WHO BELONGS: THE CONSTITUTION OF VIRGINIA AND THE POLITICAL COMMUNITY

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I. INTRODUCTION

George Mason's famous Declaration of Rights for Virginia (1776) highlights the idea of community. The document declares that government is "instituted for the common benefit, protection, and security of the people, nation, or community."[1] But when the Declaration turns to the question of who in that community should have the vote, it is more qualified. To have the right of suffrage, men must have "sufficient evidence of permanent common interest with, and attachment to, the community."[2]

The Declaration's standard, turning on "permanent common interest" and "attachment," was sufficiently open-ended to allow later generations to debate just how broad the franchise should be. In the early 19th century – the era of Jeffersonian and Jacksonian democracy – reformers, especially in the Piedmont and the Valley of Virginia, filed petition after petition asking for a convention to revise the 1776 Constitution.[3] Finally, the state held a

[1] VA. DECL. RIGHTS § 3.
[2] *Id.*, § 6.
[3] A.E. Dick Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 841–42, 845–46 (1968) [hereinafter "*For the Common Benefit*"] ("Public meetings held in Richmond, Staunton, and elsewhere in the State revealed strong revisionist sentiment, and at the session beginning in December 1825 the General Assembly found 45 pro-convention petitions put before the members.") (footnote omitted).

convention in 1829-30, making only modest reforms.[4] Then, in 1850-51, another convention brought about essentially universal white male suffrage.[5]

The Civil War and Reconstruction brought yet more voters to the rolls – former slaves and other blacks who now would be enfranchised.[6] But this was not to last. The constitutional convention of 1901-02 overturned the progressive Constitution of 1870,[7] which had created Virginia's first statewide system of public education.[8] For the first time since the founding era, the trajectory was not an enlarged electorate. Instead, the Constitution of 1902 was an instrument of disenfranchisement, both of blacks and poor whites.[9]

A key question of constitutional design is the question of what is meant by the creation of a political community. Who belongs, who does not? Who counts, who does not? Reformers like Thomas Jefferson, an outspoken critic of limiting the franchise to property holders, thought it unacceptable that men who had risked their lives for their country could not vote if they did not own property.[10] Reformers after the Civil War wanted black Virginians to have the full benefits of citizenship, including the franchise.[11]

In constitutional design, deciding who gets to vote is but one way to answer the question of who belongs and who does not. There are other clear signals as to who is on the outside, such as provisions that discriminate against certain races. For example, the 1902 Constitution mandated that

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[4] A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 9–11 (1974) [hereinafter HOWARD COMMENTARIES] ("For all the expectation that the calling of the 1829-30 Convention had aroused, it made little substantive change in the existing order.").

[5] VA. CONST. art. III, § 1 (1851); *"For the Common Benefit"*, *supra* note 3, at 858 ("[T]he suffrage was extended to free white males over 21 years of age with two years' residence in the State . . . .").

[6] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 448 (2016); W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880, at 619 (1935); MARK WAHLGREN SUMMERS, THE ORDEAL OF THE REUNION: A NEW HISTORY OF RECONSTRUCTION 4 (2014).

[7] On the 1870 Constitution's provision for a statewide system of public education, *see* VA. CONST. art. VIII, § 1 (1870). Brent Tartar makes a persuasive argument that the Reconstruction-era constitution should be referred to as the Constitution of 1869. *See* BRENT TARTER, CONSTITUTIONAL HISTORY OF VIRGINIA (forthcoming). On the constitutional convention of 1901-02, *see infra* Section II.D.

[8] HOWARD COMMENTARIES, *supra* note 4, at 881 ("The Constitution of 1870, a product of Reconstruction in Virginia, gave public education in the Commonwealth its first genuine constitutional underpinning.").

[9] *See infra id.*

[10] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 118 (William Peden ed., 1996) ("The majority of the men in the state, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders intitled [sic] to vote, not including generally the half of those on the roll of the militia, or of the tax-gatherers."); *"For the Common Benefit"*, *supra* note 3, at 875 ("Jefferson's position quite simply was that it was wrong for a smaller number of men to be able, because of their property or tax payments or place of residence, to make the laws for a larger number of men. For Jefferson, representation meant representation of people, not other interests.").

[11] *See* RICHARD LOWE, REPUBLICANS AND RECONSTRUCTION IN VIRGINIA, 1856-70 AT 74, 184 (1991); *supra* note 6.

public schools be segregated.[12] Jim Crow laws made it even more clear who was a true member of the community and who was not.[13] And so life continued in Virginia for the next half century and more.

The 1960s were a time of upheaval.[14] John F. Kennedy, Robert F. Kennedy, and Martin Luther King were assassinated. There were massive protests against the Vietnam War. Cities were in flames. Cries for social justice brought the Civil Rights Act of 1964[15] and the Voting Rights Act of 1965.[16] The Supreme Court decreed that legislative seats must be apportioned based on population.[17] The poll tax was declared unconstitutional.[18]

In such an era, Virginia's 1902 Constitution was increasingly a relic of a bygone society. For that reason in 1968, Governor Mills E. Godwin appointed members to the Commission on Constitutional Revision.[19] They were an uncommonly talented group of Virginians.[20] They included Lewis F. Powell, Jr., soon to be a Justice on the Supreme Court of the United States; Oliver Hill, Virginia's leading civil rights attorney; former governor Colgate Darden; and Hardy C. Dillard, later to serve on the World Court at the Hague.[21] To watch these men debate what a new constitution should be like was to see grand ideas of government and society meet practical issues of policy and implementation.

The Commission handed their recommendations to the Governor and General Assembly on January 1, 1969.[22] The legislators rose to the occasion.

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[12] VA. CONST. art. IX, § 140 (1902).

[13] *See* Charles E. Wynes, *The Evolution of Jim Crow Laws in Twentieth Century Virginia*, 28 PHYLON 416 (1967).

[14] *See* J. HARVIE WILKINSON, III, ALL FALLING FAITHS: REFLECTIONS ON THE PROMISE AND FAILURE OF THE 1960S (2017); RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S (2016); TODD GITLIN, THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE (1993).

[15] 42 U.S.C. §§ 2000e–2000e-17.

[16] 52 U.S.C. § 10101.

[17] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[18] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

[19] In his address to the General Assembly in January 1968, Governor Godwin called on the legislature to authorize him to create a Commission on Constitutional Revision. VA. COMM'N ON CONSTITUTIONAL REVISION, THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO HIS EXCELLENCY, MILLS E. GODWIN, JR., GOVERNOR OF VIRGINIA, THE GENERAL ASSEMBLY OF VIRGINIA, AND THE PEOPLE OF VIRGINIA 1 (Jan. 1, 1969) [hereinafter CCR]. The General Assembly promptly passed a joint resolution creating the commission. *Id.*; H.D.J. Res. 3, 1968 Gen. Assemb., Reg. Sess. (Va. 1968).

[20] For the membership of the commission, *see* CCR, *supra* note 19, at i. Governor Godwin sought to gather men capable of commanding "the respect and thoughtful consideration of the General Assembly and the people of Virginia." *Id.* at 1.

