

BRENNAN
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TWENTY
YEARS

FLORIDA: AN OUTLIER IN
DENYING VOTING RIGHTS

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FOREWORD

By Myrna Pérez

In recent years, Americans have endured a wave of highly partisan and discriminatory voting restrictions passed in state legislatures across the country. These restrictions have drawn attention for the ways in which they make voting more difficult for many citizens — especially those who are low-income, minority, young, or old. The wave included strict voter ID laws, restrictions on voter registration, and laws to limit access to voter-friendly reforms like early voting. Challenges to those laws are ongoing in courts throughout the country, and their long-term fates are still at issue.

But efforts to restrict the right to vote are not new in the United States, and few, if any, restrictions have endured for as long, and disenfranchised as many Americans, as criminal disenfranchisement laws.

Across the nation, criminal disenfranchisement laws deny over 6 million Americans a say in our democracy. More than 4.7 million of these citizens have left prison and are in their communities — working, raising families, and paying taxes. At the same time, they remain blocked from joining their neighbors at the polls. People of color bear the brunt of the practice, with over 1 in 13 African Americans disenfranchised — one-third of the total denied the right to vote.

No state disenfranchises more of its citizens than Florida. In total, over 1.6 million people have lost their right to vote.

Each state has different rules governing who can or cannot vote. In some places the rules are simple: 14 states plus D.C. automatically restore rights when an individual leaves incarceration. But others extend disenfranchisement well beyond prison. For instance, 20 states deny voting rights to people on parole or probation. That includes states like Georgia, where an estimated 250,000 citizens cannot vote, and Texas, where nearly 500,000 people currently cannot vote because of a criminal conviction.

But no state disenfranchises more of its citizens than Florida. The state imposes a what for all practical purposes is a lifetime voting ban for people with past felony convictions. In total, more than 1.6 million people have lost their right to vote in Florida, including one in five African-American adults. And to get their voting rights back, citizens must wait five to seven years and submit an application with supporting documentation to the state's governor, who in recent years has denied all but a few hundred applicants out of tens of thousands.

Mass disenfranchisement has severe consequences for Florida's communities. For instance, one study found that African Americans in communities subject to harsh disenfranchisement laws experience a decrease in turnout levels, regardless if they themselves were incarcerated.¹ These costs come with no benefits for Florida's public safety. There is no connection between disenfranchisement and deterrence of future crime. Indeed, evidence from Florida suggests that voting makes criminal behavior less likely, explaining support for reform from figures in the law enforcement and corrections sectors.

In this report, Professor Erika Wood of New York Law School makes the case against Florida's law — from its Jim Crow roots to its troubling present. Historical accounts make the law's original racist intent

very clear. The most current data detail not only the millions of Floridians barred from the polls, but the way in which the state's system perpetuates their disenfranchisement and has even interfered with the voting rights of eligible citizens. This report explains the burden that Florida's law places on both voters and the state itself, and the urgent need to finally replace it.

Change is possible. It's happening throughout the country. Over the last two decades, more than 20 states have allowed more people with past convictions to vote, to vote sooner, or to access that right more easily. In 2016 alone, Maryland's legislature enfranchised more than 40,000 people, Delaware removed financial barriers to rights restoration, and Virginia's governor committed to restoring voting rights for over 200,000 citizens. And more broadly, Americans are looking for ways to make our criminal justice system smarter, less punitive, and more rehabilitative.

Today in Florida, citizens are calling for a ballot initiative to change the state's constitution and dramatically reform Florida's disenfranchisement policy. If successful, the change could restore voting rights to nearly one-quarter of America's disenfranchised population.

This report was written by Professor Wood and published by the Brennan Center because Florida's lifetime voting ban is a stain on our democracy. This state's law is the fullest expression of the antiquated system that bars millions in our very own communities from voting. The public deserves to understand where this law came from, how it works today, the effects it has on citizens and the state — and why it must change.

Myrna Pérez
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I. INTRODUCTION

In the United States today, more than 6 million American citizens are denied the right to vote because of past criminal convictions. One-quarter of those disenfranchised Americans live in one state: Florida. With 29 electoral votes, Florida can be a critical swing state in national elections. Yet more than 1.6 million Florida residents are barred from voting. Florida denies the right to vote to more of its residents than any state, and to the largest percentage of its voting-age citizens than any state. Nearly one-third of those who have lost the right to vote for life in Florida are black, although African Americans make up just 16 percent of the state's population.² Florida's law disenfranchises 21 percent of its total African-American voting-age population.³

In the last two decades, more than 20 states have changed their criminal disenfranchisement policies to expand voter eligibility or make the restoration process less restrictive.

The breadth and depth of Florida's disenfranchisement of its residents represent a radical departure from the norm in the United States, which is itself an outlier internationally. Florida has one of the most punishing and restrictive criminal disenfranchisement laws.⁴ A felony conviction in Florida results in lifetime loss of voting rights, unless the governor chooses to restore those rights through his clemency power. Only Iowa and Kentucky have similar lifetime bans, but Florida disenfranchises more than four times as many residents as those two states *combined*.

Florida's felony disenfranchisement law traces its roots back to the racism of the deep South during Reconstruction and Jim Crow. As our country began to formally recognize in the Constitution all forms of equality for freed slaves, including the right to vote, politicians, civic leaders, and wealthy elites in Florida took deliberate and nefarious steps to systematically keep the state's African Americans enslaved and disempowered. Florida's criminal disenfranchisement law was at the center of these efforts, and its intended effects continue today.

In the last two decades, more than 20 states have changed their criminal disenfranchisement policies to expand voter eligibility or make the restoration process less restrictive.⁵ It is time for Florida to leave its shameful past behind, and recognize that the full promise of American democracy can only be realized with the full participation of all citizens, across all communities.

II. HISTORY OF FLORIDA'S FELONY DISENFRANCHISEMENT LAW

Florida's felony disenfranchisement law is part of a long and troubled history of voter discrimination. With roots tracing back to Reconstruction and the Jim Crow period, racial discrimination has stifled the right to vote in Florida for hundreds of years.

A. Reconstruction: 1865-1877

Florida became a state in 1845, but refused to extend civil and political rights to blacks immediately following the Civil War. Between 1865 and 1870, in reaction to the continued discrimination against blacks in Florida and other southern states, the U.S. Congress passed the Reconstruction Amendments: The 13th Amendment emancipated slaves, the 14th Amendment granted equal citizenship to freed slaves, and the 15th Amendment prohibited denial of the right to vote based on "race, color or previous condition of servitude." The Reconstruction Amendments were intended to guarantee freedom to former slaves and prevent discrimination against African Americans, and all Americans.

