

**“TO PURIFY THE BALLOT”  
THE RACIAL HISTORY OF FELON  
DISENFRANCHISEMENT IN LOUISIANA**

**Prologue to:  
*VOTE v. Louisiana*, 2017-CA-1141 ( La. App. 1 Cir.)**

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## A NOTE FROM THE AUTHOR

During the course of a 12-year incarceration, I listened and responded to my community while studying and applying the law during the peak era of mass incarceration. It became clear that the ever-expanding reach of the criminal justice system needed reform, and history suggests that the only path to sustainable outcomes would be through the civic engagement of directly impacted people. Like everyone else in this incarcerated community seeking a home, education, job, and family, I was (and remain) the primary stakeholder in my rehabilitation, reentry, and reintegration as a solid citizen in a stable society.

During my final years in prison, I prepared a pro se lawsuit challenging the disenfranchisement of people under community supervision in Rhode Island. Upon release in 2005, however, I joined with a group of activists and fellow disenfranchised people to launch a ballot initiative to restore voting rights. We embarked on a transformative outreach campaign, and a directly impacted person actually wrote the new constitutional amendment, and in 2006 I became the first person on parole to register to vote.

During my time in Rhode Island, my civic engagement included key roles in passing significant criminal justice reforms as a core member of Direct Action for Rights and Equality, a grassroots organization in Providence, RI. I wrote several more laws, in addition to the voting rights amendment, and was grateful to engage in the public conversation on criminal justice. Five years after gaining my right to vote, however, I lost it again by enrolling at Tulane Law School and moving to Louisiana. During Orientation Week, in the back of class, I began research on an article about voting rights. I realized Louisiana considers me (and over seventy thousand other people living in the community) “under order of imprisonment,” a curious phrase that was coined in 1974.

Felon disenfranchisement in Louisiana did not start with my arrival in 2011, nor the 1974 Louisiana state constitution. This issue pre-dates the Civil War and the past, as we all know, is always prologue.

On April 28th, 1851, nearly six hundred people disembarked from the S.S. John Ganon. Among them was a young Irish Catholic couple, Mary and Patrick, fleeing The Great Hunger, with two toddlers in tow. They left an occupied nation where laws barred them from voting or owning land, and headed to the Land of the Free, or so they were surely told, settled in the Irish Channel of New Orleans, and Patrick found work on the Mississippi River.

When Patrick crossed international waters, from Ireland to Louisiana, he had never known the right to vote, and under the Louisiana state constitution of 1845, title II, section 10, he would be eligible to vote in two years, for the first time, at age twenty-nine, even though many American-born people would never be eligible. The barrier on White foreigners such as Patrick was raised from one year to two, as Louisiana's ruling class feared these new immigrants might change their 'American way of life.' They perhaps had greater fear of Mary, who would die at 88, never having been considered worthy of full citizenship.

Louisiana's constitution of White suffrage provided that four specific crimes could deny Patrick the right to vote: Bribery, Forgery, Perjury, and the political corruption of High Crimes and Misdemeanors. All of these crimes, one might have argued in 1853, have a rational relationship to the stuffing of a paper ballot box. And no matter what desperate acts Patrick may have committed in Ireland to feed his family during a famine, there was no criminal background check following him a world away.

Patrick is, poetically, named after St. Patrick: a teenager who was kidnapped and sold into slavery, where he ultimately found his spiritual calling to help others. He is also my great-great-grandfather. He died at thirty-seven years old in 1861, the same year Louisiana seceded from the United States and began a long and infamous history of Black voter suppression, which leads us to this article. If not for this research, I would have known nothing about this lineage except for the disappearance of my father after I was born. Like many foster kids who end up in prison, our knowledge is built off hearsay. My father, also named Patrick, was a Navy veteran, an alcoholic, a prisoner, and the son of a murdered father who barely outlived his original American ancestor.

After graduating in 2014 and becoming a board member of Voice of the Experienced (formerly Voice of the Ex-Offender and known as "VOTE"), I was prepared (again) to file a pro se lawsuit that would impact over seventy thousand people living in the community. In 2015, we reached out to the local legal community on the strength of civil rights icons Norris Henderson (VOTE founder and executive director) and Bill Quigley (professor at Loyola Law School). Nearly thirty lawyers answered the call, and we began by circulating this paper, "To Purify the Ballot."

The New Orleans pro bono Civil Rights community rose to the occasion, conducting research and honing the claims. A smaller

legal team penned drafts, and we filed *VOTE v. Louisiana* in the 19<sup>th</sup> Judicial District Court in Baton Rouge on July 3<sup>rd</sup>, 2016.

On May 31, 2018, Gov. John Bel Edwards signed HB 265, a bill that carves out a group of people “under order of imprisonment,” and restores the right to vote. We are the people who have not been incarcerated under the current order during the past five years. That would mean all 40,000 people on probation (who have not been incarcerated for a probation violation) and about 3,000 of the 30,000 people on parole (who have been out on parole for over five years). Under the leadership of VOTE’s advocacy, and Rep. Patricia Smith, this is indeed a historic victory. VOTE filed the appeal in *VOTE v. Louisiana*, to the LA Supreme Court, on June 8<sup>th</sup>, 2018. The struggle continues.

I voted once in my life, in 2010, with a baby in my arms. She got the sticker (“I Voted”), just like she got the law degree four years later. Thank you, Kira Love, for everything.

## OVERVIEW

In 1985, the Supreme Court of the United States held that a provision in Alabama’s constitution disenfranchising persons convicted of crimes involving “moral turpitude,” violated equal protection.<sup>1</sup> This important ruling held that disenfranchisement due to a conviction is not without oversight; even though a statute may on its face be racially neutral, it will be struck down where the original enactment was motivated by a desire to discriminate against Black people, and the provision has had a racially discriminatory impact since its adoption.<sup>2</sup> Not until 2017, however, did Alabama legally define a crime of moral turpitude.<sup>3</sup> Plaintiffs in other states have failed to establish the racially discriminatory motive regarding the challenged language of felon disenfranchisement.<sup>4</sup> Louisiana, however, has a deep history of discriminatory intent behind voting laws, and felon disenfranchisement provisions were expanded when Black citizens gained the right to vote.

Louisiana’s original felon disenfranchisement pertained to acts that violate the public trust and are rationally related to elections. The four distinct crimes were forgery, bribery, perjury, or high crimes and misdemeanors- the latter of which is famously

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<sup>1</sup> *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

<sup>2</sup> *Id.*

<sup>3</sup> ALA. CODE § 17-3-30.1 (2017).

<sup>4</sup> *See, e.g.*, *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010); *Johnson v. Governor of State of Fla.*, 353 F.3d 1287 (11th Cir. 2003) *reh'g en banc granted, opinion vacated sub nom*, *Johnson v. Governor of Florida*, 377 F.3d 1163 (11th Cir. 2004); *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998),

associated with impeachment of public officials. This paper traces the origins and changes of Louisiana's disenfranchisement provisions, leading to the conclusion that the modern disenfranchisement of all people who are in prison, on probation, or parole for *any* felony is a violation of the state and federal constitutions.

To understand the racial element of suffrage laws in Louisiana, it is important to recognize that disenfranchisement prior to 1865 was *not* racially motivated, as only White people were allowed to vote. Further illustrating the racial animus that existed in crafting election law are the vast number of provisions enacted between Reconstruction and 1974 that have been struck down as racially motivated. Louisiana's last constitutional convention in 1974 made multiple changes, including a provision to specifically restrict the eligibility of criminally convicted political candidates, and a general restoration of rights after completion of a sentence. This current constitution also created new, specific, language regarding voting rights, but left the suspension of voting rights (for people who are "under order of imprisonment") for others to decide, at a later date.

Shortly after the ratification of the 1974 constitution, it became apparent that this new constitutional phrase, "under order of imprisonment," required an interpretation. The interpretation of terms and phrases within a constitution is generally left to the judiciary. With no controversy before the courts, it was incumbent upon the state attorney general to issue an advisory opinion. In this opinion, he found that the phrase barred people on parole, but allowed those on probation the right to vote.<sup>5</sup>

In 1977 the Louisiana legislature nullified the attorney general position and passed a law that expanded the class of voters who are "under order of imprisonment" to include people on probation.<sup>6</sup> In effect, they changed the constitution without having presented it to a constitutional convention or a ballot initiative. This process is itself circumspect, with the substance being equally suspect.

Though the law is more than four decades old, the defense of laches only applies to those plaintiffs who had the opportunity to bring an action at an earlier time and did not. For example, the infamous court case challenging the use of Washington "Redskins"

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<sup>5</sup> La. Opp. Att'y Gen. No. 75-131 (May 2, 1975).

<sup>6</sup> LA. REV. STAT. ANN. § 18:2(8). An 'order of imprisonment' is defined in R.S. §18:2(8) as: ". . . a sentence of confinement, *whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled.*" (emphasis added).

football team was originally struck down for laches.<sup>7</sup> The appellate court remanded the case for a true determination of laches based on the correct factors, without “imputing the laches of others” to the one-year-old plaintiff, for whom the defense of laches would not begin to run until he reached the age of majority.<sup>8</sup>

Similarly, everyone denied voting rights by Louisiana’s “under order of imprisonment” law would have a reasonable time between impact of the disenfranchisement and mootness of their claims. The plaintiff class could include new residents on probation (who have moved from other states) and people recently placed on probation or parole. Considering most statutes of limitation are two to three years, this is a reasonable time period in which to file. However, this time period should be extended to provide for a reasonable opportunity to grasp the complexity of the issues at stake. Typically, people in Louisiana are on probation for no more than five years, so class members run the risk of being “mooted out” due to this time limitation. In 2017, a law passed that capped probation or parole at three years for certain individuals.<sup>9</sup> Class action law contemplates this risk and therefore allows organizations to stand in, such as the ACLU or NAACP.<sup>10</sup> In Louisiana, few organizations are better situated than Voice of the Experienced to be a lead plaintiff.<sup>11</sup>

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<sup>7</sup> See *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 44 (D.C. Cir. 2005).