[21] *See* A.E. Dick Howard & William Antholis, *The Virginia Constitution of 1971: An Interview with A.E. Dick Howard*, 129 VA. MAG. OF HIST. & BIOGRAPHY 346, 358–63 (2021) [hereinafter *Interview*].

[22] CCR, *supra* note 19, at 22; HOWARD COMMENTARIES, *supra* note 4, at 22.

They accepted nearly all the commission's recommendations.[23] When they did not, there was usually measured judgment for taking a different course.[24] In 1970, a referendum was held. A privately funded group, Virginians for the Constitution, organized a campaign to educate the public on the proposed constitution.[25] When the ballots were cast, 71.8 percent of the voters had said "yes" to the constitution.[26] It took effect on July 1, 1971.

Examining Virginia's constitutional history invites us to ponder what it is we expect our Constitution to be. Virginia's Declaration of Rights reminds us that "no free government, nor the blessing of liberty, can be preserved to any people, but . . . by frequent recurrence to fundamental principles."[27] We live in an age when liberal constitutional democracy seems to be under siege in so many countries, including ours.[28] A state constitution is the place where a people write many of their hopes and aspirations.[29] How can we employ the Constitution of Virginia to nurture self-government by a free people in a way that is just and inclusive?

This Essay endeavors to respond to that very question. First, I recall Virginia's constitutional history, tracing the evolution of constitutional thought through each revision, especially as it bears on the question of who is part of the political community. Next, I take up a case study in defining Virginia's political community – felon disenfranchisement. Then I muse on how present threats to American democracy make the search for political community all the more pressing. Finally, I return to state constitutions and why they are so important to the health of American constitutionalism.

II. THE EVOLUTION OF THE VIRGINIA CONSTITUTION

A. The "Common Benefit": The 1776 Constitution

On May 15, 1776, the Fifth Virginia Convention, meeting in Williamsburg, instructed the colony's delegates to the Continental Congress in Philadelphia to declare the "United Colonies" to be free and independent

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[23] *Interview*, *supra* note 21, at 371–77.

[24] HOWARD COMMENTARIES, *supra* note 4, at 23–24.

[25] *Interview*, *supra* note 21, at 378–84.

[26] L. STANLEY HARDAWAY, VOTES CAST FOR UNITED STATES SENATOR AND MEMBERS OF CONGRESS IN JULY 14, 1970, DEMOCRATIC PRIMARY, UNITED STATES SENATOR, MEMBERS OF CONGRESS AND PROPOSED AMENDMENTS TO THE CONSTITUTION IN NOVEMBER 3, 1970, GENERAL ELECTION 20 (1970) (576,776 votes for out of a total of 802,995); A.E. DICK HOWARD ET AL., VIRGINIA VOTES FOR A NEW CONSTITUTION 15 (1973).

[27] VA. DECL. RIGHTS § 15.

[28] *See infra* Part IV.

[29] *See id.*

states.[30] On the same day, convention members set to work on a declaration of rights and plan of government for Virginia.[31]

The authors of Virginia's first constitution had ready models in British constitutionalism to draw on, including Magna Carta and England's 1689 Bill of Rights.[32] The Virginia Declaration of Rights, however, was far more than a restatement of the mother country's principles. No Englishman could, for example, have maintained that the British Constitution was founded on the averment that "all power is vested in, and consequently derived from, the people," as Virginians could about their document.[33]

Steeped in the traditions of natural law, Virginia's Declaration of Rights posits that "all men are by nature equally free and independent and have certain inherent rights."[34] Emphasizing the welfare of the community, it says that government is instituted "for the common benefit, protection, and security of the people, nation or community."[35]

When the Virginia Constitution of 1776 was adopted in Williamsburg, Thomas Jefferson was in Philadelphia for the meeting of the Continental Congress.[36] Jefferson was sharply critical of the convention's handiwork—especially the 1776 Constitution's provisions on suffrage, which limited the vote to propertied white men, and on apportionment of seats in the General Assembly. His indictment of the franchise provisions was telling: "The majority of the men in the State, who pay and fight for its support, are unrepresented in the legislature."[37] His complaint about legislative malapportionment was equally sharp: "Among those who share the representation, the shares are very unequal. Thus, the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1746."[38]

Reformers, Jefferson among them, found the road to constitutional change a long and arduous one. Sectional pressures were building. Western regions of the state were growing in population and prosperity while eastern counties were suffering from soil exhaustion and economic decline.[39] From the early years of the 19th century, hardly a session of the General Assembly

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[30] *"For the Common Benefit"*, *supra* note 3, at 820.

[31] *Id.*

[32] *See* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 205–07 (1968).

[33] VA. DECL. RIGHTS § 2.

[34] *Id.*, § 1

[35] *Id.*, § 3.

[36] *"For the Common Benefit"*, *supra* note 3, at 819.

[37] JEFFERSON, *supra* note 10, at 118.

[38] *Id.*

[39] *"For the Common Benefit"*, *supra* note 3, at 838–41.

went by without efforts to call a convention to revise the state's constitution.[40]

B. The 1830 Constitution: Debating the Franchise

Finally, in 1829, a constitutional convention met in Richmond. Its remarkable assemblage included two former presidents, James Madison and James Monroe, and a future president, John Tyler. Also present were Chief Justice John Marshall, future Supreme Court Justice Philip Barbour, and a number of past, present, and future U.S. senators and representatives.[41] Jefferson scholar Merrill Peterson called the convention "the last of the great constituent assemblies in American history."[42]

Equitable representation, a wider franchise, and popular election of the governor were among the demands of the reformers.[43] John M. Mason of Frederick County declared that other objects desired by those who had called for the convention were "as a feather in the scale" compared to the overriding object "to place the Government where of right it ought to be, in the hands of the majority of the political community."[44]

What some saw as reform, others saw as destructive of ancient values. The unrivaled orator, John Randolph of Roanoke, lashed out against the "lust of innovation."[45] He wanted no part of popular sovereignty and majority rule: "I would not live under King Numbers. I would not be his steward — nor make him my task-master."[46]

At first, prospects for reform looked favorable. But as the weeks passed, the momentum for reform weakened, and the conservatives largely had their way. Reformers wanted universal white manhood suffrage or, at the least, the vote for all who paid taxes. Conservatives defended the existing freehold franchise.[47] Benjamin Watkins Leigh, a delegate from Chesterfield County,

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[40] *See, e.g. id.* at 841–46.

[41] For a list of the delegates, see PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829-1830: TO WHICH ARE SUBJOINED THE NEW CONSTITUTION OF VIRGINIA, AND THE VOTES OF THE PEOPLE 2–10 (1830) [hereinafter 1829-30 DEBATES].

[42] MERRILL D. PETERSON, DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820'S 271 (1966). For accounts of the 1829-30 convention, *see* DICKSON D. BRUCE, JR., THE RHETORIC OF CONSERVATISM: THE VIRGINIA CONVENTION OF 1829-30 AND THE CONSERVATIVE TRADITION IN THE SOUTH (1982); KEVIN R.C. GUTZMAN, VIRGINIA'S AMERICAN REVOLUTION: FROM DOMINION TO REPUBLIC, 1776-1840, at 135–205 (2007); ROBERT P. SUTTON, REVOLUTION TO SECESSION: CONSTITUTION MAKING IN THE OLD DOMINION 72–102 (1989); *"For the Common Benefit"*, *supra* note 3, at 848–57.