Nevertheless, in its 1865 constitution, Florida explicitly limited the right to vote to "free white males."⁶ That same year, in response to emancipation, Florida's legislature — like many of its southern neighbors — enacted "Black Codes," a series of laws designed to restrict the activities of freed blacks and ensure their continued availability as a labor force.⁷ According to Reconstruction scholar Eric Foner, the commission report supporting Florida's Black Code "praised slavery as a 'benign' institution."⁸ A significant section of Florida's Black Code included increased prosecution and harsher penalties for certain crimes the legislature believed were more likely to be committed by freed blacks.⁹ To this end, the legislature passed "[a]n act to prescribe additional penalties for the commission of offences against the State, and for other purposes."¹⁰ The "other purposes" enumerated a lengthy list of crimes, such as assault of a white female, burglary, house breaking, possession of weapons, and many others, for which severe penalties, like public whipping, were imposed.¹¹ The Code criminalized disobedience, impudence, and even "disrespect to the employer."¹²

Section 2 of the Code expanded the definition of larceny and made it a punishable offense. During slavery, the stealing and sale of cotton, corn, and other agricultural products was not a crime. The Black Code made the "severance . . . and the felonious taking and carrying away" of any "agricultural production or fixture" punishable as larceny.¹³ That same year, the legislature also enacted "[a]n act to Punish Vagrants and Vagabonds," which provided for the arrest of "able-bodied persons" who were "wandering or strolling about or leading an idle, profligate or immoral course of life."¹⁴ Those arrested as vagrants could be sentenced to as much as 12 months of labor.¹⁵ A county criminal court was also established "to aid in the handling of the increase in crime caused by emancipation."¹⁶

In 1866, Florida was one of 10 ex-Confederate states that rejected the 14th Amendment.¹⁷ In response, Congress passed the Reconstruction Act of 1867 that laid out the steps by which new state governments in those 10 states, including Florida, would be created and recognized by Congress.¹⁸ Congress required each state to write a new constitution providing for "manhood suffrage" — extending voting rights to all males, regardless of race — and ratification of the 14th Amendment.¹⁹ Foner describes the Reconstruction

Act of 1867 as a “stunning and unprecedented experiment in interracial democracy. In America, the ballot did more than identify who could vote — it defined a collective national identity”²⁰

But white elites in the South were not going to give up their political, economic, and social control so easily, and they found various ways — through a combination of violent coercion and subtle legal maneuvering — to assure their continued dominance. Florida responded to Congress’s mandate in its 1868 constitution by adopting Article XIV, a controversial suffrage article, which was the result of “extensive parliamentary maneuvering.”²¹ While Article XIV, Section 1, granted the right of suffrage to “[e]very male person of the age of twenty-one years and upwards, of whatever race, color, nationality, or previous condition,”²² the constitution simultaneously included three additional provisions that intentionally undermined this promise. First, it established a legislative apportionment scheme that weakened political representation from densely populated black counties.²³ Next, it mandated the legislature to “enact laws requiring educational qualifications for electors,” but included a clause to prevent these requirements from applying to “any elector who may have registered or voted in any election previous,” thereby assuring that the educational requirements would not apply to white voters.²⁴ Finally, Article XIV, Section 2, imposed a lifetime voting ban for people with felony convictions.²⁵ Section 4 of this same suffrage article directed the legislature to “enact the necessary laws to exclude from . . . the right of suffrage, all persons convicted of bribery, perjury, larceny, or of infamous crime”²⁶ — the same crimes the legislature had recently recognized and expanded through the Black Code.

According to Florida historian Jerrell Shofner, these additions to the suffrage article were a direct reaction to being forced to recognize the Reconstruction Amendments. He explains:

Felony disenfranchisement was a way of reducing the effect of the despised black suffrage that [Florida] Conservatives knew they had no alternative but to accept. Larceny, which included the new category added by the 1865 legislature, was added to the earlier lists of crimes for which convicts could be disfranchised because the Conservatives agreed with [the sponsor’s] admonition about its increase resulting from the abolition of slavery.²⁷

Shortly after the 1868 constitution was approved, a moderate Republican leader boasted that he had kept Florida from becoming “niggerized.”²⁸ Another delegate reported in 1881 that the criminal disenfranchisement constitutional provisions were being used to reduce the number of black voters.²⁹ Having adopted constitutions consistent with the 15th Amendment, the former Confederate states were all readmitted to the Union by 1870.³⁰ In 1877, Reconstruction ended with the withdrawal of federal troops, and control of the South was returned to its own white leaders. The U.S. Commission on Civil Rights observed decades later:

While the North looked the other way, Southern conservatives began fashioning a political structure according to their own necessities. . . . For some 15 years the legal sanction that had given the vote to the Southern Negro remained on the books, but on election day the Negro generally remained at home. To keep Negroes from the polls and thus consolidate white control, ingenious and sometimes violent methods were employed.³¹

B. Jim Crow Years: 1877-1960

The post-Reconstruction Jim Crow era swept through southern states beginning in the late 1800s, with Florida taking the lead. As a backlash to the Reconstruction Amendments and their promise of civil rights and equality for African Americans, southern states began imposing laws intended to racially segregate and discriminate, giving official government sanction to extensive economic, educational, social, and political discrimination. One description of the rise of Jim Crow in Florida noted, “once the movement had begun, it spread rapidly into every sector of social life within the state.”³² Florida passed laws that officially segregated schools, transportation, and notably, jails and prisons.³³

Beginning during Reconstruction and continuing through the mid-20th century, Florida participated in the common southern practice of “convict leasing.” African Americans were aggressively arrested and imprisoned under the expanded criminal codes described earlier, and then leased out to work on private plantations and factories throughout the state with proceeds being paid back to the state.³⁴ Targeted criminalization and the segregation of prisons and jails in Florida combined to produce practical re-enslavement. The supply of free labor and the resulting profit provided additional incentive to keep Florida’s segregated prisons filled to capacity. The combination of this dynamic, along with sweeping criminal disenfranchisement laws, was one of the ways Florida continued to suppress African American voting rights for decades.

In response to the rise of Jim Crow laws, African Americans in Florida established their own social and cultural institutions, but also responded to segregation, discrimination, and disenfranchisement by filing lawsuits and staging protests and boycotts.³⁵ Criminal convictions continued to be used as a barrier to keep African Americans from voting. According to one historian:

Some of the earliest protests were against disenfranchisement of black voters who had been dropped from voter registration lists after being convicted of petty crimes. In October 1878 several hundred Jefferson County blacks converged on the courthouse in Monticello unsuccessfully requesting to have their names restored to the rolls. Similar actions occurred in Leon, Gadsden, Escambia and Madison counties where thousands were declared ineligible to vote between 1876 and 1888.³⁶

In addition to the use of criminal convictions, Florida also imposed a poll tax in its 1885 constitution, giving the legislature “the power to make the payment of the capitation tax a prerequisite for voting.”³⁷ This provision helped to keep those African-American men who were not imprisoned off the voting rolls. The 1885 constitution left intact the 1868 criminal disenfranchisement provisions of the suffrage article.

Throughout the Jim Crow era, African Americans who tried to register and vote in Florida were harassed and intimidated, resulting in extremely low voter registration rates. Eventually, allegations of widespread violence and discrimination throughout the South prompted Congress to pass the Civil Rights Act of 1957. Among other things, the Act established the U.S. Commission on Civil Rights to “investigate allegations . . . that certain citizens of the United States are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin”³⁸ Notably, the

Commission's first sworn voting complaint came from Gadsden County, Florida. It alleged, "through threats of bodily harm and losing of jobs, and other means, the Negro residents of Gadsden County, Fla., are being deprived of their right to vote."³⁹ The Commission's report documented that in Gadsden County in 1958 "only 7 Negroes were registered [to vote] . . . although 10,930 adult Negroes lived there."⁴⁰ The report concluded that "fear is a real deterrent to registration" in the county.⁴¹

C. Civil Rights Era: 1960-1970

A few years later, in 1961, the Commission on Civil Rights issued a second report, documenting additional incidents of voter intimidation in Florida. According to the Commission's report, in Liberty County, a rural district southwest of Tallahassee:

[S]ome Negroes registered in 1956, but thereafter they were subjected to harassment. Crosses were burned and fire bombs hurled upon their property, and abusive and threatening telephone calls were made late at night. Two white men advised one of the registrants that if the Negroes would remove their names from the books all the trouble would stop. All but one did remove their names, and their troubles ended; the one who did not was forced to leave the county.⁴²