<sup>8</sup> *Id.* at 48-50.

<sup>9</sup> S.B. 139, became Act No. 280, signed by the governor on 6/15/17 and effective 11/1/2017. It amended La. Code. Crim. Pro. art. 893 to cap suspension of sentences for first, second, or third noncapital felony convictions, unless otherwise provided by law. 2017 Reg. Sess. (La. 2017). The new law was eroded the next year by SB 389 [sent to Gov....] which allows judges to add additional time to a probation sentence for failure to comply with terms of probation, however not solely due to inability to make payments of court fines, fees, and restitution.

<sup>10</sup> *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977), “An association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.” *Id.*

<sup>11</sup> Formerly known as “Voice of the Ex-Offender,” (VOTE) is a 501(c)(3) organization in New Orleans, with chapters in Shreveport, Lafayette, and Baton Rouge, organizing and developing formerly incarcerated people and allies through voter registration and civic participation. VOTE’s founders are themselves formerly incarcerated, and VOTE grew out of their work while in prison. Lead plaintiffs in *VOTE v. Louisiana* include two VOTE co-founders (Kenneth Johnston and Checo Yancy) and VOTE’s Deputy Director (Bruce Reilly). *Who we are*, VOICE OF THE EXPERIENCED, <https://www.vote-nola.org/who-we-are.html> (last visited on April 23, 2018).

## I. HISTORY OF FELON DISENFRANCHISEMENT

### A. Pre-Statehood Era

At the core of any challenge against disenfranchisement is the development of society's inclusiveness, and expansion of democracy. Extending suffrage to paupers, "Negroes,"<sup>12</sup> Native Americans, and women inherently embraced the principle that laws can (and do) change. Louisiana has perhaps the most interesting history of any American state, having been ruled under three separate cultures, laws, and languages. The norms of France, Spain, and England were often starkly different; for example, in the 1760s, torture of White men under French law in Louisiana, although unthinkable under British law in Virginia, was an acceptable form of punishment.<sup>13</sup> Upon the transfer of power to Spain, local planters unleashed an excessive show of force, to affirm their authority over the region. Cattle rustling, for example, carried the death penalty.<sup>14</sup> The slave trade in Louisiana was booming at the turn of the century, and as the population of enslaved individuals continued to increase,<sup>15</sup> a show of force during transitions could be expected. Louisiana underwent another transition when Spain retroceded the territory to France in 1800, and yet another in 1803, when the United States completed the Louisiana Purchase. An 1811 uprising of enslaved people seeking freedom in New Orleans was brutally repressed by the militia and locally stationed soldiers.<sup>16</sup>

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<sup>12</sup> At times this paper uses historical legal terms for the sake of academic accuracy. However, usage of "Negro," "Black," or "African-American" is not intended to disparage anyone, nor as an attempt to assign racial or ethnic identities upon anyone. Furthermore, the author apologizes to other People of Color who are less represented in this paper, particularly Latino and Vietnamese populations of Louisiana. However, readers should recognize the current and historical racial composition of Louisiana, and how this Black and White struggle has been embodied in the law. The capitalization of "White" and "Black" is meant to distinguish a racial category from the actual colors.

<sup>13</sup> Thomas N. Ingersoll, *The Law and Order Campaign in New Orleans, 1763-1765, A Comparative View*, in SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 45, (Sally E. Hadden et al eds., 2013).

<sup>14</sup> *Id.* at 50. *See also id.* at 54. In 1769, the Spanish military seized New Orleans and temporarily threatened the local slave-owners' power. The Spanish utilized a policy of organizing free Black people to become slave catchers, to instill resentment between the groups. *Id.*

<sup>15</sup> Jean-Pierre Leglaunec, *Slave Migrations in Spanish and Early American Louisiana: New Sources and New Estimates*, 46 LA. HIST.: J. OF LA. HIST. ASS'N, 185, 202-203 (Spring 2005).

<sup>16</sup> Nathan A Buman, *Historiographical Examinations of the 1811 Slave Insurrection*, 53 LA. HIST.: J. OF LA. HIST. ASS'N, 318, 317-328 (Summer 2012).

Since statehood, there have been eleven constitutions drafted by the state of Louisiana.<sup>17</sup> These include three prior to Secession, two during the Civil War, one during Reconstruction, four more before the Voting Rights Act, and the current one of 1974.<sup>18</sup>

### B. Statehood of 1812; Initial disenfranchisement

The initial Louisiana constitution of 1812 was created prior to statehood and followed the model of Kentucky.<sup>19</sup> In most instances, the language is exact: voting rights were granted to free<sup>20</sup> White male citizens over 21 years of age, who had resided in the state for one year and paid a state tax within the past six months.<sup>21</sup> In a separate article, the constitution provides that “laws shall be made” to exclude from office and suffrage those “convicted of bribery, perjury, forgery, or other high crimes and misdemeanors.”<sup>22</sup> These enumerated crimes, along with barring duelists from voting, are all, arguably, rationally related to the integrity of elections among White men.<sup>23</sup>

The central meaning of the section limiting the right to vote is clear:

. . . the privilege of free suffrage shall be supported by laws regulating elections and *prohibiting* under adequate penalties, *all undue influence thereon, from power, bribery, tumult, or other improper practices.*<sup>24</sup>

There is no suggestion that disenfranchisement was a civil penalty, deprivation of citizenship, or punishment that followed

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<sup>17</sup> Louisiana drafted a state constitution in the following years: 1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921, and 1974. See W. LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 2-17 (1991).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2.

<sup>20</sup> White people of this era could not be slaves, but could be indentured servants until their debt was paid (such as fare passage from Europe). One not under indentured servitude was considered “free.” See Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 873-874 (Spring 2012).

<sup>21</sup> LA. CONST. of 1812, art. II, § 8.

<sup>22</sup> *Id.* art. VI, § 4. See LA. REV. STAT. of 1856, Elections § 20: All persons convicted of the crimes of bribery, perjury, forgery, and other high crimes and misdemeanors, punishable by imprisonment with hard labor in the penitentiary, shall be excluded from the right of suffrage. And all persons convicted of any of the said offences in any other country, and who shall have removed here, shall not have the right to vote.” See also *id.* §§ 17-18 (providing for the penalties for perjury or false swearing).

<sup>23</sup> *Dwight v. Rice*, 5 La. Ann. 580, 581 (1850). It was known that people could eliminate political rivals by legally killing them in a duel, thus this specific dilemma might be eliminated. “[T]he 130th article of the Constitution directs that duelists shall be deprived of holding any office of trust or profit, and of enjoying the right of suffrage under the Constitution...” *Id.*

<sup>24</sup> *Id.* (emphasis added).

common criminal convictions. The enumerated crimes of bribery, perjury, and forgery are a specific type that could have easily been used to rig an election in the days of paper ballots and limited documentation.

The only non-specific conviction-based disenfranchisement is “high crimes and misdemeanors.”<sup>25</sup> This exact phrase is listed elsewhere in the state and federal constitutions.<sup>26</sup> This “term of art” refers to violations of public trust, perpetrated by officials, and made famous by presidential impeachment proceedings.<sup>27</sup> The Louisiana Supreme Court has, on several occasions, weighed the distinction of “high crimes and misdemeanors,” generally in the context of officials facing impeachment.<sup>28</sup> In a relatively contemporaneous ruling, the court held:

[I]f the constitution had meant that judges were removable only for ‘crimes and misdemeanors,’ article 196 of the constitution would have stopped with those words, and would not have enumerated the other nine distinct causes of removal, including ‘malfeasance in office’ and ‘gross misconduct.’<sup>29</sup>

This holding is instructive and persuasive in application to suffrage. Not only are officials typically held to higher standards than voters, but there are also the three distinct causes of disenfranchisement: bribery, perjury, and forgery.

Setting parameters for these crimes, and defining “high crimes and misdemeanors,” is part of considerable scholarship. Harvard Law School professor Laurence Tribe sets forth this specific guideline for “high crimes and misdemeanors”:

[It] must refer to major offenses against our very system of government, or serious abuses of the governmental power with which a public official has been entrusted (as in the case of a public official who accepts a bribe in order to turn his official powers to personal or otherwise corrupt ends), or grave wrongs in pursuit of governmental power (as in the case of someone who subverts democracy by using bribery or other nefarious means in order to secure government office and its

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<sup>25</sup> LA. CONST. of 1812, art. VI, § 4.

<sup>26</sup> *E.g.*, U.S. CONST. art II, § 4, declares: “The president, vice-president, and all civil officers of the United States, shall be *removed from office* on impeachment, and conviction of treason, bribery, or other *high crimes and misdemeanors*.”

<sup>27</sup> See Laurence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 GEO. WASH. L. REV. 712, 717-18 (1999).

<sup>28</sup> See, *e.g.*, *Dwight*, 5 La. Ann. at 582; *Saint v. Meraux*, 163 La. 242, 254 (1926).

<sup>29</sup> *State ex rel. Attorney Gen. v. Lazarus*, 39 La. Ann. 142, 178 (1887).

powers, or in order to hold onto such office once attained). And, sure enough, even a cursory examination of the precise history of the phrase “high Crimes and Misdemeanors,” and of the path that phrase took as it found its way from fourteenth-century England into the Constitution of the United States in the summer of 1787, confirms that understanding of what the words meant.<sup>30</sup>

### C. 1845-1861: Refining White Male Citizenship

In 1845, Louisiana enacted a new constitution that increased White males’ residency requirements to two years in order to vote, while eliminating the requirement of having paid a tax.<sup>31</sup> Presumably this would reduce the vote among White male immigrants, while expanding the vote among poor White men with longer residency, in the spirit of Jacksonian ideals of the common man.<sup>32</sup> Those White men explicitly disenfranchised are any soldier, seamen or marine in the Army or Navy of the United States, pauper, person under interdiction, “nor under conviction of any crime punishable with hard labor.”<sup>33</sup> The intentions behind disenfranchising the military and the paupers have long since evaporated.

