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THE MISSING AND MISPLACED HISTORY IN *SHELBY COUNTY, ALABAMA V. HOLDER* – THROUGH THE LENS OF THE LOUISIANA EXPERIENCE WITH JIM CROW AND VOTING RIGHTS IN THE 1890S

*M. Isabel Medina**

ABSTRACT

The modern Supreme Court adheres to the principle of facial neutrality and the significance of facial neutrality to equality norms in the context of race. The Louisiana Constitutional Convention of 1898, which restricted the franchise in a number of race neutral ways and introduced the "Grandfather Clause," exempting any males entitled to vote on January 1, 1867 and their male descendants over the age of 21 at the date of adoption of the new Constitution from the new restrictions, is illustrative of the very racially conscious ways in which southern state legislatures in the post-Reconstruction Era deliberately sought to use neutral rules to thwart equality for blacks. This paper explores the Louisiana experience and what it suggests about the Court's use of neutrality as a primary principle in guiding equality norms. It does so by exploring the recent Supreme Court decision in *Shelby County, Alabama v. Holder* and the majority opinion's use of history in its analysis, and restoring some of the history leading up to passage of the Voting Rights Act of 1965, in particular, the Louisiana experience with voting rights in the 1890s, to illustrate the significance of the historical record in understanding modern day trends and norms.

I. INTRODUCTION

In *Shelby County, Alabama v. Holder,*[1] the Supreme Court struck down the provision in the Voting Rights Act of 1965[2] that provided the formula for determining which jurisdictions were required to obtain preclearance from the Department of Justice before changing their voting procedures. The Court's opinion rests largely on two principles: (1) the conclusion that dramatic changes in society since 1965, reflected in voter turnout and registration rates and in the number of minority candidates

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1. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973 to 1973aa-6 (1965)).

holding office, rendered use of the formula unconstitutional; (2) the principle that still, today, the constitutional structure relies primarily on states in regulating elections—thus, the provisions of the Voting Rights Act, rather than being seen to flow from the provisions of the Fifteenth Amendment, "employed extraordinary measures," and a "dramatic departure from the principle that all States enjoy equal sovereignty."[3]

The Voting Rights Act of 1965 was a key part of President Johnson's Great Society reforms designed to prohibit the practices adopted by southern states and in use by some states across the country to deter, suppress, and discourage the franchise of blacks and other persons of color. The Act may be enforced through litigation, but as Justice Ginsburg's *Shelby* dissent points out, this kind of litigation is after-the-fact, resource-intensive, complex, and expensive,[4] and through the Act's preclearance requirements, so are the provisions at issue in *Shelby*. The Act was amended in 1975 to address practices that deterred, suppressed, or hindered the vote of United States citizens whose primary language was not English.[5] The section of the Act at issue in the case, section 4, provided the factors that determined which jurisdictions were covered by section 5 of the Act: whether on Nov. 1, 1964, the state or a state's political subdivision had maintained a test or device restricting registration or the vote (like a literacy test or good moral character requirement), and whether less than 50 percent of persons of voting age were registered to vote on Nov. 1, 1964 or had voted in the presidential election of November 1964. This formula rendered Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia covered jurisdictions and political subdivisions in Arizona, Hawaii, Idaho, and North Carolina covered jurisdictions as well. The coverage formula was expanded in 1970 and 1975, adding Alaska, Texas, and Arizona as fully covered jurisdictions and numerous subdivisions in a number of states, and reauthorized and extended the Act for an additional 25 years in 2006.[6] The states that were fully covered jurisdictions in 1965 were still fully covered jurisdictions at the time of the *Shelby* litigation.

Section 5 requires covered jurisdictions to secure preclearance from the Department of Justice prior to making any changes in their voting procedures.[7] Jurisdictions may obtain preclearance by proving that the change does not have the purpose or effect "of denying or abridging the right to vote on account of race or color."[8] Shelby County, in Alabama, a covered jurisdiction since 1965, challenged the constitutionality of current section 4 factors and section 5 of the Act after the Attorney General objected to the

3. *Shelby Cnty.*, 133 S. Ct. at 2618.

4. *Id.* at 2640 (Ginsburg, J., dissenting).

5. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 203, 206, 89 Stat. 400, 401-02 (1975).

6. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2005).

7. § 4(b), 79 Stat. at 439.

8. *Id.*

County's proposed voting changes.[9] The district court upheld the Act and the D.C. Circuit affirmed.[10] Purportedly reviewing the reauthorization of the Act under a rationality standard,[11] the Court nevertheless struck down section 4, rendering the provisions of section 5 ineffective, at least until Congress enacts a new formula to determine which jurisdictions are subject to section 5 requirements.

The *Shelby* Court's majority opinion deals with history, curiously. At the outset, the opinion begins with the ratification of the Fifteenth Amendment and it briefly, in one paragraph, describes the failure of "congressional enforcement of the Amendment" in the first century after its enactment.[12] The Court does not discuss or acknowledge the extraordinary change and dramatic departure from original founding premises that the Reconstruction Amendments themselves constituted. Instead, the Court recounts passage of the Voting Rights Act in 1965, subsequent amendments, and court opinions considering the constitutionality of the Act. The Court then discusses the *Shelby* litigation. In Part II of the opinion, when it turns to the substantive issue, the Court turns to a historical narrative again, this time, however, focused on federalism principles in particular, as concerns elections.[13] Chief Justice Roberts quotes from a 1990s federalism case, *Gregory v. Ashcroft*, to the effect that "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections."[14] The federal government retains "significant control over federal elections," he acknowledges, but as an example he returns to the original Constitution, and the provision in Article I granting Congress power to change the time and manner states have set for electing senators and representatives, rather than the more obvious and telling example, the Fifteenth Amendment. In this part of the opinion, in fact, examining the relationship between the federal government and state governments in the context of voting rights, the Court does not mention or recount the adoption of the Fourteenth and Fifteenth Amendments at all. The Court's opinion discusses the original Constitution, in particular the Tenth Amendment, and simply ignores the Civil War and the Reconstruction Amendments, and how they altered the constitutional landscape on voting and elections. This missing history facilitates the Court's conclusion that the provisions of the Voting Rights Act "authorizes federal intrusion into sensitive areas of state and local policymaking" and represents "an extraordinary departure from the traditional course of relations between the States and the Federal Government," themes echoed in

9. Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424 (D.C. 2011). Justice Ginsburg's dissent in *Shelby* details the reasons why application of the preclearance requirement to Shelby County, and Alabama in particular, was justified. *See Shelby Cnty., Ala.*, 133 S. Ct. at 2632 (Ginsburg, J., dissenting).

10. Shelby Cnty., Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012).

11. *Shelby Cnty.*, 133 S. Ct. at 2622.

12. *Id.* at 2619.

13. *Id.* at 2623.

14. *Id.* (quoting Gregory v. Ashcroft, 501 U.S. 452, 461-62 (1991)).

previous recent Court decisions.[15] At its conclusion, the Court's majority emphasizes the need for the coverage formula to address "current conditions," presumably, rather than looking to historical discrimination.

Although the *Shelby* Court's ruling is limited, the opinion, substantively and stylistically, ignores the wave of state legislation imposing more restrictions on the franchise, ostensibly directed at deterring voter fraud but impacting, in particular, voters of color, including immigrant citizen voters and voters of reduced means.[16] This paper explores the historical narrative that followed the enactment of the Fourteenth and Fifteenth Amendments to the understanding of state sovereignty over regulation of elections currently missing in the Court's majority opinion, through the Louisiana experience in Reconstruction and the subsequent curtailing of voting rights during the 1890s and the segregation era.

Louisiana's historical narrative on voting rights reveals the promise and hope that came out of the Civil War and the abolition of slavery, as well as the violence and ease with which powered groups who are not necessarily numerical majorities can solidify their grasp of power, and how readily the law, specifically constitutional law, assists them.

II. LOUISIANA CONSTITUTIONS, RACE, AND THE VOTE

Louisiana's first Constitution, adopted in 1812, contained no specific reference to slavery or race. It set up a system of government mirroring that set up by the United States Constitution, and although it did not contain a formal bill of rights, it did include specific provisions recognizing some of the rights protected under the federal Constitution. Suffrage was extended to all free white male citizens of the United States, at least 21 years of age, who had resided in the territory for one year and paid a tax,[17] and most Louisiana constitutions until the Civil War continued to extend the suffrage to free white male United States citizens who had reached the age of 21, sometimes extending the period of residency to two years.[18] Although Louisiana's Constitution contained no specific reference to slavery

15. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203, 224 (2009) (quoting Lopez v. Monterey Cnty., et al., 525 U.S. 266, 282 (1999); Presley v. Etowah Cnty. Comm'n, 502 U.S. 491, 500-501 (1992)).

16. *See* Alabama Act No. 2011-673 (2011) (codified at ALA. CODE § 17-9-30 (2011)), *available at* http://www.alabamavoterid.com/downloads/2011-673.pdf (last visited Sept. 10, 2014); Voter Information Verification Act, S. L. 2013-381, H.B 589 (2013), *available at* http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H589v9.pdf (last visited Sept. 10, 2014); *and* An Act Relating to Requirements to Vote, S.B. 14 Texas (2011), *available at* http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB00014F.pdf#navpanes=0 (Sept. 10, 2014); *see also* Kobach v. U.S. Election Assistance Comm'n, 2014 U.S. Dist. LEXIS 35696 (Dist. Ct. Kan., Mar. 19, 2014); Fernanda Santos, *Two States Win Court Approval on Voter Rules,* N.Y. TIMES, March 19, 2014, at A1; *and* Rick Lyman, *Texas' Stringent Voter ID Law Makes a Dent at Polls*, N.Y. TIMES, November 6, 2013, at A20.

17. LA. CONST. OF 1812, art. II, § 8, *in* BENJAMIN WALL DART, LOUISIANA CONSTITUTIONS ANNOTATED 499 (1932); *see* LOUISIANA CONSTITUTIONAL CONVENTIONS 1812-1921, Louisiana State Law Institute 17 (1950).

18. LA. CONST. OF 1845, *in* DART, *supra* note 17, at 508 (required that voters had to have been a U.S. citizen for two years and resided in the state for two consecutive years prior to election); LA.

(like the United States Constitution), Louisiana law had provided for slavery under both French and Spanish rule, and adopted a slave code in 1806 that rendered slaves "real estate," that is property to be sold, mortgaged, and seized as real estate.[19] Although New Orleans and other parts of Louisiana witnessed the growth of an educated, propertied, and professional free black class, that group was not successful in gaining the franchise or political power, except perhaps indirectly.[20]

The Constitution of 1861 implemented Louisiana's ordinance of secession and amended the 1852 Constitution by substituting the Confederate States for the United States wherever it appeared.[21] It was the first Louisiana Constitution to not be put to a vote of the people. As John Hope Franklin noted in *Reconstruction After the Civil War*, New Orleans fell almost immediately to Union forces. By August 1862, more than 11,000 ex-Confederate Louisianians had agreed to take an oath of allegiance to the Union, placing themselves in a position to send representatives to Congress by February 9, 1863.[22] Louisiana, thus, was the only Confederate state to have representatives in Congress before the Confederacy collapsed, while plans for the South's reconstruction began to be debated and formulated.[23] One of those representatives, Michael Hahn, was elected governor in February 1864, while Louisiana was still under military control.