The Commission's report presented corresponding statistics showing that counties with the highest percentage of black populations had among Florida's lowest black voter registration rates.⁴³ Voter registration remained low in Gadsden County, one of two Florida counties where in 1960 blacks were the majority of the local population. In 1961, there were 12,261 voting-age African Americans, but still only seven were registered to vote.⁴⁴

This was the documented social and political climate in Florida when the state held another constitutional convention in 1968. In the midst of the Civil Rights movement, and after the landmark Voting Rights Act passed in 1965, the Florida legislature convened to draft its first new constitution since 1885. According to Florida historian Richard Scher, "the impact of the 1964 Civil Rights Act and the 1965 Voting Rights Act, the goals of which were in part designed to rid Florida of the last remaining vestiges of Jim Crow laws and practices, was still being nervously anticipated by many white Floridians."⁴⁵ Notably, there were no African-American elected officials in the legislature that approved the new constitution.⁴⁶

The Constitution Revision Commission, created by the Florida legislature to draft the new state constitution, made major revisions to some sections, but merely tinkered with the felony disenfranchisement provision that had existed since Reconstruction. The 1968 constitution eliminated the previous provision that denied the right of suffrage to "all persons convicted of bribery, perjury, larceny or of infamous crime," but left intact blanket felony disenfranchisement. Article VI, Section 4, of the 1968 constitution provided: "No person convicted of a felony . . . shall be qualified to vote . . . until restoration of civil rights . . ." ⁴⁷ That is the Florida law as it remains today.

D. A Legal Challenge: Johnson v. Bush

With its deep roots in Jim Crow and its lasting impact on African Americans, Florida's felony disenfranchisement law has not gone unchallenged. In 2000, Thomas Johnson, a 51-year-old African-American man from Gainesville, filed a class action lawsuit alleging the felony disenfranchisement law violated the U.S. Constitution because it "arbitrarily and irrationally denies [plaintiffs] the right to vote because of race" in violation of the 14th and 15th Amendments.⁴⁸ Johnson had been convicted of a felony in New York in 1992 and served eight months in prison.⁴⁹ He sued on behalf of himself and others who had served their criminal sentences but were denied the right to vote in Florida.

The U.S. District Court for the Southern District of Florida concluded that the state's felony disenfranchisement law was not intentionally discriminatory, and thus did not violate the U.S. Constitution. While acknowledging the discriminatory roots of the law, the District Court concluded that the 1968 re-enactment of the provision "cleansed Florida's felon disenfranchisement scheme of any invidious discriminatory purpose"⁵⁰ According to the court, "a facially neutral provision . . . might overcome its odious origin."⁵¹

On appeal, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit disagreed.⁵² The Court of Appeals traced the history of the provision back to its racist roots, considered its continuing disparate impact on African Americans, and concluded that "an original discriminatory purpose behind Florida's felon disenfranchisement provision establishes an equal protection violation that persists . . . unless it is subsequently reenacted on the basis of an independent, non-discriminatory purpose."⁵³ The court concluded, "[r]etaining an originally discriminatory provision in order to preserve continuity, or out of deference to tradition, or simply due to inertia does not amount to an independent purpose sufficient to break the chain of causation between the original racial animus and the provision's continuing force as law."⁵⁴

Florida appealed the panel's decision to the Eleventh Circuit Court of Appeals sitting en banc. The en banc court vacated the panel's decision and affirmed the District Court's opinion, upholding the constitutionality of Florida's felony disenfranchisement law.⁵⁵ Like the District Court, the Eleventh Circuit en banc concluded that the 1968 reenactment "eliminated the taint" from the earlier discriminatory provisions.⁵⁶

Plaintiffs appealed the Eleventh Circuit ruling to the U.S. Supreme Court, but it declined to hear the case.⁵⁷ As a result, the Eleventh Circuit's en banc opinion remains the final word, and Florida's felony disenfranchisement law remains intact.

III. FLORIDA'S CURRENT FELONY DISENFRANCHISEMENT LAW

Florida's felony disenfranchisement law today is the same as when it was inserted into the state constitution 150 years ago. Under the Florida Constitution, a person is denied the right to vote upon conviction of a felony for life, unless he receives a "restoration of civil rights."⁵⁸ The power to restore civil rights, including the right to vote, is vested in the governor and the cabinet, which in Florida consists of the attorney general, the chief financial officer, and the agriculture commissioner. The state constitution says the governor, with the approval of two members of the cabinet, may "grant full or conditional pardons, restore civil rights, [and] commute punishment . . ."⁵⁹ Under this provision, the Florida governor maintains broad discretion over who may vote.

Each governor can decide whether and how to administer this clemency power by drafting Rules for Executive Clemency. These rules determine who is eligible to apply for voting rights restoration, the requirements of the application process, and the time it takes for rights to be restored. In recent years, different governors have issued

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different clemency rules, resulting in significant shifts in who may vote. The doors may be swung open by one governor, and then slammed shut by a successor. When Gov. Rick Scott (R) came into office in 2011, he did just that, issuing new rules that significantly rolled back those of his predecessor, Gov. Charlie Crist, who served as a Republican but has since become a Democrat. Scott was re-elected to a second term in November 2014.

A. Relevant Government Entities

While the governor and cabinet determine the rules for eligibility and procedures for restoration of civil rights, four government entities administer those rules: (1) the Commission on Offender Review (formerly called the Parole Commission); (2) the Department of Corrections; (3) the Board of Executive Clemency; and (4) the Office of Executive Clemency.⁶⁰ The Board of Executive Clemency (Clemency Board) consists of the governor and the cabinet; it holds the power to grant clemency and restore civil rights.

The Commission on Offender Review provides victim services, administers parole and conditional release programs, and operates as the administrative and investigative arm of the Clemency Board.⁶¹ The Commission's Office of Clemency Investigations (OCI) is charged with investigating, reviewing, evaluating, and reporting to the Clemency Board in all types of clemency cases, including restoration of civil rights.⁶² The OCI also obtains the Commission's advisory recommendation on each clemency applicant and submits the recommendation to the Clemency Board.⁶³

The Department of Corrections (DOC) is responsible for operating state correctional facilities and administering the probation system in Florida. The DOC is required by statute to "inform and educate inmates and offenders . . . about the restoration of civil rights."⁶⁴ Every month the DOC is also required to send the Commission on Offender Review a list of individuals who may be eligible for restoration of civil rights.⁶⁵

The Office of Executive Clemency (OEC) is located within the Commission on Offender Review but it reports directly to the governor and the cabinet sitting as the Clemency Board.⁶⁶ OEC processes clemency applications, coordinates meetings of the Clemency Board, refers applications for investigation, issues restoration of civil rights certificates, and serves as the official custodian of all clemency records.⁶⁷

B. Florida Clemency Rules

There have been several significant changes to the clemency rules under recent governors, but some eligibility requirements and clemency procedures have remained consistent over the last decade. In general, to be eligible for restoration of civil rights, an individual must have completed all terms of his or her sentence, including incarceration, probation, parole, or any other form of community supervision. The terms of probation and parole include payment of victim restitution and any fees or fines imposed as part of the individual's sentence or incurred while serving the sentence.⁶⁸ Recent governors have also established a bifurcated clemency process. Depending on the type of conviction, some individuals convicted of nonviolent or less serious crimes are allowed to proceed without a hearing before the Clemency Board, while others convicted of more serious crimes are required to appear for a hearing. Which applicants are eligible to proceed without a hearing has varied depending on who is serving as governor.