The new general provisions of the 1845 constitution coexisted with the specific disenfranchisement as it related to criminal activity. The 1812 language remained, including the call for laws to be made that bar from office and suffrage those convicted of bribery, perjury, and forgery, or other high crimes and misdemeanors.<sup>34</sup> In very basic statutory interpretation, the general always gives way to the specific.

The next Constitution, which was adopted in 1852, essentially kept the same provisions regarding voting rights. To interpret the separate sections, independent meaning must be given to: (1) “under conviction of any crime punishable with hard labor,”<sup>35</sup> and (2) “bribery, perjury, forgery, or other high crimes and misdemeanors.”<sup>36</sup> Neither can be deemed to cover all crimes, or even all felonies, lest it make the other provision irrelevant. “Under” conviction (as with interdiction) can be most plainly

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<sup>30</sup> Tribe, *supra* note 25 at 718 (1999).

<sup>31</sup> LA. CONST. of 1845, title II, art. 10.

<sup>32</sup> See HARGRAVE, *supra* note 18, at 3-4.

<sup>33</sup> LA. CONST. of 1845, title II, art. 12.

<sup>34</sup> *Id.* title VI, art. 92.

<sup>35</sup> LA. CONST. of 1852, title II, art. 12.

<sup>36</sup> *Id.* title VI, art. 93

interpreted to mean a current status, one that expires, rather than a past occurrence. When one is under supervision, under the weather, or apprenticing under a master, it is undoubtedly considered a temporary status.

The latter element, “punishable with hard labor” contemplates only imprisonment at the state penitentiary. It cannot refer to probation, or suspended sentences, as this status did not exist in 1852, nor did it exist at the ratification of earlier constitutions in 1812 or 1845.<sup>37</sup> Thus, “under conviction for any crime punishable with hard labor,” as stated in the first three iterations of Louisiana’s Constitution, can refer only to punishment by incarceration and hard labor in the state penitentiary, as conviction of such a crime meant certain imprisonment in the absence of suspended sentences.

In this era, bribery, perjury, and forgery all carried possible sentences of hard labor.<sup>38</sup> Forgery, depending on specific sections, carried one to fourteen years of imprisonment at hard labor<sup>39</sup> while perjury could result in five to ten years of imprisonment at hard labor.<sup>40</sup> Bribery, however, could result in a fine or prison at the judge’s discretion.<sup>41</sup>

#### D. 1861: Secession

In 1861, the Louisiana constitution was altered to reflect secession from the Union and the state’s new status as a member of the Confederate States of America.<sup>42</sup> This constitution was not submitted to the people.<sup>43</sup> Subsequently, while under Union occupation and the control of General Nathaniel P. Banks, the people ratified a new constitution in 1864.<sup>44</sup> This interwar document, not recognized by Congress, empowered the legislature to enact laws extending suffrage to “such other persons, citizens of the United States, as by military service, by taxation to support the government, or by intellectual fitness, may be deemed entitled

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<sup>37</sup> “Suspension of sentence has been provided for in Louisiana since 1914 (La. Acts 1914, No. 74 §§ 1,5) and was incorporated into the article 893 of the 1928 Code of Criminal Procedure. The first comprehensive system of suspended sentence and probation was enacted in 1942 (La. Acts 1942, No. 49, § 1).” Pamela A. Prestridge, *Probation: A Comparative Study of Louisiana Law and the ABA Standards*, 33 L. L. REV. 579, 584 n. 29 (1973).

<sup>38</sup> See THE REVISED STATUTES OF LOUISIANA 140-145 (U.B. Phillips eds., 1856).

<sup>39</sup> Sections 34-45 outline the different types of forgery and the sentences; most have mandatory minimums of one, two, or three years. See *id.* at 140-142.

<sup>40</sup> *Id.* at 144.

<sup>41</sup> *Id.* at 145.

<sup>42</sup> See HARGRAVE, *supra* note 18, at 7.

<sup>43</sup> JOHN M. SACHER, A PERFECT WAR OF POLITICS: PARTIES, POLITICIANS, AND DEMOCRACY IN LOUISIANA, 1824-1861 298-299 (2003).

<sup>44</sup> HARGRAVE, *supra* note 18, at 7.

hereto.”<sup>45</sup> The ban on soldiers was eliminated, while the ban on paupers, persons under interdiction or crime punishable with hard labor was maintained.<sup>46</sup> The enumerated crimes of treason, perjury, forgery, bribery, or other high crimes and misdemeanors remained in article 93.

### E. 1868-1879: Antebellum, Reconstruction and the 1870 Amendment

The “Carpet Bag Constitution”<sup>47</sup> of 1868 was passed under Reconstruction and the occupation of General Philip Sheridan.<sup>48</sup> Suffrage did not include racial qualifications, and extended to those males over 21, born or naturalized in the U.S., one year a resident, “except those disenfranchised by this constitution, *and* under interdiction.”<sup>49</sup> Interdiction is a legal process where a court is asked to determine, from testimony and other evidence presented, whether a person is unable to consistently make decisions regarding his person and/or his property, or to communicate those decisions. It applies generally to the mentally incapacitated and elderly.

The 1868 constitution prohibited those “convicted of treason, perjury, bribery, forgery, or other crime punishable *in* the penitentiary, and persons under interdiction.”<sup>50</sup> Depending on one’s interpretation, this could mean that any conviction carrying the potential for penitentiary punishment would disenfranchise someone for life or that people no longer incarcerated at the penitentiary, as well as those people held in parish jails, would not be impacted. This article goes on to specifically grapple with suffrage for those who took up arms in the Rebellion, as did additional legislation.<sup>51</sup>

The 1868 constitutional convention included equal numbers of White and Black delegates.<sup>52</sup> This constitution also barred disenfranchised males from being members of the state militia.<sup>53</sup>

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<sup>45</sup> LA. CONST. of 1864, title I, art. 15.

<sup>46</sup> *Id.* art. 18.

<sup>47</sup> *Saint v. Allen*, 169 La. 1046, 1056 (1930).

<sup>48</sup> HARGRAVE, *supra* note 18, at 8.

<sup>49</sup> LA. CONST. of 1868, title VI, art. 98. (emphasis added).

<sup>50</sup> *Id.* art. 99. (emphasis added).

<sup>51</sup> Section 888 required that all voter registrants swear an oath that acknowledged the Rebellion to morally and politically wrong, but otherwise all men over 21 were allowed to vote, unless “disenfranchised for any of the causes stated in the first paragraph of article ninety-nine of the constitution of this state.” THE REVISED STATUTE LAWS OF THE STATE OF LOUISIANA 232-234 (Hon. Albert Voorhies ed., 1868).

<sup>52</sup> HARGRAVE, *supra* note 18, at 8.

<sup>53</sup> LA. CONST. of 1868, title VIII, art. 144.

In 1870 Louisiana amended article 99 to eliminate any reference to disenfranchising those who participated in the Rebellion,<sup>54</sup> just five years after the war officially ended and the same year as the ratification of the Fifteenth Amendment that barred disenfranchisement due to “race, color, or previous condition of servitude.”<sup>55</sup> This had the potential to restore voting rights to nearly 50,000 White residents.<sup>56</sup>

In 1879, Louisiana drafted yet another constitution in which it confined slavery to punishment for crimes.<sup>57</sup> Disenfranchisement, authorized twice in the document, applied to those convicted of “treason, embezzlement of public funds, malfeasance in office, larceny, bribery, illegal voting, or other crime punishable by hard labor in the penitentiary.”<sup>58</sup> The use of the phrase “hard labor” is instructive. By statute and by practice, prisoners were put to work in ways previously fulfilled by slaves, with debtor’s prisons for those who defaulted on their fines.<sup>59</sup> This “convict lease” program allowed planters and industrialists to access cheap labor and also relieved them of any concerns with the long-term health of the convicted persons serving as laborers. Louisiana’s statute called for the clerks of court to maintain “a book” of the names and addresses of all persons convicted of the aforementioned crimes that are expressly stated as grounds for disenfranchisement.<sup>60</sup>

#### F. 1898 Constitutional Convention to “Purify the Ballot.”

In 1896, Louisiana’s General Assembly passed an act calling for the people to vote (in two years) upon the formation of a constitutional convention that would be granted absolute power to

<sup>54</sup> CHARLES VINCENT, BLACK LEGISLATORS IN LOUISIANA DURING RECONSTRUCTION 111 (La. State Univ. Press, 1976).

<sup>55</sup> U.S. CONST. amend. XV, § 1.

<sup>56</sup> LA. SEC’Y OF STATE, CONFEDERATE PENSION APPLICATION INDEX, <http://www.sos.la.gov/HistoricalResources/ResearchHistoricalRecords/LocateHistoricalRecords/Pages/ConfederatePensionDatabase.aspx> (last visited April. 20, 2018). In 1898, when Louisiana began issuing Confederate pensions, over 49,000 names were entered in the index, indicating that the same number of individuals may have been eligible for re-enfranchisement.

<sup>57</sup> LA. CONST. of 1879, art. 5.

<sup>58</sup> *Id.* art. 187. *See also id.* art. 148 barring those “convicted of treason, perjury, forgery, bribery, or other crime punishable by imprisonment in the penitentiary, or who shall be under interdiction.” Under the 1884 edition of La. Rev. Stat. Ann. § 885., all registrants had to take an oath in which they swore that they were not disenfranchised by any causes listed in art. 187 of the constitution. *See THE REVISED STATUTES OF THE STATE OF LOUISIANA FROM THE ORGANIZATION OF THE TERRITORY TO THE YEAR 1884 INCLUSIVE* 220 (Wm. A. Seay et al eds., 1886) [hereinafter 1884 REVISED STATUTES].

