and to sift through information provided by other agencies. While these tasks are related to the agencies' central purpose, the tasks allocated to the Departments of Corrections, Law Enforcement, and Florida Commission on Offender Review are arguably indirectly connected to their missions. The Florida Department of Corrections oversees the third largest prison system in the country;<sup>200</sup> the Florida Department of Law Enforcement's primary mission is to promote public safety;<sup>201</sup> and the Florida Commission on Offender Review serves as a quasi-judicial body that makes determinations regarding parole and other releases.<sup>202</sup> When faced with the tasks directly related to these missions and the additional burden of rights restoration, administrators are likely to pass the costs of restoration to citizens.

Furthermore, the budgets of the Departments of Corrections and Law Enforcement and the Florida Commission on Offender Review have remained relatively stable over time, with slight increases in the 2018–19 budget that are unrelated to the restoration of voting rights for citizens with felony convictions.<sup>203</sup> The Department of State's elections budget was more than double that of years similarly placed in the election cycle.<sup>204</sup> However, 54% of that budget (\$20,392,786.75) came from federal grants, and over 75% of those grants (\$15,450,000.00) was dedicated to election security.<sup>205</sup> The legislature only allocated \$2 million to county supervisors of elections for use in all election

199. FL. DEP'T OF STATE, RECOMMENDATIONS FOR INCREASED ACCESSIBILITY & EFFICIENCY IN FLORIDA ELECTIONS 6–7 (2013), <https://dos.myflorida.com/media/693815/secretarys-report-on-recommendations-2013.pdf> [perma.cc/J8AT-83DJ] (noting county supervisor delay in implementing changes relating to realignment of precincts, ballots, and election technology).

200. *About the Florida Department of Corrections*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/about.html> [perma.cc/WT4F-SGE3].

201. *About FDLE*, FLA. DEP'T OF LAW ENF'T, <https://www.fdle.state.fl.us/About-Us/About-Us.aspx> [perma.cc/G99B-3XK6].

202. *Organization Overview*, FLA. COMM'N ON OFFENDER REV., <https://www.fcor.state.fl.us/overview.shtml> [perma.cc/D56P-65G7].

203. *Fla. Dep't of Corr. Operating Budget 2018–2019*, FLA. EXEC. OFF. OF THE GOVERNOR, <http://transparencyflorida.gov/OperatingBudget/Ledger.aspx?FY=19&BE=70000000&OB=Y&SC=F> [perma.cc/3KGT-4HTG]; *Fla. Dep't of Law Enf. Operating Budget & Fla. Comm'n on Offender Review 2018–19 Operating Budget*, FLA. EXEC. OFFICE OF THE GOVERNOR, <http://transparencyflorida.gov/OperatingBudget/Agency.aspx?FY=19&BE=78000000&SC=F> [perma.cc/BSS7-8GRB].

204. *Fla. Dep't of State 2018-19 Elections Operating Budget*, FLA. EXEC. OFF. OF THE GOVERNOR, <http://transparencyflorida.gov/OperatingBudget/AgencyDetailLevel.aspx?FY=19&BE=45100200&SC=F&OB=N> [perma.cc/FQW6-3Y2K].

205. *Id.*

administration activities and limited fund distribution to those counties that provided certification of matching funds in an amount equal to 15% of the amount to be received from the state.<sup>206</sup>

In addition to financial constraints, these agencies (and their administrators) face expertise and organizational challenges. Understanding the requirements contained in the law necessitates legal analysis and a knowledge of where to look to access information about voter eligibility. Yet, any experience administrators gain over time relating to voter eligibility and registration is likely routinized and not policy-specific. Training and guidance documents can help overcome this lack of administrative expertise, but the law does not provide for such instruction. When administrators are faced with a multitude of tasks and limited resources and knowledge, they are likely to choose to perform tasks with which they have familiarity rather than devoting energy to acquiring new expertise.