[43] *Id.* at 849.

[44] 1829-30 DEBATES, *supra* note 41, at 687.

[45] *Id.* at 492.

[46] *Id.* at 321.

[47] *"For the Common Benefit"*, *supra* note 3, at 849–53.

declared that "in Virginia, the great mass of intelligence and virtue resides in that stout and generous yeomanry, the freeholders of this land."[48]

A motion to give the vote to free white male taxpaying citizens failed by a tie vote.[49] The convention's final action — adding householders to the franchise — fell well short of universal suffrage.[50] Similarly, debate over the proper basis for representation in the General Assembly resulted in a compromise that shifted some seats to the western parts of the state but left the east in the majority in both houses.[51]

C. Constitutional Disruption: Civil War and Reconstruction

Two decades later, much of what the reformers at the 1829–1830 convention sought was achieved when, in 1850, another convention met to discuss revisions to the Virginia Constitution.[52] The result of those discussions was the Virginia Constitution of 1851. In this document, representation was brought more in line with the population.[53] The suffrage was extended to free white males over 21 years of age with two years of residence in the state.[54] And, 75 years after the Revolution, the people were trusted to elect the governor.[55]

Democracy was, of course, still incomplete. Blacks, whether in the bonds of slavery or not, could not vote. Nor could women. After the Civil War ended in 1865, Reconstruction finally brought the franchise to men of color. No longer would Virginia or any other state be free to decide, without hinderance, who would get the ballot based on race. The 15th Amendment to the U.S. Constitution made that clear. The right to vote was not to be denied or abridged on account of "race, color, or previous condition of servitude."[56]

Reconstruction also brought another revision to Virginia's Constitution. As a condition of readmission to the Union, the former Confederate states were obliged to ratify the 14th Amendment, which granted citizenship to

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[48] 1829-30 DEBATES, *supra* note 41, at 399.
[49] *Id.* at 641, 647.
[50] *"For the Common Benefit"*, *supra* note 3, at 853.
[51] 1829-30 DEBATES, *supra* note 41, at 455, 574, 704–05.
[52] *See* WILLIAM G. SHADE, DEMOCRATIZING THE OLD DOMINION: VIRGINIA AND THE SECOND PARTY SYSTEM, 1824-1861, at 65–77 (1996).
[53] VA. CONST. art. IV, §§ 2–5 (1851); *supra* note 3.
[54] VA. CONST. art. III § 1 (1851).
[55] *Id.* art. V, § 2 (1851)
[56] U.S. CONST. amend. XV.

anyone born or naturalized in the United States.[57] These states were also required to adopt a new, progressive constitution.[58] In Virginia, that was the 1870 Underwood Constitution (named for the 1867-68 Convention's president, a federal judge despised by conservative Virginians).[59] This constitution included provisions prohibiting slavery and granting certain property rights to children of enslaved parents who had been forbidden to marry.[60]

Reconstruction ended with the withdrawal of the last federal troops from any active role in the South.[61] Conservative Democrats, labeled Bourbon Democrats by critics, took over the reins of power in state after state, rolling back programs that Republican state governments had initiated.[62] Soon they turned their attention to the franchise.[63]

Starting with Mississippi in 1890, Southern state constitutions were rewritten to achieve massive disenfranchisement of Blacks. Devices included the poll tax, literacy tests, grandfather clauses (giving a free pass to descendants of Confederate veterans), and provisions allowing officials to refuse registration to an applicant who could not interpret a randomly chosen provision of the state constitution.[64]

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[57] *See, e.g.*, *id.* amend. XIV; CONG. GLOBE, 40th Cong., 1st Sess. 168 (1867); GERARD N. MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT 138–39 (2014).

[58] *Supra* note 52; *see also* An Act to admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870); *see also* Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 143–44 (2004). Congress placed additional conditions on the three former Confederate states slowest to present a new constitution.

[59] *See* THE CONSTITUTION OF VIRGINIA FRAMED BY THE CONVENTION WHICH MET IN RICHMOND, VIRGINIA, ON TUESDAY, DECEMBER 3, 1867 (1868). On John C. Underwood, *see Brent Tarter, John C. Underwood (1809-1873)*, ENCYCLOPEDIA VA. (Dec. 22, 2021), https://encyclopediavirginia.org/entries/underwood-john-c-1809-1873.

[60] VA. CONST. art. I, § 19 (1870); *id.* art. XI, § 9.

[61] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 582 (1988) ("Hayes did not, as legend has it, remove the last federal troops from the South, but his action implicitly meant that the few remaining soldiers would no longer play a role in political affairs.").

[62] *See, e.g.*, Allen W. Moger, *The Origin of the Democratic Machine in Virginia*, 8 J. OF S. HIST. 183, 191, 191 n.34, 204 (1942); Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 25 n.8 (2002).

[63] *See, e.g.*, Wechsler, *supra* note 62, at 55 ("[I]t was indeed the southern Bourbons, the southern ruling elites . . . who devised, passed, and implemented the plan to disenfranchise almost all blacks and tens of thousands of poor whites."); PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION (2017); MICHAEL E. PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888-1908, at 13 (2001) (discussing V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 17–33 (1949)).

[64] *E.g.*, J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 48, 56–72 (1974); C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH, 1877-1913, at 354–55 (1971); HOWARD COMMENTARIES, *supra* note 4, at 363, 369–73 (discussing the poll tax, literacy test, and grandfather clause in Virginia's 1902 Constitution); Wythe Holt, Virginia's Constitutional Convention of 1901-1902, at 160–61 (Aug.

D. The White Supremacist Constitution of 1902

In Virginia, delegates gathered for a constitutional convention in Richmond in 1901.[65] From the outset, they made clear that they were determined to rid Virginia of the progressive 1870 Constitution, denounced by one delegate as having been adopted "under the very shadow of a bayonet." [66] A delegate at the 1901-02 convention denounced the 1870 Constitution as "the blackest page in the history of this State."[67] Its provisions, he maintained, "have held in subjection . . . a race of men whose forebears fashioned this nation."[68]

Its drafters, added another delegate, were composed of "aliens to the Commonwealth and newly emancipated slaves."[69]

The 1901-02 delegates knew exactly what they wanted – white supremacy. As one delegate proclaimed, to great applause, "I want it distinctly understood that I am a white man and propose to represent white interests."[70] Another delegate was equally explicit, stating that he sought, "at any cost, to secure white supremacy" in Virginia and every one of its cities and counties.[71] To these delegates, being white was being destined to rule. "It is by way of intellectual superiority," he said, "that the Anglo-Saxon claims the right of government."[72]

The delegates were equally caustic about the 15th Amendment. The 1870 Constitution had enfranchised former slaves and other black Virginians. The delegates in 1901-02 were determined to undo that accomplishment. One delegate declared, "I assert that the horror of negro suffrage has brought shame upon the white people of Virginia."[73] In his opening remarks to the convention, the body's president, John Goode Jr., called it "a crime against

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1979) (Ph.D. dissertation, University of Virginia) (on file with the Corcoran Department of History, University of Virginia).