<sup>59</sup> *See Armstrong, supra* note 18, at 901-903.

<sup>60</sup> 1884 REVISED STATUTES, *supra* note 56, at 227.

create a constitution without ratification by the people.<sup>61</sup> By 1897, there were 294,432 registered voters.<sup>62</sup> Of these, 164,088 were White and 130,344 were “Colored.”<sup>63</sup> Among those who were able to write their names, White voters outnumbered Colored voters by 133,344 to 33,803.<sup>64</sup> Thus, implementing a literacy test for example, would likely shift the White advantage from 56% to about 80%. This is exactly what the Louisiana legislature did.<sup>65</sup>

In 1898 Louisiana had 87,240 registered voters, a decrease of over 70% in just one year.<sup>66</sup> The change had an overwhelming disparate impact. The 74,133 White voters contrasted with only 12,902 Colored voters.<sup>67</sup> While White Louisianans now controlled 87% of the vote, this was a 31% regression that had disenfranchised tens of thousands of White voters on the path to “purify” the ballot.<sup>68</sup> Any White man who could write his name had about a 50% chance of staying registered, while Whites who “made their mark” had about a 25% chance of voting in 1898. Among Black (or “Colored”) voters, those who could write their name had about a 20% chance of staying registered, while those who made their mark had about a 5% chance of voting. This small group of “literate” voters called for a constitutional convention, and elected delegates.<sup>69</sup>

The president of the delegates, the Honorable E.B. Kruttschnitt, celebrated the lack of “political antagonism” in his opening remarks, referring to the convention as a:

[F]amily meeting of the Democratic party.<sup>70</sup> [and] . . .  
[B]ut for the existence of that one question the  
assemblage would not be sitting here today. We know  
that this convention has been called together by the

<sup>61</sup> Act of Aug. 7, 1896, no. 52, § 2.

<sup>62</sup> LA. SEC’Y OF STATE, BIENNIAL REP. OF THE SEC’Y OF STATE OF THE STATE OF LA., 1896-1898, at 26-27 (1898).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See Dayna L. Cunningham, *Who Are To Be The Electors? A Reflection On The History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 379-380 (1991). Literacy Tests were held constitutional in 1898. See *Williams v. State of Mississippi*, 170 U.S. 213 (1898).

<sup>66</sup> LA. SEC’Y OF STATE,, *supra* note 60, at 33.

<sup>67</sup> *Id.*

<sup>68</sup> OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA HELD IN NEW ORLEANS TUESDAY, FEBRUARY 8, 1898 at 10 (1898) [hereinafter 1898 CONVENTION].

<sup>69</sup> 36,170 voted “for” the convention while 7,578 voted “against.” *Id.* at 4. Of the at-large delegates elected, thirty-six received tallies of between 31,000 and 35,000. The next highest vote was 3,121. Clearly, a large bloc had their chosen delegates. *Id.* at 3-4.

<sup>70</sup> *Id.* at 8-9.

State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.<sup>71</sup>

The “purification” of the electorate was not related to race-neutral corruption or illiteracy, as illiterate White male voters had been voting for nearly a century.<sup>72</sup> The delegation, according to the text, applauded the bombastic speech eight times; several rounds of applause followed overt statements regarding the disenfranchisement of “Negroes.”<sup>73</sup>

The convention’s president contemplated that, in order to suppress Black suffrage, there would need to be collateral damage; to the “large class of the people of Louisiana who will be disenfranchised under any of the proposed limitation of the suffrage,” Kruttschnitt claimed that it was not done with hostility, but in the spirit of shielding the weaker, ignorant classes from harm, “to protect them just as we protect a little child.”<sup>74</sup> With a desire to create an “everlasting foundation of right and justice,” the convention’s work “may be left to the verdict of history.”<sup>75</sup> The jury has been out, one might say, for over a century.

A contingent of influential women petitioned the convention to enact women’s suffrage with several rationales, including that an educated woman is disenfranchised while Louisiana does not deny that right to “an illiterate negro who may be the fortunate possessor of a few hundred dollars worth of property.”<sup>76</sup> The voices of this era continually refer to suffrage as a privilege to be earned, and not as a right.<sup>77</sup> Delegates from Confederate veterans organizations petitioned the convention to not be denied suffrage and to have monuments erected in their honor.<sup>78</sup> A resolution also called for Confederate veterans to receive government pensions no differently than all other American soldiers.<sup>79</sup>

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<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.* Kruttschnitt subsequently refers to the “ignorant and corrupt delegations of Southern negroes.” *Id.* at 10.

<sup>73</sup> *Id.* at 9-10.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 48-49. Memorial of citizens of New Orleans on the suffrage, signed by Mrs. Caroline E. Merrick, et. al.

<sup>77</sup> *Id.* at 49. *See also, id.* at 33 (address of Dr. J.L. Curry, representative of Peabody Educational Fund, on the importance of public education to voting: “[Suffrage] is a conventional privilege...”); *id.* at 76 (Citizens of Rapides on the issue of suffrage: “We hold that the right to vote is not a natural or inherent right, but a privilege granted by the State to the Citizens...”).

<sup>78</sup> *Id.* at 77.

<sup>79</sup> *Id.* at 77.

When the Suffrage and Elections committee first reported out, the minority submitted its dissent, including an objection to the “grandfather clause” that enfranchised anyone, in the absence of other qualifications, who is a legitimate male descendant to persons who were voters prior to 1868.<sup>80</sup> One draft enfranchised everyone who served in the Civil War, regardless of education or property qualifications.<sup>81</sup> Importantly, it was proposed that all prior voter registration be nullified, forcing all to re-register under the new guidelines.<sup>82</sup> The consensus within the proposals was to nullify the Black vote by any means necessary.<sup>83</sup>

The resolution that effectively eliminated Black voting in Louisiana for nearly four generations, ordinance 205, passed by a 95-28 margin.<sup>84</sup> The bulk of debate centered upon “immigrant vs. native born,” and not any objections to Black disenfranchisement. The delegates believed that, legally, states had a right to discriminate amongst their citizens on the issue of suffrage, as long as it is not on account of race, color, or servitude.<sup>85</sup> Interestingly, the extent of the relationship between enumerated criminal activity and suffrage may be seen in the proposal to bar those who ever tampered with elections from holding office, elective or appointed, while allowing their suffrage to remain intact.<sup>86</sup> This contrasts with the historical barriers, under Whites-only suffrage, to people convicted of perjury, forgery, and bribery (the very crimes with a clear and rational relationship to tampering with elections).

Ultimately, the closing addresses were clear regarding the delegation’s purpose “to establish the supremacy of the White race,” which they also equated with the Democratic Party of the time.<sup>87</sup> Thus, to elevate their chosen party is, according to the all-

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<sup>80</sup> *Id.* at 93.

<sup>81</sup> *Id.* See also *id.* at 103, 110-111, proposed amendments to grandfather clause. Some proposals were very specific and restrictive, such as requiring unmarried men to have served in civil or military service, or exempted those who pay an occupational license fee of at least five dollars per year. *Id.* at 105-106. Also proposed was the exemption of anyone who had been a voter for 35 years. *Id.* at 106.

<sup>82</sup> *Id.*

<sup>83</sup> For example, one amendment lost because, as committee member Amos L. Ponder explained, it contained “all the vices of the South Carolina place and none of the virtues; besides, it would make the negro vote the arbiters of all political contests in this State, and especially more in North Louisiana.” *Id.* at 135.

<sup>84</sup> *Id.* at 141-142, Ordinance 205 passed on March 25, 1898, the 26<sup>th</sup> day of proceedings. *Id.*

<sup>85</sup> *Id.* at 109-110. Adopted Resolution No. 102, proposed by Mr. Tebault, was drawn from a law lecture at Tulane Law School on the implications of the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments: “This did not secure to negroes the right to vote, but merely secured to them that they should not be discriminated against on account of race, color, or servitude.” *Id.*

<sup>86</sup> *Id.* at 104.

<sup>87</sup> *Id.* at 374.

Democrat delegation, is to elevate their chosen race.<sup>88</sup> Several delegates deferred to the Fourteenth and Fifteenth Amendments, which do not create a federal right to vote (but does bar states from discriminating based on race or previous condition of servitude) but the Majority openly flouted the supremacy of federal law. The Fourteenth and Fifteenth Amendments make no explicit mention of felon disenfranchisement,<sup>89</sup> but it is a reasonable inference that the Louisiana delegates would let every White man vote, regardless of criminal history; therefore it was race, not wealth, literacy, nor morality that guided their hands. Any provision that disenfranchised vastly more Black people than White, particularly if such people could make it so, would be legitimate under this rationale of suffrage.

The convention also ended the Convict Lease-Labor system because the prisoners were being “treated harshly, and often made to suffer many unnecessary ills.”<sup>90</sup> An official at the time estimated that 10% of the people died during their legal term of enslavement.<sup>91</sup> Another large faction of the “anti-lease” public opposed slave labor competing with “honest labor” in the job market.<sup>92</sup> The delegates changed the law so that the state would now directly utilize convict labor, overwhelmingly Black men, on roads, railroads, levees, and other public works.<sup>93</sup> Management of the prison system was, incidentally, turned over to the men of S.L. James and Company (previous holders of the lease).<sup>94</sup> At this time only 989 people were in the penitentiary: 840 Black and 149 White.<sup>95</sup> Black prisoners constituted nearly 85% of the penitentiary’s population. Today, 66% of the approximately thirty-five thousand people in prison are Black, and 53% of the approximately seventy thousand people under community supervision are Black.<sup>96</sup>

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<sup>88</sup> *Id.* Semmes acknowledged that the Democratic Party’s ascendancy is due to the participation of illiterate White people who lack property. *Id.* at 375. Retaining their suffrage was of utmost importance, thus the granting of a window to register using an exception they openly feel may be struck down as unconstitutional. *Id.*

<sup>89</sup> 14<sup>th</sup> Amendment, section 2, refers to apportionment of representatives: “. . . when the right to vote at any election . . . is denied . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . .”