The organizational structure of Florida's electoral system only exacerbates the problem. Consider, for example, the Department of State. The Secretary of State serves as chief election officer<sup>207</sup> and has the legal responsibility for "implementing, operating, and maintaining, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive, computerized statewide voter registration system."<sup>208</sup> Yet, elections are not the Secretary's sole policy focus. The Department of State consists of six divisions tasked with wide authority, from formalizing the legal standing of Florida businesses to promoting funding and programs for the arts.<sup>209</sup> The division of the Department of State responsible for the election administration is the Florida Division of Elections, which itself consist of three subunits.<sup>210</sup> None of these subunits are directly responsible for voter registration, which is delegated to local supervisors of elections. The Division of Elections' Bureau of Voter Registration Services assists county Supervisors of Elections with the voter registration process, but it does not control the appointment, removal, or funding of those Supervisors. Each Supervisor of Elections is elected by voters in her county and the county's board of county commissioners pays her compensation.<sup>211</sup>

Such a complicated organizational scheme can create coordination and implementation problems. Even if one set of administrators devotes time and energy into understanding the new legal framework implementing Amendment 4, another set of administrators *within the same agency* may thwart their efforts due to differential organizational missions, resources, and expertise.

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206. S.B. 2500, 2019 Cong, 1st Reg. Sess. (Fla. 2019).

207. Fla. St. § 97.012 (2019).

208. Fla. St. § 98.035(1) (2019).

209. *About the Department*, FLA. DEP'T OF STATE, <https://dos.myflorida.com/about-the-department/> [perma.cc/EH4J-X4ZK] (last visited Aug. 25, 2019).

210. *About Us*, FLA. DIV. OF ELEC., <https://dos.myflorida.com/about-the-department/> [perma.cc/9WJP-UQXR].

211. Fla. St. § 98.015(1)–(2) (2019).

## 2. Individual Experience

Second, even if administrative capacity did not provide roadblocks to administration, citizens' interpretation of the processes necessitated by the law likely will inhibit restoration of voting rights to citizens with felony convictions. The individual learning and compliance costs inherent in the law are quite high. Florida has prevented citizens with felony convictions from voting for the past 150 years.<sup>212</sup> Even in the wake of a public campaign advertising the passage of Amendment 4, citizens with felony convictions may not be aware of its effects. Public attention to the Amendment largely focuses on those who already know the potential implications of Amendment 4, as opposed to providing less politically engaged citizens with information regarding voter registration.<sup>213</sup> Groups such as Florida Rights Restoration Coalition recognize this problem and are working on visiting communities and encouraging civic participation: "We basically remind everybody that the impact of Amendment 4 is intact, that the lifetime ban is history, and we're now looking at a situation where we have about 800,000-plus who are immediately eligible, and about 500,000-plus who are not yet eligible because of financial obligations."<sup>214</sup>

The citizens in the latter category, who are not eligible for rights restoration because of outstanding court fines, fees, or restitution, have received considerable attention in recent months. As discussed above, these obligations are a type of compliance cost that may prevent individuals with felony convictions from being able to restore their voting rights.<sup>215</sup> Estimates from the Florida court system suggest that over 80% of financial obligations will remain unpaid because the defendant does not have the resources to do so.<sup>216</sup> As put by Julie Ebenstein, a senior staff attorney with the American Civil Liberties Union ("ACLU") Voting Rights Project, the administrative barriers in the law "nearly guarantee that people will miss election after election . . . because they cannot

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212. Letitia Stein, *Politics Cloud Felon Voting Rights Restoration in Florida*, REUTERS (Dec. 15, 2018), <https://www.reuters.com/article/us-usa-florida-felons/politics-cloud-felon-voting-rights-restoration-in-florida-idUSKBN1OE0C> [perma.cc/5HVZ-3BZM].

213. Maruam Saleh, *How Some Florida Prosecutors are Pushing Back Against GOP Voter Suppression Efforts*, THE INTERCEPT (July 15, 2019), <https://theintercept.com/2019/07/15/florida-voting-rights-amendment-4/> [perma.cc/D9FX-5FPA] (statement of Neil Volz, deputy director of the Florida Rights Restoration Coalition).