Other stages of the clemency process where governors have changed the clemency rules include: (1) whether an individual must file a written application; (2) whether supporting documents are required as part of the application; (3) whether waiting periods are imposed before an initial application, and/or before being eligible to re-apply; (4) whether individual review is required for each application; (5) whether there is a mandatory or discretionary determination on each application; and (6) whether a waiver of the rules is available for an applicant who is not otherwise eligible to apply.

C. Crist Rules of Executive Clemency

In April 2007, within months of taking office, Crist, a Republican at the time, issued new clemency rules that, for the first time in decades, eliminated a formal application process for some categories of individuals seeking to have their voting rights restored (“Crist rules”).⁶⁹ In an op-ed announcing the new rules, he explained, “once [convicted individuals] have paid their debt, society should honor its part of the bargain and allow citizens to re-enter society and enjoy the rights granted by our Creator. To not do so is more than reckless or irresponsible, it is unjust.”⁷⁰

The previous clemency rules implemented by former Gov. Jeb Bush (R) required the Florida Parole Commission to review the records of each individual with a nonviolent conviction released by the Department of Corrections and circulate a list of the individuals to the Clemency Board for review.⁷¹ If two or more members of the Clemency Board objected to the restoration of civil rights to any individual, that individual would have to file a separate application for restoration.⁷²

While not fully automatic, the Crist rules did streamline the restoration process for many individuals with nonviolent convictions. Under the Crist rules, those with certain categories of nonviolent convictions became eligible for restoration of civil rights once they: (1) completed all conditions of their sentences, including imprisonment, probation, parole, or conditional release; (2) paid all fees,

finer, and restitution, and (3) had no pending criminal charges.⁷³ Those who met these eligibility requirements did not have to be individually reviewed by the Clemency Board or file an application for restoration of civil rights.⁷⁴ Instead, the Florida Parole Commission (now called the Commission on Offender Review) automatically reviewed the records of all individuals released by the Department of Corrections upon completion of sentence.⁷⁵ If the individual met the eligibility requirements, the Commission would provide that information to the Clemency Board, which would then issue a certificate restoring civil rights.⁷⁶ The Crist rules provided that an eligible individual “shall have his or her civil rights immediately restored by automatic approval of the Clemency Board.”⁷⁷

The Crist rules also provided for voting rights restoration without a hearing to those convicted of certain categories of violent crimes not eligible for the above streamlined process.⁷⁸ Under Rule 10, those convicted of some violent crimes, with exclusions for murder, manslaughter, certain sexual crimes, certain crimes involving children, and terrorism and treason, could have their civil rights restored after a 15-year waiting period.⁷⁹ While these individuals did not have to appear for a hearing, restoration of their civil rights did require individual approval by the governor and two members of the cabinet.⁸⁰ All others were required to file an application and request a hearing before the Clemency Board.⁸¹

Crist continued to provide a waiver that had also been available under the Bush rules.⁸² Under Rule 8, an applicant who did not meet the eligibility requirements could seek a waiver of the rules as long as at least two years had passed since the date of conviction and all restitution had been paid.⁸³ The Parole Commission would review the waiver request and make a recommendation to the Clemency Board.⁸⁴ Waivers required the approval of the governor and one member of the Clemency Board.⁸⁵

The Crist rules opened the door for thousands of new voters. According to the Auditor General, under the Bush rules only 26 percent of individuals with felony convictions were eligible to have their rights restored without a hearing. Under the Crist rules, 80 percent of individuals became eligible.⁸⁶

D. Scott Rules of Executive Clemency

In 2010, Crist chose not to seek re-election, and Republican Rick Scott was elected governor. Soon after taking office in 2011, Scott issued new Rules of Executive Clemency (“Scott rules”),⁸⁷ which were released hastily with little opportunity for public comment. The Clemency Board called an emergency, unscheduled meeting, distributed copies of the new rules immediately prior to the meeting, and limited public comment to a half-hour, giving each witness just two minutes to speak.⁸⁸ In substance, Scott’s clemency rules not only rolled back the reforms implemented by Crist, they were even more restrictive than those in place under Bush.

Scott’s clemency rules not only rolled back the reforms implemented by Crist, they were even more restrictive than those in place under Bush.

The Scott rules imposed a five-year waiting period before anyone could apply for rights restoration.⁸⁹ Even after completing their sentence, including community supervision, and paying all restitution, individuals with certain nonviolent convictions must wait five years before being eligible to apply for restoration. Those convicted of crimes not on the list must wait seven years before being eligible to

apply, and they must have a hearing before the Clemency Board.⁹⁰ The clock resets if an individual is arrested, even for a misdemeanor, during the waiting period, even if no charges are ever filed.⁹¹

The Scott rules also expanded the list of convictions that require a hearing — and the accompanying seven-year waiting period — far beyond the lists created by Crist and Bush.⁹² Even some nonviolent crimes, like bribery, public corruption, and computer pornography, require a hearing under the Scott rules.⁹³ Scott also eliminated the Rule 8 waiver provision that had been made available under both Bush and Crist.⁹⁴

In addition, the Scott rules created a more burdensome application process. The rules require every individual to file a written application and a variety of supporting documents, including certified copies of the charging instrument, judgment, and sentence for each conviction.⁹⁵ The rules then require the Clemency Board to review each individual application,⁹⁶ and the applicant must receive the approval of Scott plus two members of his cabinet.⁹⁷ The Clemency Board exercises unfettered discretion in its review of applications; an individual can be denied for any reason or for no reason at all.⁹⁸ If an application is denied, the applicant must wait another two years just to re-apply and start the process all over again.⁹⁹

IV. IMPACT OF FLORIDA'S FELONY DISENFRANCHISEMENT LAW

More Americans are denied the right to vote because of a past conviction in Florida than in any other state, by far. As of 2016, a staggering 1.6 million people in Florida were disenfranchised.¹⁰⁰ Of these, 1.4 million were people who have completed their entire criminal sentence, including probation and parole. Florida disenfranchises more of its citizens than Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee combined.¹⁰¹ In total, Florida disenfranchises more than 10 percent of its voting-age population, far higher than any other state.¹⁰² Nearly one-third of the disenfranchised are black,¹⁰³ although African Americans make up just 16 percent of the state's general population.¹⁰⁴ More than one in five African Americans in Florida is denied the right to vote because of a past criminal conviction.¹⁰⁵

Beyond the sheer number of people who are denied the right to vote, Florida's felony disenfranchisement law has widespread and lasting effects across the state, with real consequences for the country. With 29 electoral votes and nearly 13 million registered voters, Florida is one of the nation's most significant swing states. But with 1.6 million disenfranchised individuals, Florida's law has a significant impact on its citizens' ability to participate in America's democracy.

Florida disenfranchises more of its citizens than Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee combined.