<sup>90</sup> *Id.* at 378.

<sup>91</sup> Mark T. Carleton, *The Politics of the Convict Lease System in Louisiana: 1868-1901*, 8 LA. HIST.: J. OF LA. HIST. ASS’N, 5, 6. (1967).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 24.

<sup>95</sup> *Id.* at 25, n.53.

<sup>96</sup> LA. DEPT OF PUB. SAFETY & CORR., BRIEFING BOOK: APRIL 2017 UPDATE, 35, 120, [http://www.doc.la.gov/media/1/Briefing%20Book/Apr\\_17/full.apr.17.bb.pdf](http://www.doc.la.gov/media/1/Briefing%20Book/Apr_17/full.apr.17.bb.pdf).

The Honorable Ernest B. Kruttschnitt, the 1898 constitutional convention's elected president, summed up the convention's work as follows:

“We have not drafted the exact Constitution that we should have liked to have drafted; otherwise we should have inscribed in it, if I know the popular sentiment of this State, universal white manhood suffrage, and the exclusion from the suffrage of every man with a trace of African blood in his veins. . . . What care I whether the test we have is a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause.)”<sup>97</sup>

### G. 1898-1921 Radical Change

In 1898, Louisiana's new self-ratifying constitution introduced voter registration provisions to be enacted as laws by the General Assembly in its next session.<sup>98</sup> These registration laws were subsequently (although many years later) struck down as violating Equal Protection.<sup>99</sup> The literacy test was also exempted by the “grandfather clause,”<sup>100</sup> and did not apply to an illiterate citizen who possessed three hundreds dollars of property.<sup>101</sup> Further radical changes included a poll tax on all aspiring voters under the age of sixty.<sup>102</sup> Louisiana also limited primary voting to White men who were registered to vote, later to be known as the “White Primary.”<sup>103</sup>

Article 202 of the 1898 constitution is the most expansive disenfranchisement in Louisiana's eighty-six years of statehood. It bars from registration, voting, and office all those who:

“[H]ave been convicted of any crime punishable by imprisonment in the penitentiary, and not afterwards pardoned with express restoration of the franchise; . . . inmates of charitable institution . . . those actually

<sup>97</sup> 1898 CONVENTION, *supra* note 66, at 380. The address acknowledged that the Fifteenth Amendment kept the delegates from doing exactly what they want to do. *Id.*

<sup>98</sup> LA. CONST. of 1898, art. 197, § 2.

<sup>99</sup> *See Louisiana v. U.S.*, 380 U.S. 145 (1965).

<sup>100</sup> LA. CONST. of 1898, art. 197, § 5.

<sup>101</sup> *Id.* § 3, 4. Under typical inflation calculation, \$300 in 1900 is worth approximately \$8,500 today. U.S. Inflation Rate Calculator from 1665 through 2018, U.S. Inflation Rate 1900-2018 (\$300), <https://www.officialdata.org/1900-dollars-in-2018?amount=300> (last visited May 15, 2018).

<sup>102</sup> LA. CONST. of 1898, art. 198. Taxes shall have been paid for two years prior.

<sup>103</sup> *See Marrero v. Middleton*, 131 La. 432, 437 (1912).

confined in any public prison; all indicted persons, and all persons notoriously insane or idiotic, whether interdicted or not.”<sup>104</sup>

This language bans the prisoner and those people who have ever been convicted. It also provides no due process for the allegedly mentally ill people, while eliminating the presumption of innocence by disenfranchising those people indicted by crimes.

The General Assembly repealed all the prior elections' statutes, including those that applied to felon disenfranchisement.<sup>105</sup> One of their first acts includes various election-related crimes, punishable “as provided” in section 44 of the act.<sup>106</sup> Section 44 makes no reference to losing one's voting rights, although it does allow for imprisonment.<sup>107</sup> However, any commissioner who reported a false result (and other such frauds) was punishable under Section 44 “*and shall be further disqualified from voting at any election.*”<sup>108</sup>

Other criminal acts in the election laws fail to allow for disenfranchisement.<sup>109</sup> The added disenfranchisement of the election commissioners would be frivolous if every conviction were intended to create automatic disenfranchisement. All of these crimes carry some potential for disenfranchisement, and can only be rectified if intended to have two systems: a selective disenfranchisement for White men, and an all-encompassing disenfranchisement for Black men.

In 1900, with the intent to “preserve the purity of primary elections,” Louisiana passed other relevant statutes.<sup>110</sup> Those who illegally voted, or engaged in other fraudulent conduct, in a primary were guilty of a misdemeanor and fined twenty five to three hundred dollars and/or imprisoned in jail for ten days to three months, and shall not be permitted to participate in any

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<sup>104</sup> LA. CONST. of 1898, art. 202.

<sup>105</sup> See 1 CONSTITUTION AND REVISED LAWS OF LOUISIANA 687-88 (Solomon Wolf ed., 2d ed. 1904).

<sup>106</sup> *Id.* at 688-718, *reprinting* Act 152 of 1898. Such crimes include stealing ballots, false canvass, destroying records, possessing liquor at polling place, illegal voting, and destruction of ballots. *Id.* at 692-694, 701-702, and 715-716.

<sup>107</sup> *Id.* at 702. Section 44 provides for all violators of these acts shall be punished by a fine not more than \$1000 or imprisonment for not more than a year; where deemed a felony, punishment in the State penitentiary for two to five years. *Id.*

<sup>108</sup> *Id.* at 692. (emphasis added).

<sup>109</sup> See, e.g., *id.* at 715-716. In Section 78, it is explicitly stated that the commissioners' willful destruction of ballots is an automatic felony. *Id.*

<sup>110</sup> *Id.* at 719. The title of Act 33, 1900, p. 203, read: “An act to preserve the purity of primary elections by regulating the manner of calling, holding and conducting same;...by prescribing the manner in which electors shall be qualified to vote therein...and repealing all laws in conflict with the same.” *Id.*

primary election (nor hold any office) for four years.<sup>111</sup> Such people were not barred from the general election.

In the 1913 constitution, the notorious literacy test, grandfather clause, and poll tax remained in place.<sup>112</sup> The restrictions on primary elections were strengthened by amendment in 1920, granting parties the power to require “additional qualifications.”<sup>113</sup>

## H. 1921 to 1974: Entrenchment and Expansion

### 1. 1921 Louisiana Constitution

In 1920, America ratified the Nineteenth Amendment, granting women the fundamental right of citizenship and marking another major step towards equality and democracy.<sup>114</sup> It was fifty years before Louisiana ratified this amendment.<sup>115</sup> Nonetheless, a new constitutional convention convened and added considerable new language to the disenfranchisement provisions. The latitude that was granted to elections officials to bar voters comported well with the spirit of racial discriminatory intent that marked these times. This constitution continued the practices of the literacy test<sup>116</sup>, grandfather clause<sup>117</sup>, primary restrictions<sup>118</sup>, and poll tax.<sup>119</sup> Louisiana developed further provisions to disenfranchise its citizens, including the understanding clause<sup>120</sup> and character requirements.<sup>121</sup>

In 1960 the legislature passed the “segregation law package,” amendments that placed additional restrictions on voter qualification.<sup>122</sup> “The new amendments defined bad character as being convicted of a misdemeanor, participation in common law

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<sup>111</sup> *Id.* at 720-721

<sup>112</sup> LA. CONST. of 1913, art. 197, §§ 3-5; *id.* art. 198; *see also, id.* art. 202.

<sup>113</sup> *Id.* art. 200, as amended by Acts 1920, No. 238, adopted Nov. 2, 1920.

<sup>114</sup> U.S. CONST. amend. XIX.

<sup>115</sup> Thirty-eight states ratified the amendment; Louisiana voted in favor of the amendment on June 14, 1970. *See* Patsy Sims, *But Ladies...It Was For Chivalry*, THE TIMES PICAYUNE, (Aug. 26, 1970), p. 27.

<sup>116</sup> LA. CONST. of 1921, art. 8, § 1(c).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* § 4.

<sup>119</sup> *Id.* § 2. The poll tax was eliminated via the 24<sup>th</sup> Amendment to the U.S. Constitution in 1964, U.S. CONST. amend. XXIV.

<sup>120</sup> LA. CONST. of 1921 § 1(c), (d). “Applicant shall be able to read any clause in this Constitution, or the Constitution of the United States, and give a reasonable interpretation thereof.” *Id.* § 1(c).

<sup>121</sup> *Id.* § 1(c). “He shall be of good character and shall understand the duties and obligations of citizenship under a republican form of government.” *Id.*

<sup>122</sup> *Louisiana Designates Races on the Ballot*, 15 STAN. L. REV. 339, 349 n. 5 (March 1963).

marriage, and parentage of illegitimate children.”<sup>123</sup> The crime-based disenfranchisement expanded to include those who have been convicted of two misdemeanors, and sentenced to over 90 days in jail, over the previous five years; or sentenced to over six months in prison for a single misdemeanor in the past year.<sup>124</sup> Such specific acts “shall not be deemed exclusive,” and bad character can be established by “any competent evidence.”<sup>125</sup> Article VIII, section 6 of the 1921 Louisiana constitution also provided, in pertinent part:

The following persons shall not be permitted to register, vote or hold office . . . in this state, to-wit: Those persons who have been Convicted within this state of a Felony . . . and Have not afterwards been pardoned with express restoration of franchise . . . by the governor of this state . . .<sup>126</sup>

Various statutes served to enact this total felon disenfranchisement, save for express restoration via governor’s pardon. At that time, Revised Statute 18:42 declared ineligible to register or vote “those who have been convicted of any crime punishable by imprisonment in the penitentiary, and have not afterwards been pardoned. . . .”<sup>127</sup> If nothing else, this marks the clearest expression of conviction-based disenfranchisement in Louisiana’s history, alongside the most comprehensive legal regime to deny Black suffrage at a time when newly enfranchised Black women threatened to put additional pressure on a democracy of White Supremacy.