214. *Id.* (statement of Neil Volz, deputy director of the Florida Rights Restoration Coalition).

215. *Id.*

216. Daniel Rivero, *Felons Might Have to Pay Hundreds of Millions Before Being Able to Vote in Florida*, NAT'L PUB. RADIO (WLRN) (Jan. 20, 2019), <https://www.wlrn.org/post/felons-might-have-pay-hundreds-millions-being-able-vote-florida> [perma.cc/M67S-6TU7].

afford to pay financial obligations[.]”<sup>217</sup> On June 28, 2019, in conjunction with the ACLU, the NAACP Legal Defense and Education Fund, and the Brennan Center for Justice, a group of citizens who have outstanding financial obligations sued Florida election officials over the constitutionality of the new law.<sup>218</sup> The plaintiffs alleged, *inter alia*, that the law’s requirement that a citizen must pay all outstanding judicial debt before her rights are automatically restored under Amendment 4 violates the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments of the United States Constitution.<sup>219</sup> In its Order Granting a Preliminary Injunction, the United States District Court for the Northern District of Florida held that Florida cannot deny rights restoration because an individual does not have the financial resources to pay outstanding debt.<sup>220</sup>

In addition to the learning and compliance costs, there are also large psychological costs to rights restoration in Florida. Most discussion of Amendment 4 and its implementing legislation reinforces the notion of citizens with felony convictions as a separate class of citizens. For example, in debate over provisions of the law, State Representative James Grant argued on the House floor, “The affected class disenfranchised themselves when they committed a crime.”<sup>221</sup> Rhetoric such as this, combined with the fact that citizens must separately identify themselves on voter registration forms, make citizens more likely to opt out of government participation. Indeed, the plaintiffs in the suit challenging the constitutionality of the law argued that the law’s effect is

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217. Jane C. Timm, *Florida Republicans Move to Limit Felon Voting Rights Despite Constitutional Amendment*, NBC NEWS (Mar. 19, 2019), <https://www.nbcnews.com/politics/politics-news/florida-republicans-move-limit-felon-voting-rights-despite-constitutional-amendment-n985156> [perma.cc/RS8Q-SY6M].

218. Complaint, *Gruver v. Barton et al.*, No. 1:19-CV-00121 (N.D. Fla. June 28, 2019) (consolidated with *Jones et al. v. Desantis et al.*, No. 4:19-CV-00300, 2019 WL 5295192 (N.D. Fla. Oct. 18, 2019)).

219. *Id.* (First Amendment-based claims for relief include unconstitutional burden on core political speech and associational rights. Fourteenth Amendment-based claims for relief include: violation of the doctrine of fundamental fairness; unconstitutional discrimination in violation of the Equal Protection Clause; unconstitutional burden on the right to vote; violations of procedural due process; and intentional race discrimination. Twenty-Fourth Amendment-based claim includes unconstitutional poll tax. The complaint also includes a claim for retroactive punishment in violation of the Ex Post Facto Clause of Article 1, Section 10 of the Constitution).

220. *Jones et al. v. Desantis et al.*, No. 4:19-CV-00300, 2019 WL 5295192, at \*11 (N.D. Fla. Oct. 18, 2019). The Court went on to state that Florida must adopt procedures that permit qualified individuals to register and vote if they are unable to pay outstanding financial obligations. *Id.* at \*13.