A. Impact of Governor's Clemency Rules

The various changes to the clemency rules over the last few years have had a dramatic impact on who votes in Florida. From 2003 through 2005, under the Bush rules, the number of restoration of civil rights (RCR) cases received by the Clemency Board remained stable, averaging about 44,716 a year.¹⁰⁶ Crist's efforts to streamline and automate the restoration process resulted in a flood of RCR cases. After his rules went into effect in 2007, the numbers went up to 113,638 and then increased to 133,200 in 2008 — almost double and triple the average number of cases under Bush.¹⁰⁷ The Parole Commission estimated that under the Bush rules, 26 percent of individuals were eligible for rights restoration without a hearing. Under the Crist rules, 80 percent became eligible for the new streamlined restoration process.¹⁰⁸

However, it proved difficult for the Parole Commission to keep up with the sudden increase. Although 113,638 cases were received in 2007, only 53,856 were processed that year.¹⁰⁹ In 2008, the Commission caught up with some of the backlog, processing 151,823 cases.¹¹⁰

Not surprisingly, the number of RCR cases plummeted after Scott's clemency rules went into effect in 2011. In 2009, under the Crist rules, 24,537 people were approved for rights restoration.¹¹¹ In 2010, a year that included some time when Crist's rules were still in effect, 36,713 applications were filed and only 27,456 were processed.¹¹² In 2011, under Scott, just 52 applications were approved, representing a 99.8 percent decrease from 2009.¹¹³ In 2012, this number increased to 342, still less than 2 percent of the number restored in 2009 under the Crist rules.¹¹⁴ In 2013 and 2014, the numbers were 569 and 562, respectively.¹¹⁵ In 2015, 427 citizens had their voting rights restored.¹¹⁶

The reason for the sharp decline remains unclear. Certainly fewer people are eligible for restoration of civil rights under Scott’s rules, and certainly the application process is more burdensome for applicants, and it takes the state longer to process each application. Nevertheless, the enormous drop in approvals seems to also be the result of the Board exercising its discretion to deny applications with no clear reason. A spokesperson for the Clemency Board confirmed that if the Board determines someone is ineligible for restoration of civil rights, that individual is informed that he is ineligible and the basis of his ineligibility is explained. However, if the Clemency Board decides to exercise its discretion and deny an individual, even though he may be eligible, while that individual is informed of the denial he is never told the reason for his denial, and that reason is not recorded.¹¹⁷

B. Financial Impact on Individuals

The longstanding requirement that individuals pay all fees, fines, and restitution before being eligible to apply for rights restoration has, in effect, revived the Florida poll tax. Indeed, the requirement creates one of the most common — and lasting — obstacles to rights restoration.

The longstanding requirement that individuals pay all fees, fines, and restitution before being eligible to apply for rights restoration has, in effect, revived the Florida poll tax.

To fund its criminal justice system, Florida relies in part on fees that are imposed on defendants as they pass through the system. From 1996 through 2007, the Florida legislature authorized more than 20 new “legal financial obligations” related to criminal cases.¹¹⁸ These financial obligations fall into three general categories: fines, restitution, and “user fees.” They include: an application fee for a public defender, a fee reimbursing the cost of one’s prosecution, and charges by local jails to reimburse “subsistence costs,” among dozens of others.¹¹⁹

The amount individuals owe when they come out of prison can vary dramatically depending on the type of conviction and the county where they were convicted. According to one informal survey, the average debt owed was more than \$700.¹²⁰ This amount included only fees imposed as part of the court case and did not include additional supervision costs or victim restitution.

Restitution is often the single largest financial obligation imposed as part of a criminal sentence. It can total in the thousands of dollars, and payment is a condition of probation or parole. The average restitution debt in Florida is approximately \$8,000.¹²¹ In 2007, the Florida Department of Corrections reviewed the files of 80,000 individuals who were awaiting rights restoration under the Crist rules. The Department concluded that nearly 40 percent of those with pending applications would not be eligible because they still owed restitution.¹²²

On top of the fees, fines, and restitution imposed by the court as part of the criminal sentence, there are often high surcharges, interest, and administrative and late fees that accumulate as part of the collection process. Florida law allows a private attorney or collections agent hired by the court clerk to collect a debt to add up to a 40 percent surcharge to the amount it collects from delinquent payments.¹²³ Courts are also authorized to enter civil liens that attach against the real or personal property owned by an individual who owes debt as the result of a criminal conviction. A civil restitution lien continues for 20

years after the date of entry and carries a rate of interest determined by the Chief Financial Officer of Florida.¹²⁴ As a result, the debt an individual has the day he leaves prison can multiply quickly if not paid immediately.

By linking eligibility to vote to an individual's ability to pay, Florida has imposed a modern-day poll tax. Wealthy individuals who are able to immediately pay off all financial obligations move ahead in the line to have their voting rights restored, while those who are indigent struggle to make payments as interest and surcharges accumulate. For many, these financial obligations will create a permanent bar to voting.

C. Fiscal Impact on the State

Processing clemency applications is by far the task that takes up the most staff time and resources at the Commission on Offender Review. Regardless of how strict or lenient the clemency rules are, processing individual cases presents an enormous burden on the agency. According to the Commission's 2015 Annual Report, clemency occupied 88,916 staff hours, amounting to 53 percent of the Commission's total workload.¹²⁵ By contrast, parole determinations amounted to just 11 percent of the workload.¹²⁶ The clemency workload has been fairly consistent in the last decade, ranging from 40 to 50 percent of the Commission's overall workload. Indeed, 2015 was the highest percentage since 2005-2006, when it was 49 percent.¹²⁷

The Commission's annual reports repeatedly emphasize the burden placed on staff by the clemency process, the backlog of applications, and the need for more staff to process applications in a timely manner.

The disproportionate burden clemency imposes on the Commission does not seem to be influenced by changes in the clemency process. While the number of RCR cases increased dramatically under Crist, the time to process each case dropped significantly with the streamlined procedure provided by the Crist rules.¹²⁸ Conversely, while the number of RCR cases decreased under Scott, the time to process each case increased significantly with the requirement that each application be investigated and reviewed individually.¹²⁹ According to the Commission on Offender Review, under the Crist rules in 2008-2009, it took an employee an average of .60 hours to conduct an RCR review without a hearing.¹³⁰ In 2010-2011, under the Scott rules, it took an employee an average of 5.1 hours to complete an RCR review without a hearing.¹³¹ Thus, under the Scott rules, it takes more than eight times the amount of staff time to process each application, even when a hearing is not required.

The Commission's annual reports repeatedly emphasize the burden placed on staff by the clemency process, the backlog of applications, and the need for more staff to process applications in a timely manner.¹³² In fact, every year from 2007 through 2011, the Commission requested money from the legislature to support additional employees, but no funding was granted.¹³³ In 2012, the legislature finally allotted an additional \$350,000 in recurring general revenue funds for clemency.¹³⁴ In 2013, the legislature provided an additional \$25,000 in non-recurring general revenue funds for clemency.¹³⁵ In 2014, clemency funding included an additional nine full-time clemency employees, and a \$46,500 increase in funds for clemency phone operators.¹³⁶ Thus the increase in workload caused by the Scott rules has had implications for Florida taxpayers.

D. Impact on Election Administration

Florida's complicated law and piecemeal restoration process not only impact the individuals and government agencies charged with administering it — they also create opportunities for manipulation of the voter rolls, widespread confusion among election officials, and inconsistent application of the law among Florida's 67 counties.

The 2000 presidential election was left hanging in the balance for more than a month because of errors in Florida election administration. In the end, the race was decided by a mere 537 votes, and was the subject of a controversial United States Supreme Court opinion.¹³⁷ Florida's election administration errors were numerous that year: broken polling machines, inaccurate and incomplete voter registration lists, inadequate language translation, inaccessible polling places, poorly trained poll workers, and an overall lack of preparation for a large voter turnout, which created long lines, eligible voters being turned away, and valid votes left uncounted.

Consequently, if someone had their rights restored in another state, his name could still end up on the purge list.