The Constitution of 1864 abolished slavery[24] and authorized the legislature to grant the vote 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 thereto," but it did not guarantee the franchise to black males, nor did it require the legislature to actually provide it.[25] This Constitution was submitted to the electorate and ratified in September 1864 with a vote of 6,836 against 1,566. That electorate, however, did not include blacks. According to Franklin, more than 18,000 free black property owners resided in New Orleans at the outbreak of the war. They sought the vote as early as 1862, even appealing directly to President

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CONST. OF 1852, *in* DART, *supra* note 17, at 523 (changed the requisite time period back of residence to one year and eliminated the requirement of a certain number of years of U.S. citizenship).

19. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 1619-1860 74-77 (1996).

20. *See* Paul A. Kunkel, *Modifications in Louisiana Negro Legal Status Under Louisiana Constitutions 1812-1956,* 44 JOURNAL OF NEGRO HISTORY 1, 4 (1959); *see generally* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1974) *and* LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH 1790-1915 (1990).

21. LA. CONST. OF 1861 *in* DART, *supra* note 17, at 536.

22. JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 15 (1961).

23. *Id.* at 16.

24. LA. CONST. OF 1864, arts. I-II, *in* DART, *supra* note 17, at 537 (abolishing slavery and involuntary servitude except as punishment for crime, and restricting the legislative power: the "legislature shall make no law recognizing the right of property in man").

25. LA. CONST. OF 1864, art. XV, *in* DART, *supra* note 17, at 540. In 1865, Louisiana enacted a Black Code granting some rights to newly freed slaves, but not the right to vote.

Lincoln.[26] But the Constitution of 1864 rejected their plea, and the Louisiana state legislature similarly made no provision for black suffrage.[27] President Lincoln died in April 1865, while Congress began consideration of the Fourteenth Amendment.

Congress refused to recognize the state government established under the 1864 Constitution. In June 1866, Congress passed the Fourteenth Amendment vesting citizenship in all persons born in the United States, and thus, vesting citizenship in blacks. An effort in July 1866 to hold a constitutional convention in Louisiana to grant suffrage to African Americans led to the Riot of 1866 – what one historian called "an absolute massacre" at the Mechanics Institute in New Orleans over the push for the franchise.[28] Louisiana, like other southern states, rejected adoption of the Fourteenth Amendment.[29] But the next year, in 1867, Louisiana's newly installed military government called for a new Constitutional Convention.[30] To elect delegates to the Convention, the state was to register adult male voters without regard to race, and this time the number of black registered voters vastly outnumbered whites, with 82,907 blacks out of a total of 127,639.[31] Despite the substantial majority of black voters, the electorate, by agreement, elected 98 delegates to the new Convention: 49 white and 49 black.[32]

In 1868, two years before ratification of the Fifteenth Amendment, the state adopted a new Constitution that guaranteed broad "civil, political, and public rights and privileges, to all persons, without regard to race, color, or previous condition, born or naturalized in the United States."[33] This Constitution began with a well-developed bill of rights, which subsequent Louisiana constitutions have continued to enshrine. The number and quality of rights, however, have been curtailed in subsequent constitutions. Included in its guarantee, through a series of provisions, was the right to vote – it was granted only to men not to women, but for the first time in Louisiana every male person 21 years or over, born or naturalized

26. FRANKLIN, *supra* note 22, at 21. In 1862, Paul Trevigne, a free man of color, began editing *L'Union*, a newspaper that pushed for free black suffrage. JAMES G. HOLLANDSWORTH, JR., AN ABSOLUTE MASSACRE: THE NEW ORLEANS RACE RIOT OF JULY 30, 1866 10-15 (2001).

27. FRANKLIN, *supra* note 22, at 25.

28. *Id.* at 64-65; HOLLANDSWORTH, *supra* note 26, at 10-15.

29. FRANKLIN, *supra* note 22, at 67.

30. *Id.* at 70. Congress' 1867 reconstruction plan divided up the former Confederate states into five military districts. Louisiana and Texas constituted one district. Congress required ratification of the Fourteenth Amendment and adoption of a state constitution to be approved by Congress in return for the state's full admission to the Union. *Id.* at 70-71.

31. Kunkle, *supra* note 20, at 11.

32. *Id.*

33. LA. CONST. OF 1868, *in* DART, *supra* note 17, at 553. The Constitution of 1868 was the result of a convention called under the federal reconstruction acts by authority of Special Order No. 166. Louisiana voters voted in favor of this convention in September 1867. LOUISIANA CONSTITUTIONAL CONVENTIONS, *supra* note 17, at 7 n.3. The Constitution itself was approved by Louisiana voters in 1868.

in the United States and a resident of the state for one year, was guaranteed a vote.[34] There was a long list of exclusions – most dealing with participation in the confederacy, but the presumption was one of universal suffrage for men.[35] Under this Constitution, the number of black voters in Louisiana increased dramatically. This Constitution also provided for an integrated, free public school system for all children from the ages of 6 to 21, and guaranteed blacks equal access to public accommodations.[36]