221. Veronica Stracqualursi, *Florida House Passes Bill That Would Require Ex-Felons Pay All Fees Before Exercising Voting Rights*, CNN (Apr. 25, 2019), <https://www.cnn.com/2019/04/25/politics/florida-amendment-4-voting-rights-felons/index.html> [perma.cc/LT7T-SGXL].

disenfranchising in part because it reinforces long-standing disparities along racial and socio-economic lines.<sup>222</sup>

### 3. Political Effects and Potential for Change

When considering the balance of administrative and citizen costs associated with policy implementation, it is important to consider the political preferences of the actors involved in administrative policymaking.<sup>223</sup> With respect to implementation of Amendment 4, those actors include state legislators, the Secretary of State, and county election supervisors. First, as elected officials, state legislators have an incentive to keep statutory language relatively vague.<sup>224</sup> Legislators can claim credit for enacting vague legislation and leave administrators to translate a general mandate into a functioning program, a process that inevitably involves “the trampling of numerous toes.”<sup>225</sup> When constituents become frustrated with the administration of policy, legislators can blame administrators and then intervene with “technical fixes.”<sup>226</sup>

In such a system, it is important to consider whether the key administrators involved in the policy process are elected or appointed. The decentralization and discretion inherent in election administration provides administrative policymakers with the opportunity to make decisions based on political goals.<sup>227</sup> With respect to electoral reform, administrative preferences differ depending on job description and method of selection. Policy managers tend to be more concerned with costs and efficiency than with normative goals such as equal representation.<sup>228</sup> Elected officials are more likely to be responsive to public pressure.<sup>229</sup>

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222. Complaint, *Gruver v. Barton et al.*, No. 1:19-CV-00121 (N.D. Fla. June 28, 2019).

223. See Daniel Palazzolo, Vincent G. Moscardelli, Meredith Patrick & Doug Roubin, *Election Reform after NAVA: Voter Verification in Congress and the States*, 38 *PUBLIUS* 515, 531 (2008).

224. MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 46 (2d ed. 1989).

225. *Id.*

226. HERD & MOYNIHAN, *supra* note 14, at 36.

227. See COMM’N ON FED. ELEC. REFORM, *supra* note 171, at 50; see also Richard C. Fording, Joe Soss & Sanford F. Schram, *Devolution, Discretion, and the Effect of Local Political Values on TANF Sanctioning*, 81 *SOC. SERV. REV.* 285, 286 (2007).

228. Moynihan, *supra* note 72, at 165.

229. Barry C. Burden, David T. Canon, Stephane Lavertu, Kenneth R. Mayer & Donald P. Moynihan, *Selection Method, Partisanship, and the Administration of Elections*, 41 *AM. POL. RES.* 903, 906 (2013); see also COMM’N ON FED. ELEC. REFORM, *supra* note 171, at 51 (arguing that state chief elections officers should remain insulated from political pressure through fixed terms of appointment and clear lines of responsibility).

The primary manager of election policy in Florida is the Secretary of State.<sup>230</sup> In contrast to the majority of states, Florida's Secretary of State is an appointed official.<sup>231</sup> The Governor appoints the Secretary, subject to confirmation by the state Senate, and the Secretary serves at the pleasure of the Governor.<sup>232</sup> For the purposes of implementation of the law and Amendment 4, this is notable for two reasons. First, gubernatorial appointment combined with at-will removal means that the Secretary of State likely is more responsive to the Governor than to any other political actor. In this way, the Secretary provides the Governor with an opportunity to gain control over administrative policymaking and to tailor procedures to gubernatorial political interests.<sup>233</sup> Second, to the extent that the Secretary of State adopts policies to implement the law, she likely is more concerned about the managerial aspects of election administration than about citizen responsiveness.

Unlike the Secretary of State, each of the sixty-seven county supervisors of elections is elected every four years.<sup>234</sup> In theory, this structure generates incentives for administrators to be more accountable to citizens' needs and to support policies that reflect citizen preferences.<sup>235</sup> However, when the burden to drive legislative or administrative policy change falls on citizens with little political clout, those citizens tend to be less successful.<sup>236</sup> Elected officials have little incentive to respond to those citizens who lack political power or are viewed as "undeserving."<sup>237</sup> As a class of potential voters, citizens with felony convictions fall within this category and therefore have limited ability to hold elected administrators accountable for policy implementation.<sup>238</sup>

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230. FLA. STAT. § 97.012 (2019).