Once again, race played a critical role. Although voters across the state were stymied that year, poor and minority communities suffered the worst of it. In a report documenting its comprehensive investigation of the 2000 election, the United States Commission on Civil Rights found approximately 11 percent of Florida voters in 2000 were African American — yet African Americans cast more than half of the 180,000 rejected ballots.¹³⁸ The Commission found that “statistical data, reinforced by credible anecdotal evidence, point to the widespread denial of voting rights.”¹³⁹ The report then concluded that “the disenfranchisement of Florida's voters fell most harshly on the shoulders of Black voters.”¹⁴⁰

One of the reasons for this disparate impact on African Americans was Florida's felony disenfranchisement law. In 1998, in preparation for the national election, the State Division of Elections contracted with DBT Online (“DBT”), a private company, to create a list of ineligible voters who would then be “purged” from the voter registration rolls.

In Florida, the secretary of state is the chief election officer and is responsible for, among other things, maintaining the statewide voter registration system.¹⁴¹ Within the secretary of state's office, election administration is overseen by the Division of Elections (Division).¹⁴² Each county elects a supervisor of elections who is responsible for updating and maintaining voter registration records for that county.¹⁴³ In Florida, there are 67 county supervisors of elections.¹⁴⁴

DBT performed an automated matching process against databases provided by the state and DBT's own databases. From the beginning, there was concern and confusion about the best way to create an accurate list. At a meeting in early 1999, the county election supervisors expressed a preference for exact matches on the list as opposed to a “fairly broad and encompassing” collection of names.¹⁴⁵ DBT advised the Division of Elections that it could produce a list with exact matches. Despite this, the Division opted to “cast a wide net” for the purge lists.¹⁴⁶ The matching only required a 90 percent name match, which produced “false positives” or partial matches of the data.¹⁴⁷ Moreover, the Division

required that DBT Online perform “nickname matches” for first names and to “make it go both ways.” Thus, the name “Deborah Ann” would also match the name “Ann Deborah.”¹⁴⁸

The result was a badly flawed, overly broad list that included names of many eligible voters who were nonetheless purged from the rolls and not permitted to cast a ballot in the 2000 presidential election. The felony disenfranchisement law created two types of errors in the list. First, the list included the false positive matches for many common names because the only other data compared was date of birth. Under instructions from the Division, DBT did not match social security numbers or any other unique identifiers.¹⁴⁹ Second, it included names of people with a record of a felony conviction in a number of states, but for some states cross-checked only the Florida Clemency Board.¹⁵⁰ Consequently, if someone had their rights restored in another state, his name could still end up on the purge list.¹⁵¹

“I could not believe it, after voting all these years since the 50s without a problem . . . I knew something was unfair about that. To be able to vote all your life then to have somebody reach in a bag and take some technicality that you can’t vote. Why now? Something’s wrong.”

In the end, 173,127 Floridians were identified as potentially ineligible to vote in the November 2000 election.¹⁵² Of those, 57,746 were identified as people with felony convictions.¹⁵³ Despite being aware that the lists included many errors, the Division of Elections distributed the relevant portions of the list to the 67 county election supervisors, with no guidance or policies on how each county should handle the list.¹⁵⁴ According to the Commission:

The process by which each county verified its exclusion list was as varied and unique as the supervisors of elections themselves. Some supervisors of elections sent letters to the alleged felons and held hearings to allow them to produce evidence of their clemency status or establish they were on the list in error. Other supervisors chose not to use the exclusion list at all.¹⁵⁵

The Commission’s report on the 2000 election includes multiple examples of individuals who were informed they were not eligible to vote as a result of the felony purge list.¹⁵⁶ Some of these individuals were informed far enough in advance, and took the initiative to contest the error, which allowed them to vote on Election Day. But untold thousands of others were either not informed, or were unsuccessful in their efforts to get back on the rolls. One individual, Wallace McDonald, was convicted of vagrancy in 1959, a misdemeanor, for falling asleep at a bus stop during the Jim Crow years.¹⁵⁷ He received a letter in 2000 saying he had been removed from the rolls because of a felony conviction. Despite hiring an attorney, McDonald was not allowed to vote in 2000. He stated:

I could not believe it, after voting all these years since the 50s without a problem . . . I knew something was unfair about that. To be able to vote all your life then to have somebody reach in a bag and take some technicality that you can’t vote. Why now? Something’s wrong.¹⁵⁸

Despite the national attention, the lawsuits, and a civil rights investigation resulting from the 2000 election, Florida again developed a controversial purge list in preparation for the 2004 presidential election. The list included 48,000 “suspected felons,” nearly half of whom were African American.¹⁵⁹ After a lawsuit was filed, data revealed there were many names on the list of people who had never been convicted, and thousands of people included on the list had already had their rights restored through the clemency process.¹⁶⁰ Florida was forced to withdraw the list before it was used to purge voters.

But Florida’s complex restoration process continued to confuse election officials. In 2009, when the Crist rules were in effect, a survey of all 67 county election officials revealed widespread confusion and misinformation among those responsible for providing information to the public about voter eligibility and registration.¹⁶¹

The result of these election administration errors is the “de facto” disenfranchisement of untold thousands of *eligible*, would-be voters in Florida, in addition to the 1.6 million denied the vote under the law. De facto disenfranchisement has severe, long-term effects on voter participation. Once a single local election official or poll worker misinforms a citizen that he is not eligible to vote, it is unlikely that citizen will ever follow up or make a second inquiry.¹⁶² That same individual may pass along the same inaccurate information to his family members, neighbors, and peers, creating a lasting ripple effect across the community.

E. RCR’s Positive Impact on Recidivism Rates

For years, a number of law enforcement and correctional officials have supported laws that restore voting rights to people after they leave prison and have re-entered the community.

When Scott amended the Clemency Rules in 2011, he added a requirement that the Office of Executive Clemency, the Commission on Offender Review, and the Department of Corrections provide an annual report on the status of individuals whose rights were restored for the previous two calendar years, including recidivism statistics and evaluative data. The statistics provide valuable information about possible connections between restoration of rights and successful re-entry.

For years, a number of law enforcement and correctional officials have supported laws that restore voting rights to people after they leave prison and have re-entered the community. Based on their experience in policing and community supervision, these officials have recognized that bringing people into the political process makes them stakeholders, which in turn helps steer them away from future crimes.¹⁶³

The data gathered under the Scott rules supports this theory. The average recidivism rate in Florida has hovered around 30 percent for the last five years.¹⁶⁴ In 2011, of the 52 people granted RCR, zero were returned to custody.¹⁶⁵ In 2012, out of the 342 people granted RCR, only one re-offended.¹⁶⁶ In 2013, out of 569 people granted RCR, zero re-offended.¹⁶⁷ In 2014, of 562 people granted RCR, three re-offended.¹⁶⁸ In 2015, of 427 people granted RCR, one re-offended.¹⁶⁹ While there is not enough data to conclude that there is a direct correlation between restoring civil rights and decreased recidivism, the 0.4 percent average recidivism rate for those who have had their rights restored is eye-opening, and should be studied in more depth.

V. CONCLUSION

Florida's law gives the governor, an elected official, the power to pick and choose who gets to vote and who does not. In doing so, it creates a complicated bureaucracy that burdens state officials and taxpayers alike. The law is rooted in a racist past and continues to deny the right to vote to more than 20 percent of Florida's African-American voting-age citizens. Florida should remember its past and leave it behind. It is time to end this vestige of Jim Crow, and for Florida to do its part to realize the true promise of American democracy.