The exercise of the franchise for blacks, however, throughout this period, continued to be a dangerous practice. Historian Eric Foner referred to this time period as a "wave of counterrevolutionary terror."[37] Also in 1868, the state saw the establishment of the Knights of the White Camellia, Louisiana's Ku Klux Klan, subsequently replaced by the White League.[38] The Colfax Massacre in 1873 gave witness to the violence which black voters would encounter in casting their vote, and made it clear, as well, that law, specifically constitutional law, could insulate that violence from accountability.[39] Attempts to prosecute some (over 100) of the perpetrators of the massacre federally under an act prohibiting persons from interfering with the franchise resulted in a guilty verdict for three defendants, but was ultimately set aside by the United States Supreme Court on a technicality in *United States v. Cruikshank* in 1875, with the Court noting that "the Constitution of the United States has not conferred the right of suffrage upon any one."[40] Suffrage was not a constitutional right; it was protected only "on account of race, color, or previous condition of servitude."[41] The Court set aside the convictions, finding that the indictments were insufficient because they failed to specify that the interference with the vote was on account of race.[42] In *United States v. Reese*, handed down the same year as *Cruikshank*, the Court stymied another prosecution under the same statute, this time finding some of the statute's provisions on voting rights beyond Congress' powers under the Fifteenth Amendment because they did not expressly limit their application to cases involving racial discrimination.[43] The language of the statutory provisions, the Court reasoned, was

34. LA. CONST. OF 1868, arts. 13, 98, *in* DART, *supra* note 17, at 554, 563.

35. LA. CONST. OF 1868, art. 98, *in* DART, *supra* note 17, at 563.

36. LA. CONST. OF 1868, art. 135, *in* DART, *supra* note 17, at 565. Louisiana was one of only two southern states to provide for an integrated system of public education during Reconstruction. FRANKLIN, *supra* note 22, at 111-12.

37. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 425 (1988).

38. JOE G. TAYLOR, LOUISIANA RECONSTRUCTED 1863-1877 162-63 (1974); TED TUNNELL, CRUCIBLE OF RECONSTRUCTION: WAR, RADICALISM AND RACE IN LOUISIANA 1862-1877 153 (1984).

39. *See generally* NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR (2006).

40. United States v. Cruikshank, 92 U.S. 542, 555 (1875) (the Court found all of the counts alleged in the indictments insufficient for a variety of reasons). This paper discusses only the counts that involved interference with the vote. Some counts, the Court concluded, were simply too vague and general, and "so defective that no judgment of conviction should be pronounced upon them." *Id.* at 559. The indictment was based on the Enforcement Act of 1870, 16 Stat. 140 (May 31, 1870). *Id.* at 544.

41. *Cruikshank*, 92 U.S. at 555.

42. *Id.* at 555-56.

43. United States v. Reese, 92 U.S. 214, 219-20 (1875).

broad enough to apply to conduct not motivated by racial discrimination, and, thus, the indictment, although reflecting a case in which it was clear the conduct involved racial discrimination, could not be sustained.[44] *Reese* and *Cruikshank* identified the significance of using neutral rules or language in dealing with matters of race. Neutral rules could be used to facilitate or insulate racial discrimination or violence from legislative or judicial reach and sanctions.

Ten years later, the Court rejected a similar argument, when Georgians convicted of conspiring to "injure, oppress, threaten[,] and intimidate" an African American man from voting in an election, and willfully beating, bruising, wounding, and maltreating the voter, sought a writ of habeas on the basis that their indictments were insufficient and that Congress lacked the power to pass the voter protection laws.[45] The *Yarbrough* Court rejected arguments that the indictments were insufficient and suggested it "is a waste of time to seek for specific sources of the power to pass these laws."[46] Nonetheless, the Court looked to the same provisions in the original Constitution as the *Shelby* Court identified, article I, section 4, and described the various statutes enacted by Congress pursuant to its power to "at any time make or alter such [state] regulations."[47] The *Yarbrough* Court, however, went on to consider the Fifteenth Amendment:

> The Fifteenth Amendment . . . by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States.[48]

The Court went on to caution the threat to a republic stemming from "the temptations to control these elections by violence and by corruption . . . a constant source of danger,"[49] a caution that seems especially prescient today in the wake of *Shelby* and decisions restricting Congress' power to limit campaign contributions.[50]

When the federal government abandoned Reconstruction policies in 1877 under President Rutherford B. Hayes, Louisiana and other southern states responded by gradually undoing through law the political, economic, and social gains of blacks after the Civil War and the enactment of the

44. 44. *Id.* at 221.

45. *Ex Parte* Yarbrough et al. (The Klu Klux Klan Cases), 110 U.S. 651, 655-56 (1884).

46. *Id.* at 666.

47. *Id.* at 660-63.

48. *Id.* at 664.

49. *Id.* at 666.

50. *See, e.g.,* McCutcheon et al. v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014) *and* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.[51] White supremacists targeted any distinctions that Louisiana culture had drawn between creoles of color and darker-skinned blacks; by the turn of the century all were targeted. As the state's largest metropolitan area with a substantial Catholic creole (mixed race) population, many of whom had provided political leadership during the state's Reconstruction government, New Orleans was at the center of the battle over the mechanisms designed to deprive blacks and creoles of political power—mechanisms that mandated segregation of the races and disenfranchisement of blacks.