231. SHANTON, *supra* note 22, at 12–13.

232. FLA. STAT. § 20.10(1) (2019).

233. *See e.g.* Hugh Hecló, *A Government of Strangers: Executive Politics in Washington*, THE BROOKINGS INST. 68–76 (1977); DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS* (2008); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION OF AMERICAN POLITICS* 235, 245 (John E. Chubb & Paul E. Peterson eds., 1985).

234. FLA. STAT. § 98.015(1) (2019). States vary in selection and removal of local election administrators, but the majority of states have elected officials. Note, *Toward a Greater State Role in Election Administration*, *supra* note 44, at 2316.

235. Susan M. Miller, *Administering Representation: The Role of Elected Administrators in Translating Citizens' Preferences into Public Policy*, 23 J. PUB. ADMIN. RES. THEORY 865, 869 (2013).

236. *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161–62 (2004) (arguing that disenfranchisement laws operate as a sanction that reduces the political clout of entire communities).

237. Fossett & Thompson, *supra* note 125, at 370; Moynihan & Herd, *supra* note 12, at 663–64.

238. *See* Brodtkin, *supra* note 63, at 20 (finding that welfare clients' limited capacity for self-advocacy makes it difficult for those clients to hold the state accountable).

The court system provides only modest hope of remedy in this situation. Notably, litigation challenging administrative action is hard to pursue, particularly for the economically disadvantaged.<sup>239</sup> In the area of election administration, litigation tends to come at points of crisis, rendering the courts “less like an advancing army charging in to dominate a territory and more like a fire brigade that has been summoned when half the building is already engulfed in flames.”<sup>240</sup>

Even then, a consistent theme in election law jurisprudence is a high level of deference to administration, and the judicial preference for as-applied challenges give states greater discretion in their administrative processes.<sup>241</sup> Courts have struggled with how to weigh administrative burden, legislative ambiguity, and administrative discretion, particularly in the context of voting rights.<sup>242</sup> This struggle is even more apparent with respect to the restoration of the voting rights of citizens with felony convictions.<sup>243</sup> Before the passage of Amendment 4, the U.S. Court of Appeals for the Eleventh Circuit noted the tension between the potential for disparate treatment and the political consequences resulting from administrative burden and established standards for Equal Protection challenges.<sup>244</sup> Yet the Court ultimately held that, without more, demonstration of a lack of administrative standards is insufficient as a legal argument.<sup>245</sup>

239. *Id.* at 24–25.

240. Wise, *supra* note 29, at 131–32.

241. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202–03 (2008); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449–58 (2008); Joshua A. Douglas, *The Significance to the Shift toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 637 (2009); Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311, 322 (2019); *see also* Bucklew v. Precythe, 139 S. Ct. 1112, 1127–29 (2019) (distinguishing between as-applied and facial challenges); United States v. Stevens, 559 U.S. 460, 472–73 (2010) (providing for two types of facial attacks: (a) establishment that no set of circumstances exists under which a statute is constitutionally valid or (b) demonstration that the vast majority of applications of the statute are unconstitutional).

242. HERD & MOYNIHAN, *supra* note 14, at 252.

243. *See* Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1837–38, 1847 (2013) (a series of narrow rulings in election administration makes it difficult to articulate the appropriate framework for determining when state procedures violate equal protection); Simmons, *supra* note 149, at 310, 313–16 (noting that re-enfranchisement is an unsettled area of law); Wallace, *supra* note 53, at 680 (suggesting that procedural due process challenges may be appropriate to challenge felon re-enfranchisement procedures).

244. Hand v. Scott, 888 F.3d 1206, 1209–10 (11th Cir. 2018) (staying Hand v. Scott, 315 F. Supp. 3d 1244 (N.D. Fla. 2018)).