ENDNOTES

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- 4 ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, *RESTORING THE RIGHT TO VOTE* 3 (2009), available at <https://www.brennancenter.org/publication/restoring-right-vote>.
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- 6 FLA. CONST. of 1865, art. VI, § 1.
- 7 Joe M. Richardson, *Florida Black Codes*, 47 FLA. HIST. Q. 365, 377 (1969).
- 8 ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1864-1877*, at 200 (1988).
- 9 Richardson, *supra* note 7, at 373-74, 377.
- 10 Expert Report by Prof. Jerrell H. Shofner, Ph.D. at 6, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (No. 00-CV-3542).
- 11 *Id.*
- 12 FONER, *supra* note 8, at 200; see also Richardson, *supra* note 7, at 375 (“[I]f a former slave entered into a contract and was disrespectful or impudent to his employer or refused to work, he could be sentenced for vagrancy.”).
- 13 Expert Report by Prof. Jerrell H. Shofner, Ph.D., *supra* note 10, at 7 (quoting 1865 Fla. Laws 23).
- 14 Richardson, *supra* note 7, at 371; Expert Report by Prof. Jerrell H. Shofner, Ph.D., *supra* note 10, at 7 (quoting 1865 Fla. Laws 28-29).
- 15 Richardson, *supra* note 7, at 374.
- 16 *Id.* at 373.
- 17 FONER, *supra* note 8, at 269.
- 18 *Id.* at 276.
- 19 *Id.*
- 20 *Id.* at 278.

- 21 Expert Report by Prof. Jerrell H. Shofner, Ph.D, *supra* note 10, at 16; *see* FLA. CONST. of 1868, art. XIV.
- 22 FLA. CONST. of 1868, art. XIV, § 1.
- 23 *See* FLA. CONST. of 1868, art. XVI, § 29. Historian Jerrell Shofner explains that the 1868 constitution based legislative apportionment on geography, rather than numerical representation. Under the new scheme, “each county would have one representative in the assembly and no county would have more than four.” Because most blacks at the time lived in eight concentrated agricultural counties in the middle of the state, there would be disproportionate representation in favor of the 29 remaining counties that were sparsely populated and predominantly white. Expert Report by Prof. Jerrell H. Shofner, Ph.D, *supra* note 10, at 15.
- 24 FLA. CONST. of 1868, art. XIV, § 7.
- 25 Florida’s constitution included a criminal disenfranchisement provision as early as 1838, prior to emancipation. That provision stated, “[t]he General Assembly shall have power to exclude . . . from the right of suffrage, all persons convicted of bribery, perjury or other infamous crime.” FLA. CONST. of 1838, art. VI, § 4.
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- 28 *Johnson v. Governor of Florida*, 353 F.3d 1287, 1296 (11th Cir. 2003) (citing historian Jerrell Shofner), *vacated*, 405 F.3d 1214 (11th Cir. 2005) (en banc).
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- 30 FONER, *supra* note 8, at 270.
- 31 U.S. COMM’N ON CIVIL RIGHTS, REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959, at 30 (1959) [hereinafter 1959 COMMISSION ON CIVIL RIGHTS REPORT], *available at* <http://www.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf>.
- 32 Wali R. Kharif, *Black Reaction to Segregation and Discrimination in Post-Reconstruction Florida*, 64 FLA. HIST. Q. 161 (1985), *reprinted in* IRVIN D. S. WINSBORO, FLORIDA’S FREEDOM STRUGGLE: THE BLACK EXPERIENCE FROM COLONIAL TIME TO THE NEW MILLENNIUM 157 (2011).
- 33 *Id.*
- 34 1914 Fla. Laws 1984 (“Boards may, in their discretion, hire out such prisoners to be kept and worked either within the county where the crime was committed or in any other county in the State of Florida. . . . Provided, That before hiring, leasing or letting out such prisoners, the said Boards of County Commissioners shall advertise for at least thirty days in one or more of the county papers their intention to lease, hire or let the said prisoners, thereby giving those who desire to bid for such prisoners an opportunity to be present, either in person or by attorney, and submit their respective bids therefor.”) For a compelling history of the practice of convict leasing and its role in American history, see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).
- 35 Kharif, *supra* note 32, at 162-63.
- 36 *Id.* at 158 (citing Jesse Jefferson Jackson, *Republicans and Florida Elections and Election Cases 1877-1891* (1974) (unpublished Ph.D. dissertation, Florida State University) (on file with author)).

37 FLA. CONST. of 1885, art. VI, § 8.

38 Civil Rights Act of 1957, Pub. L. 85–315, 71 Stat. 634.

39 1959 COMMISSION ON CIVIL RIGHTS REPORT, *supra* note 31, at 55.

40 *Id.* at 57.

41 *Id.* at 58.

42 U.S. COMM’N ON CIVIL RIGHTS, REPORT ON VOTING, 1961, at 28-29 (1961) [hereinafter 1961 COMMISSION ON CIVIL RIGHTS REPORT], *available at* <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk1.pdf>.

43 *Id.* at 260-63.

44 *Id.* at 28.

45 Expert Report by Professor Richard K. Scher, Ph.D. at 4, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002), (No. 00-CV-3542).

46 *Id.* at 3. The first black representative in the Florida legislature in modern times was Joe Lang Kershaw, elected in November 1968, the same election in which the new constitution was adopted. *Id.*

47 FLA. CONST. art VI, § 4.

48 *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002), *aff’d*, 405 F.3d 1214 (11th Cir. 2005) (en banc). The suit also alleged that Florida’s law imposed an improper poll tax in violation of the Twenty-Fourth Amendment and violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Id.*

49 *Id.*; *see* Complaint at ¶ 5, *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002) (No. 00-3542).

50 *Johnson*, 214 F. Supp. 2d at 1339.

51 *Id.* (quoting *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).

52 *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003) *vacated*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

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61 FLA. PAROLE COMM'N, 2013 ANNUAL REPORT 6-7 (2013) [hereinafter 2013 ANNUAL REPORT], *available at* <https://www.fcor.state.fl.us/docs/reports/FCORannualreport201213.pdf>.

62 *Id.* at 15.

63 *Id.*

64 FLA. STAT. § 940.061.

65 *Id.*

66 2013 ANNUAL REPORT, *supra* note 61, at 14.

67 *Id.*

68 FLA. STAT. §§ 947.18 (conditions of parole); 947.147 (victim restitution as condition of control release); 947.181 (fines, fees, restitution or other costs as conditions of parole); 948.032 (restitution as condition of probation); 948.03 (terms and conditions of probation).

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75 *Id.*

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81 *Id.* at R. 6, 11.

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- 83 Crist Rules, *supra* note 69, at R. 8; Bush Rules, *supra* note 71, at R. 8.
- 84 *Id.*
- 85 *Id.*
- 86 STATE OF FLA. AUDITOR GEN., PAROLE COMMISSION RESTORATION OF CIVIL RIGHTS: OPERATIONAL AUDIT 3 (2009) [hereinafter 2009 OPERATIONAL AUDIT], *available at* http://www.myflorida.com/audgen/pages/pdf_files/2010-010.pdf.
- 87 Fla. Rules of Exec. Clem. (March 9, 2011) [hereinafter Scott Rules]; *see also* Erika L. Wood, *Turning Back the Clock in Florida*, HUFFINGTON POST (Mar. 10, 2011), http://www.huffingtonpost.com/erika-wood/turning-back-the-clock-in_b_834239.html.
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- 89 Scott Rules, *supra* note 87, at R. 9(A).
- 90 *Id.* at R. 10.
- 91 *Id.* at R. 9(A).
- 92 *Id.* *Cf.* Crist Rules, *supra* note 69, at R. 9(A); Bush Rules, *supra* note 71, at R. 9(A).
- 93 *Id.*
- 94 *See* Scott Rules, *supra* note 87 and accompanying text.
- 95 Scott Rules, *supra* note 87, at R. 6.
- 96 *Id.* at R. 9(B).
- 97 *Id.*
- 98 *Id.*
- 99 *Id.* at R. 14.
- 100 UGGEN, SHANNON & LARSON, *supra* note 2, at 15.
- 101 *Id.*
- 102 *Id.* The only other state that comes even close to Florida is Mississippi, which disenfranchises 9.63% of its population. *Id.* In 38 states, less than 3% of the population is disenfranchised as the result of a criminal conviction. The average disenfranchisement rate for the country is 2.47%. *Id.*
- 103 *Id.* at 15-16.