[65] REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA. HELD IN THE CITY OF RICHMOND JUNE 12, 1901, TO JUNE 26, 1902, at 250 [hereinafter 1901-02 DEBATES].

[66] Act of March 2, 1867, ch. 153, 14 Stat. 428. *See* 1901-02 DEBATES, *supra* note 65, at 19, 162, 250, 313, for various 1901 delegates' negative opinions of the post-Civil War constitution and the federal government's role in guiding it.

[67] 1901-02 DEBATES, *supra* note 65, at 290.

[68] *Id.* at 306.

[69] *Id.* at 19; *see also* RICHARD L. HUME & JERRY B. GOUGH, BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION (2008).

[70] 1901-02 DEBATES, *supra* note 65, at 208.

[71] *Id.* at 306.

[72] *Id.* at 307.

[73] 1901-02 DEBATES, *supra* note 65, at 1535.

civilization and Christianity" that forced the people of the South "to submit to universal negro suffrage."[74] Another delegate saw the amendment as an act of revenge against the South: "The ballot was given to the negro in hot and vengeful haste, not to uplift and protect him, but to degrade and humiliate us."[75]

The delegates in Richmond had no doubt that the reins of government belonged in the hands of white men. "The Anglo-Saxon," said one delegate, "represents the very aristocracy of the races."[76] Another delegate declared, to great applause, that he "would be recreant to [his] sense of duty" if he failed "to secure the means of white supremacy in the conduct of the affairs of this government and of every city and county in the Commonwealth."[77]

Delegates invoked theology and history as justification for their racist ideations. In his opening speech, Goode declared that Blacks had no education or experience with the duties of citizenship.[78] "The all-powerful Creator, for some wise purpose, had made him inferior to the white man, and ever since the dawn of history . . . he had occupied a position of inferiority," he said.[79] It was, many in the hall believed, God's plan for the races. Virginians could not preserve their civilization, urged one delegate, if they ignored "this great black problem which has dragged down everything it has touched since the curse of Ham was pronounced by the Almighty."[80]

The path to white supremacy was certain: remove Black voters from Virginia politics. Indeed, no one at the convention doubted that its core purpose was black disenfranchisement. One delegate made that purpose clear: "[T]housands of people in the State would never have voted for the Convention had they not believed by doing so, the negro would be eliminated as an element in our state politics."[81]

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[74] *Id.* at 20.

[75] *Id.* at 290.

[76] *Id.* at 2966. Belief in the innate superiority of Anglo-Saxons was by no means limited to Virginia or the South. In 1885, a prominent evangelical, Josiah Strong, wrote about the destiny of the Anglo-Saxon race. JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS (1885). Strong proclaimed the Anglo-Saxons are preeminent because of their love of liberty and devotion to the Protestant tradition. *Id.* at 209. His book was the nation's second best-selling book of its time, second only to the Bible. EDWARD J. BLUM, REFORGING THE WHITE REPUBLIC: RACE, RELIGION, AND AMERICAN NATIONALISM, 1865-1898, at 217 (2007). In a speech seeking to justify the acquisition of the Philippines by the United States, Indiana Senator Albert Beveridge invoked God's purpose for the English-speaking and Teutonic peoples. But for God's plan, Beveridge declared, the world "would relapse into barbarism and night. And of all our race He has marked the American people as His chosen nation to finally lead in the regeneration of the world." 33 CONG. REC. 711 (1900).

[77] 1901-02 DEBATES, *supra* note 65, at 306.

[78] *Id.* at 20.

[79] *Id.*

[80] *Id.* at 1227.

[81] HOLT, *supra* note 64, at 101 (quoting Letter from M. Q. Holt to Allen Caperton Braxton (June 25, 1901) (on file with Duke University Libraries).

Some delegates went even further. Claggett B. Jones wanted the ballot restricted to "the respectable element of a community."[82] He refused "[to turn] my people over to a rabble."[83] Another delegate agreed that giving the vote to Blacks was not the only problem. "[I]t is the depraved and incompetent men of our own race, who have nothing at stake in government."[84] Colleague George D. Wise asserted that suffrage was a force for good "when exercised by intelligent citizens," but it was dangerous "in the hands of the ignorant, the depraved and the vicious."[85]

What place in the "community" conceived in Virginia's Declaration of Rights did the delegates of 1901 reserve for persons of color? There was "but one spot within the Commonwealth of Virginia where he can make himself useful," delegate Walter Allen Watson said.[86] "[T]hat spot is in the corn field and on the tobacco ground as an agricultural laborer."[87] Some delegates looked back with nostalgia on the benign effects of slavery. As one declared, "[W]hen the restraining hand of the white race was taken from [the slave], when he missed the intimate association between slave and mater [sic], he degenerated."[88]

In confronting the question of public education, delegates viewed spending money to educate Blacks as both wasteful and harmful. "[T]his man in black," Watson said, "is absolutely incapable of cultivation or useful advancement."[89] A colleague painted a bleak picture of the evils of teaching Black children to read: "[F]or every one that will read the Bible he will find ten who will read Jesse James and Billie the Kid, and Uncle Tom's Cabin."[90] Higher education was even more inconceivable. "What is your educated negro to do in Virginia?" a delegate asked.[91] "Is he to practice law? Is anybody going to employ him? Is he going to Wise county and practice medicine?"[92] Advanced education would "bring him into speedy and immediate conflict with the superior race."[93] Brunswick County delegate Robert Turnbull, declaring the evils of educating Blacks, said that education had made them vagabonds: "We have . . . unfitted them for what God

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[82] 1901-02 DEBATES, *supra* note 65, 2124–25.
[83] *Id.*
[84] *Id.* at 2998.
[85] *Id.* at 3141.
[86] *Id.* at 1225.
[87] *Id.*
[88] *Id.* at 3062.
[89] *Id.* at 1221.
[90] *Id.* at 1222.
[91] *Id.* at 1224–25.
[92] *Id.* at 1225.
[93] *Id.*

Almighty intended them to be and . . . they are too proud to work on the farm and unfit for anything else."[94]

The men at the 1901-02 convention were there, of course, to write a constitution. They had ample precedents at hand. Reconstruction had come to an end. "Redeemed" governments had wrested control of southern states' governments from "carpetbaggers" who had been empowered by radical Republicans in Congress. The Redeemers could not bring back slavery – the 13th Amendment stood in the way of that – but they could set out to restore white supremacy.[95] Mississippi led the way. Its 1890 Constitution was imitated by other southern states, including Virginia.[96] These constitutions used a variety of devices to achieve disenfranchisement of blacks: the poll tax, literacy tests, understanding clauses, and grandfather clauses.[97]

The convention delegates had little reason to worry that the United States Supreme Court would stand in their way. That tribunal had rejected such a challenge to Mississippi's 1890 constitution.[98] Justice McKenna, writing for a unanimous Court, ruled that Mississippi's Constitution was neutral on its face; it did not matter that those who administered the state's laws might use them to discriminate.[99] That decision gave a green light to the delegates in Richmond. Thus, a prominent member of the convention in Richmond, Carter Glass, the owner and editor of the *Lynchburg News*, declared that his colleagues could move ahead with their "primary purpose" — "to eliminate every negro of whom we could be rid without running counter to the prohibition of the Federal Constitution."[100]

The convention made sure that the path to voter registration would not be easy. Property owners and those who had served in either the United States or Confederate army or navy (and their sons) were entitled to register to vote without limitation.[101] Otherwise, an applicant must be able to read any section of the Constitution submitted to him by the registration officials and

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[94] *Id.* at 1674.