In 1879, Louisiana adopted a new Constitution. White women petitioned the Convention working on the new Constitution for the vote.[52] This initial push for the franchise for women did not align itself explicitly with white supremacy and sought the vote for women on the grounds that they deserved it and would use it wisely. Nonetheless, the Constitution of 1879 failed to provide women the franchise, but continued to restrain the power of the legislature to restrict the suffrage "on account of race, color[,] or previous condition of servitude."[53] This Constitution continued to require free public schools for all children in Louisiana, but added a new article providing for the establishment in New Orleans of "a university for the education of persons of color."[54] Thus began in Louisiana the formal expectation and establishment of legal segregation. The violence of the Reconstruction period continued unabated. In 1887 in Thibodaux, south Louisiana Catholic territory planters and other whites massacred, striking black sugar plantation workers.[55] Still, in 1888, voter registration lists for the state listed 128,150 "colored" voters and 125,407 whites.[56]

In 1890, Louisiana enacted a statute mandating segregation of the races in railroad cars, later upheld by the United States Supreme Court in *Plessy v. Ferguson*.[57] The challenge to the law was mounted in New Orleans by creoles, who traditionally had enjoyed a more privileged status in New Orleans society than slaves or darker skinned blacks.[58] Light-skinned creoles, many of whom passed for white, including Homer Plessy, strongly resisted racial segregation and the increasing rigidity of racial castes that made it more and more difficult for interracial relationships of any kind in

51. C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 4-8 (1955); WILLIAM IVY HAIR, CARNIVAL OF FURY ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900 13-14 (1976).

52. Armantine M. Smith, *The History of the Women's Suffrage Movement in Louisiana*, 62 LA. L. REV. 509, 514-23 (2002); CARMEN LINDIG, THE PATH FROM THE PARLOR: LOUISIANA WOMEN 1879-1920 37-40 (1986).

53. Smith, *supra* note 52, at 522-23; LA. CONST. OF 1879, art. CLXXXVIII, *in* DART, *supra* note 17, at 593.

54. LA. CONST. OF 1879, arts. CCXXIV, CCXXXI, *in* DART, *supra* note 17, at 599.

55. REBECCA J. SCOTT, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 81-87 (2005); ADAM FAIRCLOUGH, RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915-1972 8 (1995).

56. SCOTT, *supra* note 55, at 85.

57. Plessy v. Ferguson, 163 U.S. 537 (1896).

58. SCOTT, *supra* note 55, at 88-93; FAIRCLOUGH, *supra* note 55, at 15.

Louisiana. It took over six decades in the twentieth century to restore legal protections to blacks in the South, but even at its height, blacks and black community organizations, like the Comite des Citoyens who organized Plessy's challenge to the railroad car statute, continued to battle Jim Crow. Those abuses and increasing competition for low-skilled work, largely as a result of the 1890s depression, domestic migration to the city, and an influx of immigrants, continued to erupt into racial violence, like the Robert Charles riot of 1900 in New Orleans.[59]

Notwithstanding the naked racism of the era and the incidents of racial violence in the city itself, historians like Adam Fairclough maintain that the incidence of racial violence, including lynchings, and the overall attitudes of whites to blacks in Louisiana were "harsh, but not as harsh as in Alabama or Mississippi."[60] Fairclough attributed this difference in attitude to the influence of Catholicism in the southern half of the state, and New Orleans. According to Fairclough:

> Catholicism itself, for all its conformity to the practices of white supremacy, softened, albeit slightly, the harder edges of racism. The ameliorative influence of the Catholic Church was discernible, for example, in the lynching statistics. Between 1889 and 1922, the peak years, the north Louisiana parishes of Caddo, Quachita, and Morehouse, all overwhelmingly Protestant, witnessed more lynchings than any other counties in the nation. Over half the lynchings that occurred in Louisiana between 1900 and 1931 took place in seven parishes, all of them mainly Protestant, and all but one in the northern part of the state.[61]

The majority of Louisiana's black population was rural and resided in north Louisiana. The city and the state were poor and the populations of both were overwhelmingly illiterate. Although the constitutions had been requiring the establishment of public schools throughout the state for both black and white children since the end of the Civil War, most Louisiana children lacked access to public education.[62]

In the 1890s, with a majority of blacks making up the state's population (51%), Louisiana set about the task of disenfranchising blacks.[63] In

59. HAIR, *supra* note 51, at 137-38.

60. FAIRCLOUGH, *supra* note 55, at 9.

61. *Id.*

62. JAMES G. DAUPHINE, A QUESTION OF INHERITANCE: RELIGION, EDUCATION, AND LOUISIANA'S CULTURAL BOUNDARY 1880-1940 5, 11, 70-72 (1993). New Orleans adopted compulsory attendance in 1910, and in 1914, the state adopted compulsory attendance for all cities with a population of 25,000 or more. In 1916 the state adopted compulsory attendance for all children from ages 7 to 14. *Id.* at 88-89. In 1920, Louisiana had the highest illiteracy race in the country (21.9%) for people 10 years and older. *Id.* at 93.

63. VAN WOODWARD, *supra* note 51, at 84-99; JUSTIN A. NYSTROM, NEW ORLEANS AFTER THE CIVIL WAR: RACE, POLITICS AND A NEW BIRTH OF FREEDOM 215-216, 236-37 (2010).

1896, Louisiana voters approved an act calling for a Constitutional Convention "with power to frame and adopt, without submission to the people, a new Constitution for the State."[64] For the first time since secession, Louisiana voters deprived themselves of the right to vote on the new Constitution.