The Louisiana Supreme Court held in 1960 that the statutory and (then constitutional) reference to “the penitentiary” could only apply to the Louisiana State Penitentiary, otherwise

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<sup>123</sup> *Id.*

<sup>124</sup> LA. CONST. of 1921 § 1(c)(7).

<sup>125</sup> *Id.* See also *id.* § 1(d): Character and understanding. “He shall demonstrate that he is well disposed to the good order and happiness of . . . Louisiana by executing an affidavit affirming that he will faithfully and fully abide by all the laws of the State of Louisiana.” *Id.*

<sup>126</sup> Amended by Acts 1946, No, 388, adopted Nov. 5, 1946; Acts 1968, No. 663, adopted Nov. 5, 1968.

<sup>127</sup> “R.S. 18:111 directed the Clerk of Court to report to the Registrar the names and addresses of every person sentenced ‘for any crime punishable in the penitentiary,’ and also directed the Registrar to erase the names of such persons from the precinct register. R.S. 15:572.1 prohibited any person convicted of a crime punishable by imprisonment in the penitentiary and not pardoned from registering, voting or Holding office.” See *Fox v. Mun. Democratic Executive Comm. of City of Monroe*, 328 So. 2d 171, 173-74 (La. Ct. App. 1976). These statutes have since been superseded by a regime relevant to the 1974 constitution. *Id.* at 174.

they would have written “a penitentiary” or “any penitentiary.”<sup>128</sup> This interpretation was in favor of a White politician whose 1925 federal felony conviction was the subject of disputing his suffrage rights. The court also volleyed back on the legislature, ruling that they lacked authority to disenfranchise based on “any” crime.<sup>129</sup>

For the next half-century, Louisiana imposed one of the most comprehensive disenfranchisement schemes, preventing Black voters from developing any political power in local, state, or federal elections.

### I. 1974 Louisiana Constitution: Current Authority

The 1965 Voting Rights Act (VRA) changed the landscape of voting rights, particularly across the South. Under the VRA Section 2, no state provision may be enacted with discriminatory intent to deprive a racial minority of voting rights.<sup>130</sup> From 1898 to 1974, a substantial force of overt racial animus was embedded into Louisiana’s electoral process. This is well characterized in a 1966 decision by the New Orleans-based Fifth Circuit Court of Appeals, *U.S. v. Louisiana*.<sup>131</sup> This court specifically ordered a suspension of all tests and devices defined in the VRA.<sup>132</sup>

Louisiana’s troubled implementation of the VRA is partially summarized in a 1972 federal case, *Toney v. White*, which outlines the rash of injunctions that were required to force election officials to register Black citizens.<sup>133</sup> This jurisprudence makes clear that the VRA covers pre-existing disenfranchisement based

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<sup>128</sup> *Crothers v. Jones*, 239 La. 800, 819 (1960), “In November, 1938, and March, 1940, the term “the penitentiary” was interpreted by the Attorney General of the State of Louisiana to mean “the Louisiana State Penitentiary.” *Id.*

<sup>129</sup> *Crothers* at 821. In 1940, Act 129, La.Rev.Stat. 15:572.1, was enacted by the Legislature of Louisiana. The title of Act 129 of 1940 reads as follows: “To prohibit any person who shall have been convicted of any crime either in any of the Courts of Louisiana or in any of the Courts of the United States which may be punishable by imprisonment in the penitentiary, and not afterward pardoned with express restoration of franchise, from registering, voting, or holding office or appointment of honor, trust or profit in the State of Louisiana; to carry into effect the provisions of the Constitution of the said State, Section 6 of Article VIII and to provide a method whereby such Constitutional provisions and the provisions of this Act may be enforced, and to make it a crime to violate the provisions of this Act, and to provide penalties therefor.”

<sup>130</sup> 52 U.S.C.A. § 10301(a) (West 2018).

<sup>131</sup> *United States v. State of La.*, 265 F. Supp. 703 (E.D. La. 1966).

<sup>132</sup> *Id.* at 708. Specifically, “the provisions of Article VIII, Sections 2 and 18 of the Constitution of Louisiana and Sections 31(2), 32, 36 and 191, subd. A of Title 18 of the Louisiana Revised Statutes are suspended insofar as they prescribe tests and devices defined in Section 4(c) of the Voting Rights Act of 1965.” *Id.*

<sup>133</sup> *Toney v. White*, 348 F. Supp. 188 (W.D.La. 1972).

on racial animus. Nine years after the VRA, Louisiana finally convened to reconcile its laws with new federal authority.

Article I, section 10 of the Louisiana constitution of 1974 begins with the guarantee of the fundamental right to citizenship for all people, and eliminated the restoration requirement of an express governor pardon, and altered the voting barrier into an optional suspension. The new provision, however, continues to carve-out citizenship based on imprisonment, and far more vaguely. To wit:

*“Every citizen of the state, upon reaching eighteen years of age, shall have the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.”*<sup>134</sup>

The phrase “under order of imprisonment” is nowhere to be found in the criminal code.

LSU Constitutional Law Professor Lee Hargrave, who served as the primary drafter of the document, explained the voting provisions in his 1974 law review article on Louisiana’s new constitutional rights:

The word choice, ‘under an order of imprisonment,’ may seem unusual; ‘imprisoned’ would be simpler and more direct. The reason for the choice was to overcome an objection that an escapee would not be ‘imprisoned’ and thus not within the exception. That choice of words does not prevent a person on probation or parole from voting since such a person is not under an order of imprisonment. The language contrasts with Section 20’s deliberate use of ‘termination of state and federal supervision following conviction for any offense,’ where it was intended that completion of probation or parole requirements be met before full rights of citizenship are restored. Though the general expression used in Section 20, ‘full rights of citizenship,’ normally encompasses voting rights, the more specific provision in this article providing for return of the right to vote when one is no longer under an order of imprisonment will prevail.<sup>135</sup>

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<sup>134</sup> LA CONST. of 1974, art. I, § 10.

<sup>135</sup> Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 34-35 (1974).

Terms in the constitution are given their plain and simple meanings.<sup>136</sup> “Imprisonment” is not entirely difficult to grasp, and laypeople would not associate community supervision with an order of imprisonment. People on probation are under orders of community supervision, and people on parole are under orders of release by the parole board (an arm of the government).

### J. Post-1974: Refining and Defining the Vote

The imprecise disenfranchisement language of 1974 continues the historical challenge of consistency and discretion at the polling station. Such discretion is as problematic as the operative definition of “imprisonment.” As noted in *Toney*, the state has not always treated similarly situated Black and White citizens equally.<sup>137</sup> In that case, the court found that ineligible White voters were being allowed to vote, while eligible Black citizens were being denied. The eligibility did not hinge upon felony convictions, but the vagueness and permissiveness to suspend that were codified in the 1974 constitution could be utilized in such a manner, especially where the mechanism for disenfranchisement (criminal convictions) has failed to be race-neutral to this very day.<sup>138</sup>

The U.S. Supreme Court held in *Hunter v. Underwood* that Alabama’s disenfranchisement based on crimes of moral turpitude was unconstitutional, as it was created distinctly to open up a class of convictions that could be developed into systemic racial discrimination.<sup>139</sup> When considering equality of enforcing criminal laws (and disenfranchising people), one must ask: Why are there so few arrests for drug possession and drug distribution on college campuses? Whenever discretion is a part of citizenship, there are no inalienable rights, and “America” remains a myth.

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<sup>136</sup> *Caddo-Shreveport Sales v. Office of Motor Vehicles ex rel. The Dep’t of Pub. Safety & Corr.*, 97-2233 (La. 04/14/98), 710 So. 2d 776,780. Courts generally look “first to the dictionary definition” in order to ascertain the “ordinary, usual, and commonly understood meaning” of undefined constitutional text. *Id.*

<sup>137</sup> *Toney*, 348 F.Supp. at 195.

<sup>138</sup> Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>, (last visited on April 22, 2018).

<sup>139</sup> *Hunter v. Underwood*, 471 U.S. 222, 223 (1985).

### 1. 1975 Attorney General Advisory Opinion

Prior to passage of the current disenfranchisement laws, Attorney General William “Billy” Guste was called upon, by statute,<sup>140</sup> to advise the Board of Elections as to the definition of “under order of imprisonment.”<sup>141</sup> This suggests that, even with no creation of enabling legislation, some elections officials interpreted the constitution to mean that *they* “may suspend” voting rights. Using traditional constitutional construction methods, Guste interpreted the disenfranchisement clause to affect those people on parole while allowing individuals on probation the right to vote.<sup>142</sup> The Attorney General distinguishes the probationers as under the Division of Parole and Probation Supervision, and “those persons are not under an order of imprisonment, as the granting of probation by the judge amounts to a suspension of sentence.”<sup>143</sup>

The Attorney General pointed out that the 1974 constitution explicitly added article I, section 20, which restores “full rights of citizenship” *upon completion of supervision*.<sup>144</sup> This language was decidedly *not* inserted into section 10, regarding voting rights, aware that voting rights are not the totality of “full rights of citizenship,” thus each section deserves independent weight and it is well established that the specific overrides the general.