[95] *See, e.g.*, HERRON, *supra* note 63; PERMAN, *supra* note 63.

[96] *See* DOROTHY OVERSTREET PRATT, SOWING THE WIND: THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1890 (2017); VA. CONST. (1902).

[97] THE CONSTITUTION OF VIRGINIA FRAMED BY THE CONVENTION WHICH MET IN RICHMOND, VIRGINIA, ON TUESDAY, DECEMBER 3, 1867, *supra* note 59.

[98] *See* Williams v. Mississippi, 170 U.S. 213 (1898).

[99] *See id.*

[100] 1901-02 DEBATES, *supra* note 65, at 293.

[101] VA. CONST. art. II, 1§ 30 (1902) ("The General Assembly may prescribe a property qualification not exceeding two hundred and fifty dollars for voters in any county or subdivision thereof, or city or town, as a prerequisite for voting in any election for officers, other than the members of the General Assembly, to be wholly elected by the voters of such county or subdivision thereof, or city, or town."); *id.* § 22 ("No person who, during the late war between the States, served in the army or navy of the United States, or of the Confederate States, shall at any time be required to pay a poll tax as a prerequisite to the right to register or vote.").

to give "a reasonable explanation" of that section.[102] Given the various impediments, including the poll tax, one delegate at the convention predicted, with obvious confidence, that the obstacles "will be too great for the negro."[103]

Unwilling to take the chance that the existing electorate (many of whom would be excluded from the franchise) might not approve the proposed constitution, the convention simply promulgated it. It took effect without a vote of the people.[104] Its framers' predictions about the franchise proved accurate. After 1902, fewer than 5 percent of all registered voters were Black,[105] whereas in 1867 almost half had been Black.[106] Poor whites, as well, were disqualified in large numbers.[107] Virginia lived under the shadow of the 1902 Constitution for the next half century. A smaller proportion of Virginians voted during the first half of the 20th century than in any other state in the country or, indeed, than in any country in the world that had, or claimed to have, a representative democracy.[108]

E. A Return to Inclusion: The 1971 Constitution and the "Common Benefit"

Major changes came in the 1960s with the Supreme Court's one-person, one-vote decree, its abolition of the poll tax, and Congress's enactment of the Voting Rights Act.[109] Virginians soon took their own constitution in a new direction, approving a new constitution that took effect on July 1, 1971.[110]

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[102] VA. CONST. art. II, § 19 (1902). These persons were also excused from paying the poll tax. *Id.*, art. II, § 22.

[103] 1901-02 DEBATES, *supra* note 65, at 2973.

[104] CCR, *supra* note 19, at 45.

[105] LOWE, *supra* note 11; HANES WALTON JR. ET AL., THE AFRICAN AMERICAN ELECTORATE: A STATISTICAL HISTORY 360 (2012) (indicating African Americans represented 46.8% of voters in Virginia in 1867); A.E. Dick Howard, *50 Years On, Does Virginia's 1971 Constitution Still Meet the Challenge*, 47 VA. BAR ASS'N J. 16, 17 (2020) ("Through such devices as the poll tax and complicated registration procedures, the Virginia Constitution of 1902 accomplished the convention's purpose. In 1867, there were 105,832 black registered voters in Virginia - almost half of all registered voters in the commonwealth. In 1902, there were 21,000 - 4.7% of all registered voters.").

[106] *"For the Common Benefit"*, *supra* note 3, at 872.

[107] Holt, *supra* note 64, at 233–34 ("[D]irect and indirect effects of the new Constitution cast a large number of white voters out of the political process too. . . . [M]uch larger numbers of blacks, Republicans, ex-Populists, poor whites, and other deprived persons were defrauded at the polls, humiliated at the registrars' offices, and forced to resign themselves to even more political impotency than they had had previously.").

[108] *See* BRENT TARTER, THE GRANDEES OF GOVERNMENT: THE ORIGINS AND PERSISTENCE OF UNDEMOCRATIC POLITICS IN VIRGINIA 296-304 (2013); V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION 17–33 (1949).

[109] *See supra* notes 13–14.

[110] *See* VA. CONST.

The 1971 Constitution places Virginia on a markedly different path from that of its predecessor. Both by mandates and aspirations, today's Virginia Constitution seeks to define the political community to make fairness, justice, and inclusiveness signposts on the path to achieving a government "for the common benefit."[111]

For the first time, the Constitution of Virginia includes a prohibition on governmental discrimination based on race, color, national origin, or sex.[112] Whereas the 1902 Constitution had been interpreted to allow counties and cities to close their schools to avoid integration[113] – which enabled "Massive Resistance," a movement in which public schools were closed to avoid integration – the new Constitution requires the General Assembly to provide a statewide system of public education for all children of school age.[114] Further, the Constitution places an enforceable duty on localities to provide their share of school funding once the General Assembly has crafted a funding formula.[115]

The revisors understood the link between education and civic virtue. Drawing on language from Thomas Jefferson's Bill for the More General Diffusion of Knowledge, education now takes its place in Virginia's Bill of Rights alongside traditional rights such as expression and religion.[116] The Constitution's education article gives primacy to the Board of Education in fashioning standards of quality, subject to the ultimate authority of the General Assembly.[117]

III. A CASE STUDY IN DEFINING POLITICAL COMMUNITY: FELON DISENFRANCHISEMENT

As the 1971 Constitution enters its second half century, we may ask: Does the Constitution continue to promote the "common benefit"? Does it strengthen the sense of an inclusive political community? What issues invite our attention?

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[111] VA. DECL. RIGHTS § 3.

[112] VA. CONST. art. I § 11.

[113] *See generally* Cnty. Sch. Bd. of Prince Edward Cnty. v. Griffin, 204 Va. 650, 133 S.E.2d 565 (Va. 1963); HOWARD COMMENTARIES, *supra* note 4, at 890–95. Section 129 of the 1902 Virginia Constitution declared that "[t]he General Assembly shall establish and maintain an *efficient* system of public free schools throughout the State," and both the 1956 Board of Education and General Assembly found integration to be an *inefficient* system, harmful to students' health and welfare. VA. CONST. art. IX, § 129 (1902) (emphasis added).

[114] VA. CONST. art. VIII, § 1.

[115] *Id.*

[116] *Id.* art. 1, § 15; CCR, *supra* note 19, at 255; HOWARD COMMENTARIES, *supra* note 4, at 884, n.42.

[117] VA. CONST. art. VIII §§ 4–5.