Delegates to the convention met at Tulane Hall, on University Place, in New Orleans on February 8, 1898. The Convention's newly elected president, Ernest Benjamin Kruschnitt, made clear the Convention's primary goal in his opening statements:

> We know that this convention has been called together by the people of the 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 . . . Only a few years back, it might have been considered impolite to say what I am now saying, but there are men standing high to-day in the councils of the nation, who have seen the doors of the White House barred to them by the ignorant and corrupt delegations of Southern negroes . . . May this hall, where, thirty-two years ago, the negro first entered upon the unequal contest for supremacy, and which has been reddened with his blood, now witness the evolution of our organic law which will establish the relations between the races upon an everlasting foundation of right and justice.[65]

The goals of the proposed constitutional changes in 1898 were plainly stated. Kruschnitt claimed they were necessary to "protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana."[66] Again, women attempted to persuade the conventioners to give them the suffrage, this time by aligning themselves with the white supremacy movement; even that, however, failed to persuade a majority in the convention to grant the suffrage to women.[67] Subsequently, the women's movement in Louisiana became divided between groups who wanted the suffrage for all women and those who aligned themselves with white supremacy. Louisiana women did not obtain the vote until passage of the Nineteenth Amendment to the United States Constitution.[68]

64. Act 52 of 1896, *in* LOUISIANA CONSTITUTIONAL CONVENTIONS, *supra* note 17, at 27-29; *see* Amasa M. Eaton, *The Suffrage Clause in the New Constitution of Louisiana,* 13 HARV. L. REV. 279 (1899).

65. Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana (Feb. 8, 1898), 9-10 (R.J. Hearsey, Convention Printer 1898), *available at* https://archive.org/stream/officialjournal03convgoog#page/n0/mode/1up (last visited Sept. 10, 2014).

66. *Id.* at 381.

67. Smith, *supra* note 52, at 538-44; LINDIG, *supra* note 52, at 112-13, 131-38.

68. Smith, *supra* note 52, at 555-60; LINDIG, *supra* note 52, at 139-56.

The Louisiana Constitutional Convention of 1898 rewrote the Louisiana Constitution to restrict the franchise in a number of ways, and introduced the "Grandfather Clause," exempting any males entitled to vote on January 1, 1867, and their male descendants over the age of 21 at the date of adoption of the new Constitution from the new restrictions. The Convention journal illustrates the very conscious ways in which the state legislatures in the post-Reconstruction Era deliberately sought to use neutral rules to thwart equality for blacks by disenfranchising the majority of black voters.

The Convention debated a number of measures designed to deprive blacks of the vote, including a proposal to restrict the suffrage to persons who were voters on January 1, 1868, before the adoption of the Fourteenth and Fifteenth Amendments to the United States Constitution. The proposal was rejected because it was plainly inconsistent with the Fifteenth Amendment, since it would have immediately disenfranchised all black voters, as none could have been voters on January 1, 1868, and thus was deemed unconstitutional. Instead, the convention delegates adopted rigorous registration requirements including a two-year residency period, literacy tests and/or property requirements, and a poll tax, but provided a "grandfather clause" that exempted any males entitled to vote on January 1, 1867, and their male descendants over the age of 21 at the date of adoption of the new Constitution, from the new, burdensome educational or property qualifications.[69] The measure was similar to the previous measure, and through the working of the exemption, posed a similar conflict with the mandate of the Fourteenth and Fifteenth Amendments. Nonetheless, the measure passed with a strong majority.

A good number of delegates to the Convention, approximately one-fourth of the delegates, voted against the measure, most expressing concerns about its constitutionality, and many expressing concerns over its morality and, what they called, its undemocratic nature.[70] It is difficult to ascertain how many objected to the intentional disenfranchisement of blacks and how many objected because of its effect on poor, illiterate, white voters and creoles of color, and because its plain language directly conflicted with the Fifteenth Amendment, and thus was likely to be held unconstitutional by the United States Supreme Court. The 1898 Constitution also expressly mandated segregated public education. Article CCXLVIII provided that "there shall be free public schools for the white and colored races . . . throughout the State . . . ."[71]

The new Constitution was soon challenged in court, and the challenge ended up before one of the new judges on the Civil District Court of New

69. Official Journal of Proceedings, *supra* note 65, at 142. The poll tax was maintained until abolished in 1940 by constitutional amendment. LA. CONST. OF 1921, art. VIII, § 2, *in* DART, *supra* note 17, at 234 (as amended by Act 374 of 1940).

70. *See* Official Journal of Proceedings, *supra* note 65, at 45-46, 143-46.

71. LA. CONST. OF 1898, art. CCXLVIII, *in* DART, *supra* note 17, at 646.

Orleans: John St. Paul, one of the delegates at the Convention.[72] David J. Ryanes, a sixty-year old former slave, born in Tennessee but a resident of Louisiana since 1860 and freed in 1863, filed an action challenging the grandfather clause, and the property and literacy requirements. Ryanes had been a registered voter for 30 years; a beneficiary of the Louisiana Constitution of 1868.[73] Through his attorney, Armand Romain, Ryanes alleged that the intent and effect of the new constitutional provisions was to deny him and other Negroes or colored citizens the vote. Ryanes could read and write only a little—not enough to fill out the registration form and to demonstrate literacy to the registrar of voters. He did not own property. And as a former slave and not able to vote in Louisiana until 1867, he could not qualify to vote in Louisiana under the new Constitution.