It is the policy of the attorney general to assume the constitutionality “of all legislative statutes and constitutional amendments, until otherwise decided by the appropriate state court.”<sup>145</sup> The attorney general will not consider an act of the legislature to be unconstitutional unless it “patently appears [to be so] in the mind of any reasonable man.”<sup>146</sup> Thus, once the legislature speaks, the attorney general’s opinions are obliged to assume (regardless of fact) the constitutionality of the new law, such as following the 1977 law defining “order of imprisonment.”

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<sup>140</sup> “The attorney general shall, within thirty days of receipt of a request, give his opinion in writing upon all questions of law when requested by any state board, agency, or commission.” LA. REV. STAT. ANN. § 49:251.

<sup>141</sup> The Board of Elections requested this opinion from Guste on May 2nd, 1975. La. Op. Att’y Gen. No. 75-131.

<sup>142</sup> *Id.* “[W]hile the parolee may not be actually physically located in a penitentiary, he is legally in custody of the institution. We believe that a parolee is therefore under an order of imprisonment.” (Citing La. Code Crim. Proc. Ann. Art. 893.) This is aligned with a body of cases that consider parole as a continuation of a prison sentence, but done “at liberty.”

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> La. Op. Att’y Gen., 1948-50, p. 391 (Jan. 10, 1949).

<sup>146</sup> La. Op. Att’y Gen., 1940-42, p. 1969 (Oct. 23, 1940).

When Louisiana's Second Circuit Court of Appeals approached the issue in 1976, regarding a sitting White mayor who plead guilty to a felony, they held that the provision is:

Permissive and not self-operative . . . Unless this right is specifically suspended by legislative or other constitutional means (which has not been done in this case), it is not automatically forfeited because a citizen is convicted of a felony.<sup>147</sup>

The Second Circuit was clear in its assertion that the simple fact of a conviction does not mandate disenfranchisement.

During this era, America was only beginning to recognize civil rights of people under community supervision.<sup>148</sup> Prior to that point, vagueness and gaps in the law allowed discretionary treatments of people convicted of crimes, continuing the legacy of 10% of people dying during forced labor. In the 1970s, the Louisiana prison system had yet to come to impact such a high percentage of a state that now has 1,698,200 separate individuals in its criminal records database.<sup>149</sup>

## ***2. 1976-77 Legislature Defines and Disenfranchises***

Just two years after the ratification of the 1974 constitution, Louisiana lawmakers began passing legislation to enable this scheme of disenfranchisement. In doing so, it neglected to take into account the interim interpretations of section 10(A) by Attorney General Guste, the state's premier constitutional scholar and the longest serving Attorney General, by: (1) defining "under order of imprisonment" in the Louisiana Election Code as "a sentence of confinement, whether or not suspended, whether or not the subject of the order has been placed on probation, with or without supervision, and whether or not the subject of the order has been paroled";<sup>150</sup> and (2) by barring those who fell under this definition from voting.<sup>151</sup> This current statute, never brought to the voters for ratification, and never weighed by the judiciary, is

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<sup>147</sup> Fox v. Mun. Democratic Executive Comm. of City of Monroe, 328 So. 2d 171, 174 (La. Ct. App. 1976).

<sup>148</sup> See Morrissey v. Brewer, 408 U.S. 471 (1972) (creating due process rights for parole violations); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (establishing due process rights for probation violations).

<sup>149</sup> B.R. GOGGINS & D.A. DEBACCO, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT, table 1 (Feb. 12, 2018), <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

<sup>150</sup> LA. REV. STAT. ANN. 18:2(8).

<sup>151</sup> LA. REV. STAT. ANN. 18:102(A)(1).

being challenged in *VOTE v. Louisiana* as eviscerating the most fundamental right guaranteed by the 1974 constitution.<sup>152</sup>

### 3. 1979-1998 Attorney General Advisory Opinions

In 1979, the attorney general issued an opinion asserting that, given the definition of “under order of imprisonment” in the Louisiana Election Code and the provisions of article I of the 1974 Louisiana constitution, “a person who is convicted of a felony may not vote as long as he would be on probation or suspension of a sentence or parole.”<sup>153</sup> Subsequent opinions echoed this approach:

On the basis of the above cited statutes, an individual who has received a definitive conviction for a felony and received a suspended sentence and probation is ineligible to remain on the voter registration rolls. Insofar as Attorney General's Opinion No. 75-131 conflicts with this opinion, said opinion is recalled.<sup>154</sup>

As stated above, the attorney general is bound to support the constitutionality of any law, unless it is clearly unconstitutional. However, attorney general opinions fail to serve as legal ratification of the law, as no court has passed judgment. Challenges to the law must come through the courts, and the weight of the attorney general's opinion, if given any, should harken to the initial opinion, when it was his interpretation of the constitution, rather than the later opinion, when he was merely restating the legislative statute.

The attorney general also was challenged with the inconsistent language between the specific constitutional provision (voting) and the general provision regarding “full rights of citizenship.”<sup>155</sup> In 1990, the attorney general advised that article I, section 10 is specific to voting rights, and overrides the general provisions of article I, section 20.<sup>156</sup> In this opinion, registrars were also advised that someone on probation under a certain provision should not lose their voting rights as it is not an “order of imprisonment.”<sup>157</sup> Sixteen years since the constitution, and over a decade since enacting a new election code, the lack of clarity was evident among learned lawyers and registrars. Furthermore, the

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<sup>152</sup> *Voice Of Ex-Offender v. State of La.*, 2017-1141, (La. App. 1 Cir. 4/13/18), *reh'g denied* (Apr. 27, 2018).

<sup>153</sup> La. Op. Att'y Gen., No. 79-545 (May 18, 1979).

<sup>154</sup> La. Op. Att'y Gen., No. 84-639 (Aug. 7, 1984).

<sup>155</sup> La. Op. Att'y Gen., No. 89-456 (Mar. 8, 1990)

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* The provision is that of La. Code Crim. Proc. Ann. art. 893, which grants courts the authority to suspend sentences under specific circumstances.

Secretary of State's materials make no mention of voting rights for anyone on probation.<sup>158</sup>

Article I, section 20 of the Louisiana constitution, titled "Right to Humane Treatment," states that "[f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense."<sup>159</sup> In 1998, the attorney general advised that, under article I, section 20, restoration of full rights of citizenship, which presumably includes the right to register and vote, occurs upon termination of supervision.<sup>160</sup> He disavowed prior opinions that a pardon was necessary to restore voting rights.<sup>161</sup> He claimed the constitution "expressly provides in Art. I, §20, that this right is automatically restored upon termination of supervision."<sup>162</sup> This is not altogether on point, conflicts with a prior Advisory opinion, and fails to reconcile the general and specific provisions on rights.

It is apparent that this "Right to Humane Treatment" section of the Louisiana constitution does not expressly provide any impact upon voting rights. Furthermore, and perhaps more importantly, if section 20 was intent upon interoperability with section 10 such that "supervision" is a substitute for "under order of imprisonment," then it does not give independent meaning to all parts of the constitution.

#### ***4. 1998 Constitutional Amendment Regarding Political Candidates***

In 1998, the Louisiana legislature's focus was not voters, but candidates. This change is important for two reasons: (1) the state is aware of the proper procedure to alter fundamental rights granted by the constitution; and (2) no change was made to the voting rights clause, "under order of imprisonment," despite the lack of clarity and differing interpretations.

Amending the Louisiana constitution requires a two-thirds majority of both legislative chambers for a resolution to be passed on to the public electorate.<sup>163</sup> The resolution must be "one object", but it may be as expansive as revising an entire article of the constitution.<sup>164</sup> The secretary of state will then provide proper

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<sup>158</sup> See LA. SEC'Y OF STATE, Register to Vote, <https://www.sos.la.gov/ElectionsAndVoting/RegisterToVote/Pages/default.aspx> (last visited April. 20, 2018).

<sup>159</sup> LA. CONST. of 1974, art. I, § 20.

<sup>160</sup> La. Op. Atty. Gen. 1998, No. 98-16(B) (Aug. 27, 1998).

<sup>161</sup> *Id.* (referring to Attorney General Opinions 86-804 and 97-85).

<sup>162</sup> *Id.*

<sup>163</sup> See LA. CONST. of 1974, art. XIII, § 1(A)(1).

<sup>164</sup> *Id.* § 1(B).

notice of the resolution, including which election it will be voted upon. The voters then may pass it by majority vote. If so, the constitution is thereby amended.<sup>165</sup>

In 1998, the legislature proposed and voters approved an addition to Art. 10, prohibiting people convicted of felonies from seeking or holding public office within fifteen years of completing their sentence; this amendment was recently struck down based on the legislature failing to follow proper procedure and each chamber passing a differently worded bill.<sup>166</sup>

### 5. 2003: *Rosamond v. Alexander*

In *Rosamond v. Alexander*, candidate James Alexander, Jr. was free on bail pending appeal of a felony conviction and sentence of three years at hard labor, two of those years suspended, and probation for three years upon his completion of the prison term.<sup>167</sup> Alexander sought the right to be mayor prior to the perfection of his appeal; he was not seeking the right to vote. This case represents the only time any judge in Louisiana considered the phrase “under order of imprisonment.” Alexander did not challenge article I, section 10(A), which allows suspension of voting rights while a person is under an order of imprisonment, as he was seeking the right to elected office, not the right to vote.

*Rosamond* is distinguished from the voting rights issue because the Third Circuit was considering someone ordered to prison (not to community supervision) and did not address voting rights. They did recognize that construction of election law should be construed liberally to promote, rather than defeat, a candidacy, and any doubt as to the qualifications of a candidate should be resolved in favor of permitting the candidate to run for public office.<sup>168</sup> This general rationale applies to voting rights as well, although that was not at issue in this case.