Consider felon disenfranchisement as one issue challenging the Virginia Constitution's identification as a fair and inclusive document. Virginia has one of the country's strictest constitutional barriers to restoring the vote to former felons. The Constitution requires that the Governor act to restore the franchise to former offenders.[118] The Supreme Court of Virginia has read the Constitution's language narrowly, requiring the Governor to act on individual cases rather than on former felons as a class.[119] Having the right to vote is a significant aspect of any effort to bring former felons back into the community. Is it time to make the Constitution's path to full citizenship easier?

A. Disenfranchisement's Early Appearance

Disenfranchisement of those convicted of a crime made its first appearance in a Virginia constitution in 1830. That constitution provided that no person could exercise the right of suffrage if he had been "convicted of any infamous offence."[120] In 1851, the ban on voting was extended to include conviction of bribery.[121] The 1870 Constitution added more categories of individuals prohibited from voting: idiots and lunatics, those who fought or aided in fighting a duel, and those convicted of a list of offenses – election bribery, embezzlement of public funds, treason, or felony. Felony replaced "infamous offence" in this list.[122] The drafters of the 1902 Constitution, retaining the previous offenses, added even more – petit larceny, obtaining money or property under false pretenses, forgery, or perjury.[123] Most of these offenses disappeared in the drafting of the 1971 Constitution.[124] Convicted felons, however, remain disenfranchised unless their civil rights have been restored by the Governor.[125]

How has disenfranchisement been justified? Disqualifications such as those written into Virginia constitutions have a long pedigree. The English Levellers, often considered to have laid the foundation for modern

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[118] VA. CONST. art II, § 1.

[119] Howell v. McAuliffe, 292 Va. 320 (Va. 2016), discussed *infra* at Section III.E.

[120] VA. CONST. art. III, § 14 (1830); *see also, generally*, Case Comment, *Double Test for Infamous Crimes*, 24 WASH. & LEE L. REV. 145 (1967) (helping to define what the notion of infamous crimes means).

[121] VA. CONST. art. III, § 1 (1851).

[122] VA. CONST. art. III, § 1 (1870).

[123] VA. CONST. art. II, § 23 (1902).

[124] CCR, *supra* note 19, at 106 ("In proposed section 1, disenfranchisement of persons convicted of a felony remains automatic. The generic term 'felony' has been substituted for the list of crimes contained in present section 23. Express reference is made to restoration of civil rights by the Governor as re-enfranchising persons convicted of a felony, which works no change in the present law.").

[125] VA. CONST. art. II, § 1.

democratic theory, believed in universal suffrage.[126] Even so, they thought that those convicted of crime had forfeited the right to civic participation.[127] John Locke, widely read by Americans in the founding era, maintained that those who committed crimes violated the social compact and had no right to help make the laws.[128] Thomas Paine saw suffrage through the lens of social contract theory when he argued that those who violated their duty to their fellow citizens "justly incur a forfeiture" of the right to vote.[129] Chief Justice John Jay had the social contract in mind when he proclaimed, "He is not a good citizen who violated his contract with society . . . ."[130]

In the first half century after 1776, eleven states disenfranchised those convicted of infamous crimes or specific crimes, such as perjury or bribery.[131] Kentucky, in 1792, was the first state to specify the commission of a felony as grounds for disenfranchisement.[132] In the antebellum era, there seems to have been a connection between the expansion of the franchise and the disenfranchisement of felons. Between 1840 and 1865, the sixteen states that adopted provisions disenfranchising felons did so after establishing virtually universal white male suffrage by eliminating property requirements.[133]

Was race a factor in the disenfranchising of felons in the Antebellum era? Probably not, at least not in the way we think about racial discrimination today. As two authors put it:

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[126] Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1072 n.118 (2002).

[127] LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 269 (Don M. Wolfe ed., 1944).

[128] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 11 (C.B. Macpherson ed., 1980); Ewald, *supra* note 126, at 1074.

[129] THOMAS PAINE, *Dissertation on the First Principles of Government*, *in* 3 THE WRITINGS OF THOMAS PAINE 267 (Moncure Daniel Conway ed., 1895). American colonists were of like mind. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA: 1606-1660, at 54 (1983) (The colonists "regarded those who lived in their communities as having made a free choice to do so and thus obligated to obey the rules. A man who qualified as a freeman held rights that could be forfeited if he violated the obligation.").

[130] Henfield's Case, 11 F. Cas. 1099, 1105 (C.C.D. Pa. 1793).

[131] *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 63 (2000).

[132] KY. CONST. art. 8, § 2 (1792).

[133] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 53–54 (2006); *see also* KEYSSAR, *supra* note 131, at 29 ("The property qualifications for suffrage that had begun to erode during the revolution were gradually dismantled after 1790. . . . Virginia was the last state to insist on a property requirement in all elections, clinging to a modified (and extraordinarily complex) freehold law until 1850."). Further, nearly all nineteen states established after 1850 included both near-universal white male suffrage and a provision authorizing felon disenfranchisement in their state constitutions, with seventeen having those in place at the time of statehood. *See* MANZA & UGGEN, *supra* note 133, at 54.

> While class-based factors were important, felon disenfranchisement laws before the Civil War are not plausibly tied to race for the simple reason that most states did not permit African Americans to vote at all. . . . Since most free African Americans were already legally disenfranchised, further targeting of the black vote through disenfranchising measures directed at felons would have been largely superfluous.[134]

At Virginia's 1829-30 convention, there seems to have been little debate over providing that conviction of an infamous crime would be the basis for disenfranchisement. The principal focus was on suffrage generally.[135] Many delegates wanted to ensure that suffrage be granted to those who had a strong attachment to the community. This concern animated Benjamin Watkins Leigh's declaration that "the great mass of intelligence and virtue," resided in the freeholders.[136] At the 1850-51 convention, again the delegates did not seem inclined to linger over the disenfranchisement provision. Even suffrage, so dominant an issue in 1829-30, was less disputed than the question of representation in the General Assembly.[137]

B. Disenfranchisement of Black Americans

The 14th and 15th Amendments were aimed, above all, at protecting the rights, including access to the ballot, of the newly freed slaves.[138] Section 2 of the 14th Amendment, however, seems to provide a basis for the disenfranchisement of felons. That section provides for the reduction of a state's representation in Congress when that state's franchise is denied to "any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime . . . ."[139] Indeed, the Supreme Court has upheld statutes abridging the right to vote on the basis of committing "other crime." For example, in 1885, the Supreme Court unanimously upheld the Edmunds Act,[140] outlawing bigamy and polygamy in the

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[134] MANZA & UGGEN, *supra* note 133, at 54–55; *see also* Ewald, *supra* 126, at 1064.
[135] *See "For the Common Benefit"*, *supra* note 3, at 852–53.
[136] 1829-30 DEBATES, *supra* note 41, at 399.
[137] HOWARD COMMENTARIES, *supra* note 4, at 12–13.
[138] *See generally,* KURT T. LASH, 2 THE RECONSTRUCTION AMENDMENTS: THE ESSENTIAL DOCUMENTS 227–435 (2021).
[139] U.S. CONST. amend. XIV, § 2.
[140] Edmunds Anti-Polygamy Act of 1882, Pub. L. No. 47-47, 22 Stat. 30b (1882).