To prove the impact of the grandfather clause, Romain introduced voter records for 1896, 1897, and 1900. Those records showed a dramatic reduction in the number of blacks registered to vote: in 1896 Louisiana showed 164,088 white registered voters and 130,344 colored; by 1900, Louisiana had 125,437 white registered voters and only 5,320 colored voters. The New Orleans numbers were staggering as well: in 1896 there were 45,907 white registered voters and 14,177 colored; by 1900 white registered voters had dropped to 37,491 but colored voters had dropped to 1,493. To prove intent, Romain tried to introduce the Official Journal of the Convention Proceedings, which proved

> that the Constitutional Convention . . . was called together for the purpose principally of disfranchising the colored citizens of this state, and to adopt a plan . . . of suffrage qualifications, by which all white men in the state could . . . be retained in the Electorate, and all the colored men in the state, as far as possible should be excluded from the said Electorate . . . .[74]

The attorneys representing the defendant, the supervisor of voter registration for the parish of Orleans, objected to the admission of the Journal on the grounds that it was immaterial and irrelevant, since the language of the relevant Constitutional provisions was clear, and thus, there was no need to resort to questions about legislative intent.[75] The language of the Constitution was racially neutral, essentially, since it did not single out black voters but simply enacted race neutral restrictions and used a particular date to determine who was to be exempted from the restrictions. Judge St. John agreed that evidence as to legislative intent was irrelevant and

72. John St. Paul went on to become a Justice on the Louisiana Supreme Court. He was the founding Dean of the law school at Loyola University New Orleans.

73. SCOTT, *supra* note 55, at 42-46.

74. Transcript of Hearing at 37-38, State *ex rel* Ryanes v. Gleason, 36 So. 608 (La. 1904) (No. 14,651) (records housed at the Historical Archives of the Louisiana Supreme Court, Earl K. Long Library, University of New Orleans).

75. *Id.*

refused to consider the evidence. One of the defense attorneys was the former chair of the Louisiana Constitutional Convention of 1898, E. B. Kruttschnitt. The suit was filed on April 30, 1902. The case went to trial on July 28, 1902, and Judge St. Paul issued his decision the same day. Judge St. Paul ruled that a prior action filed by Mr. Ryanes in the same court but before a different judge barred reconsideration of the issues since the dismissal of the prior suit constituted a ruling on the merits.

On appeal, the Louisiana Supreme Court decided it lacked jurisdiction to review the dismissal of the case because the new Constitution did not specifically provide for appeals when the only question before the court was one of the alleged invasion of political rights, like the right to vote.[76] Mr. Ryanes, a voter for thirty years, like many other black voters, was left with no recourse.

Other southern states adopted Louisiana's grandfather clause approach to reduce black suffrage. In 1915, the United States Supreme Court held that this kind of grandfather clause, plainly adopted to disenfranchise blacks, violated the Fifteenth Amendment in *Guinn v. United States*.[77] In response to the *Guinn* decision, Louisiana amended its Constitution in 1921 to adopt the "interpretation test" or "understanding clause," which continued to vest almost complete discretion in the hands of registrars to determine who would be allowed to register to vote based on a potential voter's ability to "give a reasonable interpretation" of any clause in the Louisiana or United States Constitutions.[78] This provision was highly effective at deterring the black franchise. As of 1940, a total of 897 blacks were registered in Louisiana.[79] This provision remained in place until the United States Supreme Court struck it down in 1965 in *Louisiana v. United States*.[80] Black voters in Louisiana, as across the South, had to wait until Congress enacted new voter right protections empowering not just private individuals, but the Department of Justice, to enforce, and the activism of the Civil Rights Era before their votes counted again.

III. BRINGING THE WALL DOWN[81]

> A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. The wall is the state constitutional requirement that an applicant for registration 'understand and give a reasonable interpretation of any section' of the Constitutions of Louisiana or of the United

76. *Id.*

77. Guinn v. United States, 238 U.S. 347, 368 (1915) (Oklahoma's grandfather clause struck down as invalid).

78. LA. CONST. OF 1921, art. VIII, §1, *in* DART, *supra* note 17, at 231; *see* Kunkel, *supra* note 20, at 1-25.

79. Kunkel, *supra* note 20, at 21.

80. Louisaina v. United States, 380 U.S. 145 (1965). Louisiana primarily relied on its white primary law to disenfranchise black voters until 1944, when the Supreme Court struck down a parallel Texas primary system in Smith v. Allwright, 321 U.S. 649 (1944).

81. United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963).

> States. It is not the only wall of its kind, but since the Supreme Court's demolishment of the white primary, the interpretation test has been the highest, best-guarded, most effective barrier to Negro voting in Louisiana . . . [T]his wall, built to bar Negroes from access to the franchise, must come down. The understanding clause or interpretation test is not a literacy requirement. It has no rational relation to measuring the ability of an elector to read and write. It is a test of an elector's ability to interpret the Louisiana and United States Constitutions. Considering this law in its historical setting and considering too the actual operation and inescapable effect of the law, it is evident that the test is a sophisticated scheme to disfranchise Negroes. The test is unconstitutional as written and as administered.[82]

So held the lower court in *United States v. Louisiana.*[83] But it would be a mistake to think of the decades that preceded the case as a period where black citizens lay dormant, awaiting the activism of the Civil Rights Era. Throughout the early decades of the twentieth century in Louisiana, blacks continued efforts to challenge Jim Crow, segregation, and the restrictive practices that effectively denied the majority the franchise.[84] In 1944, New Orleans attorney A.P. Tureaud, with the support of Thurgood Marshall and the NAACP, filed a case in district court challenging the restrictions the registrar of St. John the Baptist Parish imposed on blacks when attempting to register to vote, which included refusing to provide applications, refusing to meet with them, and asking excessively technical questions, like to define the meaning of the word "certiorari," a term that appeared in the Louisiana Constitution in place at the time.[85] The district court dismissed the action for lack of jurisdiction on the grounds that the plaintiffs had not exhausted all possible state remedies.[86] On appeal to the Fifth Circuit with *Mitchell v. Wright,* a companion case, the Fifth Circuit reversed both lower courts, explaining its reasoning in the Alabama case[87] and making it clear that jurisdiction to decide the merits of the claims was proper and plaintiffs did not have to exhaust state judicial remedies prior to suing in federal court.[88]

For every effort to give effect to the ability of black voters to exercise the franchise, there were equally forceful efforts to resist and oppose black franchise and integration. The same period saw the rise of Citizens Councils and a concerted effort to purge the rolls of black voters and ensure that

82. *Id.* at 355-56.