245. *Id.* at 1210. The court noted,

Since a standardless reenfranchisement scheme, without more, does not state a claim for an Equal Protection violation based on invidious discrimination, it likely follows that a standardless scheme, without more, cannot establish a First Amendment violation based on viewpoint discrimination. While a

Subsequently, both parties agreed that the passage of Amendment 4 rendered the litigation moot because the Amendment created a non-discretionary system of voting rights restoration.<sup>246</sup>

From the perspective of administrative burden, the post-Amendment 4 actions of the plaintiffs in that case are illuminating. Of the nine plaintiffs, two applied for restoration but were ineligible because of outstanding court costs.<sup>247</sup> A third plaintiff did not apply for restoration at all.<sup>248</sup> Interestingly, with respect to the latter, the state of Florida noted that because she had not applied for restoration, the state lacked “knowledge whether she has any outstanding obligations.”<sup>249</sup> This means that one-third of the individuals who, by pursuing litigation in the first place, have revealed themselves to be exceptionally motivated to regain their voting rights failed to do so after the passage of Amendment 4. One can assume that the rate of failed restoration will be even higher in the general population.

### CONCLUSION

The example of Florida’s Amendment 4, subsequent legislative decisions, and likely citizen experience with administrative burden suggests that attention to statutory language of various voting rights regimes or to the constitutionality of felon disenfranchisement misses a significant point: the key to the success or failure of citizen rights restoration policy lies with the administrative state. Even seemingly accommodating procedural language like Florida’s inter-agency information sharing requirement complicates the administrative process and strains already limited agency budgets. The combination of limited administrative capacity and the learning, compliance, and psychological costs citizens with felony convictions must pay to restore their voting rights places significant hurdles in the way of rights restoration. This is not to say that rights restoration for disenfranchised citizens with felony convictions is impossible,

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discretionary felon-reenfranchisement scheme that was facially or intentionally designed to discriminate on viewpoint – say, for example, by barring Democrats, Republicans, or socialists from reenfranchisement on account of their political affiliation – might violate the First Amendment . . . no such showing has been made in this case.

*Id.* at 1211–12.

246. Supplemental Brief for Appellants at 5, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018) (No. 18-11388-G); Supplemental Brief for Appellees at 1, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018) (No. 18-11388-G).

247. Supplemental Brief for the Appellants at 4, *Hand v. Scott*, 888 F.3d 1206 (11th Cir. 2018) (No. 18-11388-G).

248. *Id.* at 4 n.1. As a result, parties did not have access to that Plaintiff’s CCA. *Id.*

249. *Id.* One wonders how individual citizens are supposed to obtain this information if the state of Florida lacks it.

or even improbable. Just that the “focus of attention should shift from *rules* governing elections to the institutions responsible for running them.”<sup>250</sup>

Politicians recognize the importance of institutions and how statutory or regulatory language presented as apolitical technical solutions to administrative problems can have real policy consequences. As noted by David A. Graham in his April 2019 piece on voting rights restoration in *The Atlantic*, conversations about voting rights in the abstract are useful for deliberate and principled policymaking, but “hashing out the nitty-gritty” of administration is a political game.<sup>251</sup> Instead of discussing rights restoration in the abstract, politicians in Florida are making consequential administrative decisions about how Amendment 4 will work in practice.<sup>252</sup> This demonstrates how even the best laid plans often go awry in the face of administrative burden, or “policymaking by other means.”<sup>253</sup>

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250. Tokaji, *supra* note 34, at 126; *see also* COMM’N ON FED. ELECTION REFORM, *supra* note 170, at 57 (“[W]e need to understand better how elections are administered”).

251. David A. Graham, *A Voting-Rights Debate Reveals Why Democrats Keep Losing*, THE ATLANTIC (Apr. 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/democrats-republicans-felon-voting-florida/588010/> (“In short, while Democrats are engaged in a largely theoretical exercise on the national level, Republicans are moving aggressively to achieve their political goals at the state level”).

252. *Id.*

253. HERD & MOYNIHAN, *supra* note 14, at 33.