- 104 *Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Dec. 9, 2016).
- 105 UGGEN, SHANNON & LARSON, *supra* note 2, at 16.
- 106 2009 OPERATIONAL AUDIT, *supra* note 86, at 3.
- 107 *Id.*
- 108 FLA. PAROLE COMM'N, ANNUAL REPORT 2008-2009 4-5 (2009) [hereinafter 2008-2009 ANNUAL REPORT], *available at* <https://www.fcor.state.fl.us/docs/reports/FCORAnnualreport200809.pdf>.
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- 110 *Id.* See also FLORIDA PAROLE COMMISSION, *PROVISO REPORT TO THE LEGISLATURE: A REPORT ON THE STATUS OF THE PROCESSING OF RESTORATION OF CIVIL RIGHTS' [SIC] CLEMENCY CASES FOR FY 2008-09 PER PROVISO LANGUAGE IN SB 2600 2009 LEGISLATIVE SESSION 15* (2009) [hereinafter 2008-2009 PROVISO REPORT], *available at* <https://www.fcor.state.fl.us/docs/reports/FCORprovisoreport0809.pdf> (stating that during the Crist administration, the Parole Commission “processed more restoration of civil rights requests and more persons have had their civil rights restored than in any previous administration”). This report further estimates that, under the Crist Rules, “123,000 more Florida citizens [were] eligible to vote in the November 2008 Presidential General Election.” *Id.*
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- 113 FLA. PAROLE COMM'N, RESTORATION OF CIVIL RIGHTS' [SIC] RECIDIVISM REPORT FOR 2010 AND 2011, at 6 (2012), *available at* <https://www.fcor.state.fl.us/docs/reports/2010-2011ClemencyReport.pdf> [hereinafter 2010-2011 RECIDIVISM REPORT]. The report for years 2011 and 2012 states that 78 people were granted restoration of civil rights in 2011, but the discrepancy is not explained. See FLA. PAROLE COMM'N, RESTORATION OF CIVIL RIGHTS' [SIC] RECIDIVISM REPORT FOR 2011 AND 2012, at 5 (2013) [hereinafter 2011-2012 RECIDIVISM REPORT], *available at* <https://www.fcor.state.fl.us/docs/reports/2011-2012ClemencyReport.pdf>.
- 114 FLA. COMM'N ON OFFENDER REVIEW, RESTORATION OF CIVIL RIGHTS' [SIC] RECIDIVISM REPORT FOR 2012 & 2013, at Tbl. II (2014) [hereinafter 2012-2013 RECIDIVISM REPORT], *available at* <https://www.fcor.state.fl.us/docs/reports/RecidivismReport2012-2013.pdf>.
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- 120 *Id.* at 11.
- 121 *Id.*
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- 123 DILLER, *supra* note 118, at 21.
- 124 *Id.* at 22.
- 125 FLA. PAROLE COMM'N, 2015 ANNUAL REPORT 8 (2015) [hereinafter 2015 ANNUAL REPORT] available at <https://www.fcor.state.fl.us/docs/reports/FCORannualreport201415.pdf>. The 2013 Annual Report noted that 84 percent of the clemency applications that year were for restoration of civil rights. 2013 ANNUAL REPORT, *supra* note 61, at 11.
- 126 2015 ANNUAL REPORT, *supra* note 125, at 8.
- 127 FLA. PAROLE COMM'N, ANNUAL REPORT 2005-2006, at 18 (2006), available at <https://www.fcor.state.fl.us/docs/reports/FCORannualreport200506.pdf>.
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- 129 FLA. PAROLE COMM'N, PROVISO REPORT: THE PROCESSING OF CLEMENCY CASES FOR FY 2010-2011 PER PROVISO LANGUAGE IN SB2000ER 2011 LEGISLATIVE SESSION 9 (2011) [hereinafter 2010-2011 PROVISO REPORT], available at <https://www.fcor.state.fl.us/docs/reports/FCORprovisoreport1011.pdf> (“While the amended [Scott] Rules resulted in a reduced number of cases being received annually by the Commission, the changes resulted in an increase in the amount of staff time needed to complete investigations.”).
- 130 2008-2009 PROVISO REPORT, *supra* note 110, at 17. A 2009 audit of the Parole Commission estimated the average processing hours per non-hearing case to be .80. See 2009 OPERATIONAL AUDIT, *supra* note 86, at 7.
- 131 2010-2011 PROVISO REPORT, *supra* note 129, at 22.
- 132 See, e.g., FLA. PAROLE COMM'N, ANNUAL REPORT 2011-2012, at 44 (2011), available at <https://www.fcor.state.fl.us/docs/reports/FCORannualreport201112.pdf>; FLA. PAROLE COMM'N, ANNUAL REPORT 2010-2011, at 61 (2011), available at <https://www.fcor.state.fl.us/docs/reports/FCORannualreport2001011.pdf>; FLA. PAROLE COMM'N, ANNUAL REPORT 2009-2010, at 6, 28 (2010), available at <https://www.fcor.state.fl.us/docs/reports/FCORannualreport200910.pdf>.
- 133 2010-2011 PROVISO REPORT, *supra* note 129, at 27-28.
- 134 EXECUTIVE CLEMENCY TIMELINE, *supra* note 60, at 5.
- 135 *Id.*
- 136 *Id.* While clemency funding increased again in fiscal year 2015-16, these appropriations appear to not be connected

to RCR.

137 *See generally* *Bush v. Gore*, 531 U.S. 98 (2000).

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139 *Id.*

140 *Id.*

141 Fla. Stat. §§ 97.012, 98.035.

142 *See About Us – Director's Office*, FLA. DIV. OF ELECTIONS, <http://dos.dos.myflorida.com/elections/about-us/> (last visited Dec. 9, 2016).

143 Fla. Stat. § 98.015.

144 *Contact Your Supervisor of Elections – Find your County*, FLA. DEP'T OF STATE, <http://dos.elections.myflorida.com/supervisors/> (last visited Dec. 9, 2016).

145 2000 U.S. COMM'N ON CIVIL RIGHTS REPORT, *supra* note 138, at Chapter 5.

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147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

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157 *Id.*

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- 159 MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, VOTER PURGES 1 (2008), *available at* <https://www.brennancenter.org/publication/voter-purges>; *see also* Ford Fessenden, *Florida List for Purge of Voters Proves Flawed*, N.Y. TIMES (July 10, 2004), <http://www.nytimes.com/2004/07/10/us/florida-list-for-purge-of-voters-proves-flawed.html>.
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- 165 2010-2011 RECIDIVISM REPORT, *supra* note 113, at Tbl. II.
- 166 2012-2013 RECIDIVISM REPORT, *supra* note 114, at Tbl. II.
- 167 *Id.*
- 168 2014-15 RECIDIVISM REPORT, *supra* note 116, at Tbl. II.
- 169 *Id.*

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