83. *Id.*

84. RACHEL L. EMANUEL AND ALEXANDER P. TUREAUD, JR., A MORE NOBLE CAUSE: A.P. TUREAUD AND THE STRUGGLE FOR CIVIL RIGHTS IN LOUISIANA 110-113 (2011).

85. *Id.* at 111.

86. Hall v. Nagel, 154 F.2d 931 (5th Cir. 1946).

87. Mitchell v. Wright, 154 F.2d 924 (5th Cir. 1946).

88. *Hall*, 154 F.2d at 931; *Wright*, 154 F.2d at 926.

registrars across Louisiana aggressively enforced the interpretation test.[89] But it was as a result of litigation instigated by the Department of Justice pursuant to the provisions of the Civil Rights Act of 1957,[90] a precursor to the Voting Rights Act of 1965, that the interpretation/understanding barrier to black suffrage in Louisiana came down. In a series of cases brought in 1961, the United States successfully challenged racially discriminatory practices in voter registration throughout Louisiana, culminating in the Supreme Court decision in *Louisiana v. United States*.[91]

The United States filed suit on October 16, 1961 in the Eastern District of Louisiana challenging the practices of the registrar of voters in Plaquemines Parish as engaging in a pattern and practice of racial discrimination against black applicants for registration since January 1953.[92] Plaquemines Parish was the home of Leander Perez, one of southern Louisiana's most well-known white supremacists and segregationists. The action, in part, challenged the registration practices established in 1962, after the "constitutional interpretation" test had been discarded and replaced with what purported to be an objective test, requiring applicants to answer six multiple choice questions.[93] In defense, the Parish challenged the constitutionality of the federal provisions at issue.[94] The district court noted that the voting age population of Plaquemines Parish in 1960 consisted of 8,633 white and 2,897 non-white persons; yet as of March 12, 1962, the number of registered voters in the parish consisted of 6,906 white and 43 black persons.[95] The court found insufficient evidence of a pattern and practice of racial discrimination, but granted an injunction prohibiting the registrar from engaging in racial discrimination in the registration process for the parish.[96] The court noted apathy on the part of blacks for failing to register, but made no reference to the violence and hostile atmosphere prospective black voters would likely encounter were they to overcome what the court considered lethargy.[97] Although the court found evidence of past discriminatory conduct (registrar providing white applicants with answers

89. FAIRCLOUGH, *supra* note 55, at 198-99, 206-08, 220-23, 226-33.

90. Civil Rights Act of 1957, Pub. L. 85-315, 71 Stat. 637 (codified as amended in scattered sections of 28 and 42 U.S.C.).

91. Louisiana v. United States, 380 U.S. 145 (1965); *see* United States v. Manning, 206 F. Supp. 623 (W.D. La. 1962); United States v. Fox, 211 F. Supp. 25 (E.D. La. 1962); United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963); *see also* John Doar, *The Work of the Civil Rights Division in Enforcing Voting Rights Under the Civil Rights Act of 1957 and 1960,* 25 FLA. ST. U.L. REV. 1 (1997).

92. *Fox*, 211 F. Supp. At 28.

93. *Id.* at 29, *aff'd*, 334 F.2d 449 (5th Cir. 1964).

94. *Id.* at 34.

95. *Id.* at 29.

96. *Id.* at 34.

97. *Id.* at 31; *but see* Doar, *supra* note 91, at 5-6 (describing violent resistance to voter registration efforts).

to copy, or providing white applicants with easier questions than those provided to black applicants), the court rejected as a remedy an order requiring immediate registration of all black citizens of voting age in the parish.[98] The court also upheld the constitutionality of the federal statute.[99]

Later in 1961, in *United States v. Louisiana,* the federal government brought suit against the state for its voter registration qualification laws, including the Louisiana constitutional provisions authorizing the interpretation/understanding requirement.[100] The lower court decision described at length the history of Louisiana's "historic policy and the dominant white citizens' firm determination to maintain white supremacy in state and local government by denying to Negroes the right to vote."[101]

IV. KEEPING THE WALL DOWN

The right to vote continues to be of vital importance to the long-term health of the country as a republic. Particularly in an era when the role of money in elections appears to be increasingly decisive and scrutiny over campaign funding effectively restricted, the vote itself appears to remain as the primary mechanism for the individual voter to have an impact on the political process. More attention needs to be paid to enhancing the franchise—facilitating the vote rather than making it more expensive and difficult for the average citizen to exercise. Moreover, rather than enacting more restrictive measures that require individual citizens to spend money, government should work to make it possible for everyone to vote easily, without the vote being affected by one's ability to negotiate bureaucracies and resource-intensive regulations. That should be the focus of 21st century state and federal legislatures—how to make it easier and cheaper for all citizens to vote rather than how to erect barriers of time, money, and place ostensibly designed to deter voter fraud, but sought primarily for political gain and to deter the vote of the wrong type of citizen. Few citizens are in a position to contribute thousands, even millions, to candidates for office. All should be able to vote.

98. *Fox*, 211 F. Supp. at 31.
99. *Id.* at 34-35.
100. United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963).
101. *Id.* at 363.