territories.[141] Five years later, the Court approved of an anti-bigamy oath in Idaho's state constitution, thus allowing the state to disenfranchise bigamists.[142]

What of crimes committed by Blacks? Even before the Civil War, there had been evidence of a tendency to associate blackness with criminality. In an 1846 address to the General Assembly, Virginia Governor William Smith complained that "free negroes constitute only about one-tenth of [Virginia's] negro race . . . and yet they perpetrate about six-sevenths of the crimes committed by it."[143] In Williams' mind, those data demonstrated "the moral degradation of the free negro, the hopelessness of his reform, the mischievous influences of his association, and the necessity of his removal."[144]

Reconstruction laid down tripwires for steps which southern states might take to use disenfranchisement to exclude African-Americans from the franchise. In March 1867, Congress passed the First Reconstruction Act, limiting disenfranchisement to crimes that were felonies at common law.[145] This limitation was included in the 1870 act admitting Virginia back into the Union.[146] And the Republicans, who were well represented in the 1867-68 convention, had a stake in restraining conservatives who might have wanted to use the new constitution to undermine voting rights guaranteed by the Reconstruction amendments.[147]

As Reconstruction waned, southern Democrats flexed their muscles in seeking ways to "redeem" the South from Republican rule.[148] Among the devices used to knock Black voters from the rolls was to include minor property crimes, such as theft, among the grounds for disenfranchisement.[149] By the mid-1880s, nearly every southern state had taken this step.[150] It is

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[141] *See* Murphy v. Ramsey, 114 U.S. 15 (1885).

[142] *See* Davis v. Beason, 133 U.S. 333 (1890), *overruled by* Romer v. Evans, 517 U.S. 620 (1996); SARAH B. GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002).

[143] JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA, 1846, at 13 (1846) (as quoted in Helen A. Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 VA. NEWS LETTER 1, 3 (2015)).

[144] *Id.*

[145] 14 Stat. 428–430 (1867).

[146] Act to Admit the State of Virginia to Representation in the Congress of the United States, 16 Stat. 62 (1870) [hereinafter Act to Admit].

[147] MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISENFRANCHISEMENT IN THE SOUTH, 1888-1908, at 20–21 (2001)

[148] *See generally, e.g.*, VANN WOODWARD, *supra* note 64.

[149] Pippa Holloway, *"A Chicken-Stealer Shall Lose His Vote": Disenfranchisement for Larceny in the South, 1874-1890*, 75 J.S. HIST. 931, 937 (2009).

[150] *See, e.g.*, Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST.,

estimated that, because of this and other devices, the voting strength of Black voters in those states had been cut by as much as one-half.[151]

In Virginia, at the 1874-75 session of the General Assembly, the legislators agreed to amend the Virginia Constitution to add petit larceny to the list of offenses that would lead to disenfranchisement.[152] Historian Ralph McDanel avers that the amendment was "aimed directly at the negro" because it was assumed that petit larceny "was a common offense among them."[153] Black Virginians knew the amendment was aimed at them. At the 1875 Colored State Convention in Richmond, Colonel Joseph T. Wilson declared:

> What State would make petit larceny a penitentiary offense? And now they want to disfranchise a colored man because he takes a chicken when he is hungry. He knew no reason why the colored people should not say to the world that they are denied in Virginia the rights of citizenship.[154]

The amendment was approved by Virginia's voters in 1876.[155]

For Democrats, amending the Constitution was only the first step. The next step was to decide how the law would be administered. It was common for Democrats to interrogate African American voters at the polls about a variety of issues, including their criminal history.[156] Lines moved slowly, and many Blacks were not able to vote before the polls closed, further eroding the Republican vote.[157] In Richmond's Jackson Ward, where many

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https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf (last visited Mar. 30, 2022).

[151] John Hope Franklin, *"Legal" Disenfranchisement of the Negro*, *in* AFRICAN AMERICANS AND SOUTHERN POLITICS FROM REDEMPTION TO DISFRANCHISEMENT 285 (Donald G. Nieman ed., 1994).

[152] RICHARD L. MORTON, THE NEGRO IN VIRGINIA POLITICS, 1865-1902, at 92 (1919) (also arguing that "[t]his was the first time that discrimination had been made against [black Virginians] through legislation striking at their peculiar characteristics"); *see also* Holloway, *supra* note 149, at 943; John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL'Y HIST. 282, 298 n.59 (2007); JACK P. MADDEX, JR., THE VIRGINIA CONSERVATIVES, 1867-1879: A STUDY IN RECONSTRUCTION POLITICS 119 (1970).

[153] RALPH MCDANIEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, at 6 (1928); *see* MADDEX, *supra* note 152, at 198 ("In 1876, by amending the state constitution . . . made conviction for petty larceny a suffrage disqualification . . . . Without mentioning race, the amendments tended to disenfranchise the poor, and the bulk of Negroes were poor.").

[154] *The Colored Convention*, DAILY DISPATCH, Aug. 20, 1875, at 1; *see generally* J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA 23 (2002) ("Events of the 1870s and 1880s convinced supporters of the Democratic Party that they ought to eliminate blacks from politics in the Old Dominion.").

[155] *See* Holloway, *supra* note 149, at 952–54.

[156] *Id.*

[157] *Id.*

African American voters lived, the Republican candidate for Congress asserted that 722 Black voters had been denied the opportunity to vote, including 557 who had been waiting in line. If these citizens had been allowed to vote, he claimed, he would have won the election, not the Democrat.[158]

When delegates met in Richmond in 1901 to rewrite the Commonwealth's constitution, they had an avowed purpose: to establish a regime of white supremacy by disenfranchising as many African Americans as possible.[159] They were aware that they could not ignore the United States Constitution. Citing *Williams v. Mississippi*, delegate Carter Glass said the convention had framed the constitutional language to achieve by indirection what convention members could not do directly – that is, they invoked the perceived characteristics of a race rather than targeting the race as such:

> Discrimination! Why, that is precisely what we propose; that, exactly is what this Convention was elected for – to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally . . . . [W]e have accomplished our purpose strictly within the limitations of the Federal Constitution by legislating against the characteristics of the black race, not against the "race, color or previous condition" of the people themselves.[160]

In 1949, political scientist V.O. Key, Jr. described Virginia as a "political museum piece" recognizing its political characteristics as "more akin to those of England at about the time of the Reform Bill of 1832 than to those of any other state of the present-day South."[161] The Byrd Organization was uncommonly successful at building its power on a highly restrictive franchise. Indeed, by the 1940s, at the height of Byrd's power, fewer than 12 percent of adults participated in elections.[162] A good part of the shrinking

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[158] *Id.*

[159] *See* 1901-02 DEBATES, *supra* note 65, at 2972–73; *see* Franklin, *supra* note 153, at 243 ("The time was at hand, therefore, to disfranchise the Negro by 'legal, constitutional' means, without seeming to violate the Fifteenth Amendment of the Federal Constitution.").