Summarizing, defendant was convicted of a felony and a sentence of confinement was imposed upon defendant as a result of said conviction. Therefore, this court finds the defendant is “under an order of imprisonment” pursuant to La. Const. art. I, § 10(B)(2).<sup>169</sup>

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<sup>165</sup> *Id.* § 1.

<sup>166</sup> *Shepherd v. Schedler*, 2015-1750 (La. 1/27/16), 209 So. 3d 752 (May 2, 2016).

<sup>167</sup> *Rosamond v. Alexander*, 2003-235 (La. App. 3 Cir. 2/28/03), 846 So. 2d 829, 830.

<sup>168</sup> *Id.*, citing *Arnold v. Hughes*, 621 So.2d 1139 (La. App. 1 Cir.1993); *Slocum v.*

*DeWitt*, 374 So.2d 755 (La. App. 3d Cir.), *writ denied*, 375 So.2d 1182 (La. 1979);

*Dixon v. Hughes*, 587 So.2d 679 (La. 1991).

<sup>169</sup> *Id.* at 831.

This summary does not account for, nor control, the issue of voting rights under article I, section 10(A). Furthermore, this potential mayoral candidate had neither finished his prison time nor been sentenced to probation. Dicta in the case, such as the court finding the definition in R.S. §18:2(8) to be “reasonable,” is not sufficient for the strict scrutiny analysis required to restrict a fundamental right.

## II. BRIEF LEGAL ANALYSIS OF LOUISIANA’S DISENFRANCHISEMENT SCHEME

It is this author’s position that the current disenfranchisement should be subjected to a strict scrutiny analysis by the courts, as has always been the case for reviewing the constitutionality of restricting a fundamental right.<sup>170</sup> In such a scenario, the state would need to show that (1) disenfranchising thousands of residents serves a compelling governmental interest, and (2) this interest could not be met through a less intrusive method.<sup>171</sup> Furthermore, Louisiana’s troubled history calls for scrutiny under the VRA regarding discriminatory intent and disparate impact upon Black citizens.

Article I, section 10 of the 1974 constitution makes it *permissive* to disenfranchise those who are “under order of imprisonment.” Notwithstanding the challenge to the definition of the phrase, the constitution implies that there will be those who may still be allowed to vote who are actually under order of imprisonment, as evidenced by the previously discussed attorney general opinions. This section allows for the disenfranchisement of voters in the first portion, and in the second portion, which discusses the exclusion of candidates from office, it mandatorily bars people under order of imprisonment. Presumably, the 1974 drafters made this choice to intentionally use permissive language in one segment and (through the 1998 legislature’s amendment process) mandatory language in another:

**(A) Right to Vote.** Every citizen . . . shall have the right to register and vote, except that this right *may* be suspended while a person is . . . under an order of imprisonment for conviction of a felony.

**(B) Disqualification.** The following persons *shall not be permitted* to qualify as a candidate for elective public office or take public elective office or appointment of honor, trust, or profit in this state:

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<sup>170</sup> See, e.g., *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

<sup>171</sup> *Id.*

(1) A person who has been convicted within this state of a felony.<sup>172</sup>

The Louisiana legislature has, without any rational basis, erred on the side of blanket exclusion regarding all people with a conviction, both inside and outside of prison.

Louisiana has never provided the people with any compelling interest as to why preventing anyone from voting is in the interest of the public. While over 70,000 people are under community supervision and being told to “do the right thing,” the state is barring them from participation in civic life. This anti-social approach, according to the American Probation and Parole Association, is actually counter-productive to rehabilitative goals of public safety.<sup>173</sup>

Louisiana courts have often ruled on the validity of article I, sections 10 and 20 as they apply to political candidates’ eligibility for office.<sup>174</sup> Louisiana’s First Circuit held that “to the extent Article I, Section 20, may be construed to conflict with Article I, Section 10, the latter, a more recent and more specific provision, prevails.”<sup>175</sup> The court refers to the clauses within §10 that apply to political office, and distinctly exempts §20 as applicable to voting rights. Louisiana courts have not ruled upon the validity of R.S. §18:2(8), declaring that terms of probation and parole satisfy “orders of imprisonment.”

#### **A. Louisiana’s disenfranchisement runs contrary to the Voting Rights Act.**

The Voting Rights Act of 1965 (VRA) bars any statute or constitutional provision enacted with the discriminatory intent to limit “the right of any citizen of the United States to vote on account of race or color...”<sup>176</sup> This would clearly preclude the

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<sup>172</sup> LA. CONST. of 1974, art. I, § 10.

<sup>173</sup> AM. PROBATION & PAROLE ASSN., *Resolution: Restoration of Voting Rights* (Sept. 2007), [http://www.appa-net.org/Eweb/Dynamicpage.aspx?site=APPA\\_2&webcode=IB\\_Resolution&wps\\_key=3c8f5612-9e1c-4f60-8e8b-1bf46c00138e](http://www.appa-net.org/Eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3c8f5612-9e1c-4f60-8e8b-1bf46c00138e) (last visited on April 21, 2018). *See also* Brief of the American Probation and Parole Association as Amicus Curiae in Support of Plaintiffs-Appellants, *VOTE v. Louisiana*, 2017-CA-1141 (La.App.1 Cir.).

<sup>174</sup> *See, e.g.*, *Fox v. Mun. Democratic Executive Comm. of City of Monroe*, 328 So. 2d 171, 174 (La. Ct. App. 1976); *Rosamond v. Alexander*, 2003-235 (La. App. 3 Cir. 2/28/03), 846 So. 2d 829, 830.

<sup>175</sup> *State ex rel. Moreau v. Castillo*, 2007-1865 (La. App. 1 Cir. 9/24/07), 971 So. 2d 1081, 1083 *writ denied*, 2007-1900 (La. 9/28/07), 964 So. 2d 349; *citing Cook v. Skipper*, 99-1448 (La.App. 3 Cir. 9/27/99), 749 So.2d 6, 10, *writ denied*, 99-2827 (La.9/30/99), 745 So.2d 601.

<sup>176</sup> 52 U.S.C.A. § 10301(a) (West 2018)

enforcement of a century of Louisiana statutes, particularly the slew of laws passed in the wake of the 1898 and 1921 constitutional conventions. The VRA served as the impetus for the 1974 constitutional convention, in the same manner as the previous federal actions, expanding the franchise, forced earlier Louisiana constitutional changes.

Section five of the VRA provides added scrutiny and protection of voters where a jurisdiction has a problematic history. Section five does not require a statute or practice to be constructed with discriminatory intent, as in section two; instead, section five is invoked where a facially neutral statute has discriminatory effects.<sup>177</sup> Section five applies only to jurisdictions as defined in the “coverage formula.”<sup>178</sup>

The primary purpose of the VRA, especially sections four and five, was to create heightened standards where there is a history of creative and malleable disenfranchisement regimes. The U.S. Supreme Court struck down the coverage formula within section four, dictating which “covered jurisdictions” garner the added scrutiny of section five.<sup>179</sup> It is anticipated that Congress will someday enact a new section four, and that this formula will likely include the state of Louisiana based on its well-documented history. The most robust element of section five is “pre-clearance.” These covered jurisdictions must pre-clear all proposed election rules with the Department of Justice.<sup>180</sup>

Louisiana’s legislature did not obtain pre-clearance, required under VRA section five, when they enacted R.S. §18:2(8) in 1976.<sup>181</sup> This definition of “under order of imprisonment” served to expand the class of disenfranchised people to also include people under orders of parole or probation. This change created a disparate impact on Black Louisiana citizens. The legislature did not obtain pre-clearance when they enacted R.S. §18:102 in 1976.<sup>182</sup> This statute transforms the permissive, and not self-operative, disenfranchisement due to felony conviction into an automatic bar.

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<sup>177</sup> 52 U.S.C.A. § 10304 (West 2018).

<sup>178</sup> See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 529.

<sup>181</sup> See United States Dept. of Just., Civil Rights Division, Voting Determination Letters for Louisiana. <https://www.justice.gov/crt/voting-determination-letters-louisiana>. (last visited May 15, 2018). This site contains a list of all determination letters for proposed legislation regarding voting right and election procedures.

<sup>182</sup> *Id.*

Overall disenfranchisement in Louisiana of the Voting Age Population is 3.04%.<sup>183</sup> This mandatory language has had a disproportionate impact on Black Louisiana citizens. Leaving aside the issue of rippling group impacts of individual disenfranchisement, the Black Voting Age Population (BVAP) of Louisiana is disenfranchised at a rate of 6.27%.<sup>184</sup>

## CONCLUSION

It is tempting (for some) to render various groups of Americans as non-citizens. This is a historical problem fought both in the courts of law and public opinion. The proper legal analysis of such policies requires a historical analysis to determine the intention of its enactment. Once a racially discriminatory impact is acknowledged, the continuation of such a policy may also satisfy the showing of discriminatory intent. Thus, contemporary and historical analyses are of utmost importance.

Maine and Vermont allow universal suffrage without jeopardizing their democracies.<sup>185</sup> There are no catastrophic reports in states where people on probation or parole can vote. These people are living their lives quite similarly to those without conviction histories, and likely show no visible differences. The difference, however, between those who have the right to vote, and those who do not, can be stark.

No judge ever sentenced someone to lose their voting rights, nor to be barred from housing, education, or employment. In fact, judges and probation officers seek stability for this population. The state invests in reentry and rehabilitation while attempting to collect (at times insurmountable) debts, and excluding people from opportunities to reintegrate and become stable citizens. The verdict of history is upon us all, and it is time to determine whether rights are truly “inalienable” or if citizenship is a temporary status.

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<sup>183</sup> CHRISTOPHER UGGEN, ET AL, THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 15 (2016).

<sup>184</sup> *Id.* Table 4, p. 16.

<sup>185</sup> See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and The Criminalization of Debt*, 117 PENN ST. L. REV. 349, 357 (Fall 2012).