[160] *See* 1901-02 DEBATES, *supra* note 65, at 3076–77; *see also id.* at 2973 (Alfred P. Thom's statement also mentioned the goal of finding constitutional mechanisms of disenfranchising black voters).

[161] V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 19 (1949).

[162] Bill Bartel, *Politics: From Byrd to Obama*, VA.-PILOT (Aug. 21, 2015), https://www.pilotonline.com/projects/pilot-150/article_d0c397e4-7656-5bdd-a578-8ce35d0b101b.html.

of the electorate in Virginia was the result of the work of the 1901-02 convention.[163] The number of votes cast in the presidential election of 1904 was only slightly more than half the total cast in 1900.[164] The Black electorate had been eviscerated. By 1950, there were only 40,376 Black Virginians registered to vote.[165] Moreover, it may be that only half of these actually voted.[166] In the first half of the 20th century, one-third of the votes in state elections came from state employees and officeholders.[167] Key quipped that "[b]y contrast Mississippi is a hotbed of democracy."[168]

C. The 1971 Constitution

By the 1960s, the political scene in Virginia had changed dramatically with the pressure of demographic change, the rise of the Republican party, Supreme Court decisions, and federal legislation.[169] Black voices were increasingly heard. It is reckoned that the approximately 100,000 votes Blacks cast for Lyndon Johnson in 1964 provided the margin for his victory in Virginia.[170] Both parties openly sought Black votes in the 1965 race for Governor. The Democratic candidate, Mills E. Godwin, Jr. had, as a state senator, been a leader of the Massive Resistance forces.[171] Changing course, in 1965, he campaigned on a platform of progress for all Virginians and managed to draw a fair number of African Americans into his camp.[172] It was Godwin, of course, who proposed the creation of the Commission on

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[163] *See* Section II.D.

[164] J. HARVIE WILKINSON III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS 1945-1966, at 5 (1968) ("Negroes qualified to vote shrank from 147,000 to 21,000, and the number of votes cast in Virginia in the presidential election of 1904 was only slightly more than half the total cast four years earlier.").

[165] *See* ANDREW BUNIE, THE NEGRO IN VIRGINIA POLITICS, 1902-1965, at 254–55 (1967).

[166] *Id.* at 255; J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA 26 (2002).

[167] J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA 26 (2002); *see generally* WILKINSON, *supra* note 164.

[168] KEY, *supra* note 161, at 20.

[169] *See generally* JAMES W. ELY, THE CRISIS OF CONSERVATIVE VIRGINIA: THE BYRD ORGANIZATION AND THE POLITICS OF MASSIVE RESISTANCE (1976); WILKINSON, *supra* note 164; FRANK B. ATKINSON, THE DYNAMIC DOMINION: REALIGNMENT AND THE RISE OF VIRGINIA'S REPUBLICAN PARTY SINCE 1945 (1992).

[170] BUNIE, *supra* note 165, at 259–60.

[171] *See generally* MINER CARL ANDREWS, NO HIGHER HONOR: THE STORY OF MILLS E. GODWIN, JR. (1970); ELY, *supra* note 169, at 182-83, 205.

[172] BUNIE, *supra* note 165, at 259–60; Henry Howell, well to the left of the ranks of the Democratic Party, said that "Mills Godwin recognizes that Virginia has changed. I believe Mills Godwin desires to be the first of a new line of progressive governors for Virginia." *Howell Backs Godwin*, VA.-PILOT, Feb. 18, 1965, at 29; *see generally* James R. Sweeney, *Bridge to the New Dominion: Virginia's 1965 Gubernatorial Election*, 125 VA. MAG. HIST. & BIOGRAPHY 246 (2017).

Constitutional Revision, whose work resulted in the adoption of a progressive constitution for Virginia.[173]

The members of the Commission on Constitutional Revision cared deeply about assuring the right to vote. In their report, they declared:

> In the first place, the Commission regards the vote as a basic and precious right in a democratic society, a right underlying and bolstering many other individual rights. Hence it follows that needless obstacles ought not to be placed in the path of Virginians seeking to have a voice in the government of their Commonwealth.[174]

Regarding their recommendations on voter disqualifications, the commissioners stated: "The essence of the present constitutional disqualifications are retained, the principal categories being those convicted of certain crimes and those of unsound mind."[175] The Commission proposed dropping most of the offenses listed in the 1902 Constitution as a basis for disenfranchisement including bribery, petit larceny, obtaining money property under false pretenses, embezzlement, forgery, or perjury. Felony convictions, however, would remain.[176] The commissioners' explanation of their reasoning is fairly summary:

> [D]isfranchisement of persons convicted of a felony remains automatic. The generic term "felony" has been substituted for the list of crimes contained in the present section 23. Express reference is made to restoration of civil rights by the Governor as re-enfranchising persons convicted of a felony, which works no change in the present law.[177]

In referring to the Commission's draft as working no change in the status quo, the report is speaking of the role of the Governor, not the enumeration of offenses that result in disenfranchisement.

How can the relatively slim attention the Commission gave to felon disenfranchisement be explained, especially given the commissioners' overarching goal of securing the ballot to as many Virginians as possible? If

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[173] *See supra* notes 19-20; Section II.E.
[174] CCR, *supra* note 19, at 101–02.
[175] *Id.* at 103.
[176] *Id.* at 106.
[177] *Id.*

we recall the hurdles to voting, in particular for Black Americans, in the years before the 1960s, we can see that other barriers, for example, the poll tax, may have loomed larger in the commissioners' minds.[178] Moreover, regarding disenfranchisement, the specification of other offenses, such as petit larceny, was more closely identified with manifest efforts to exclude Blacks from the ballot. In contrast, felony disenfranchisement has roots in views widely held in the antebellum era, well before constitutions were being drafted in order to rid the electorate of African Americans who had been enfranchised by the Reconstruction amendments.[179]

D. Felon Disenfranchisement Since 1971

Even so, the 1971 Constitution must be judged, not only by what it might have meant when adopted, but also by how it seems to fit the needs of our own time. It is the inescapable reality that the criminal justice system operates in a way that falls more heavily on racial minorities than on white Americans. What, then, of felon disenfranchisement in the years since 1971?

Two provisions of Virginia's Constitution intertwine to decide the ability of a former felon to cast a ballot: the Franchises and Officers Article and the Executive. The Franchises and Officers Article requires the disenfranchisement of felons: "No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority . . . ."[180] The Constitution's Executive Article, in a single paragraph, specifies the Governor's clemency powers. Among those powers is the authority "to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution."[181] The Virginia Code lays out the path a convicted felon must follow in order for the Governor to consider a petition to restore his or her voting rights.[182] The Governor is free to deny a petition for restoration.[183]

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[178] Observers at the time were inclined to pay more attention to the impact of devices such as the poll tax than to disenfranchisement for crime. *See, e.g.*, James Latimer, *Is Byrd Machine Being Retooled?*, RICHMOND TIMES-DISPATCH, Jan. 3, 1965, at A1 ("Future historians looking back at 1964 may well seize upon the demise of the poll tax in federal elections, and the [Byrd] organization's failure to find a voter-control substitute, as the most significant political development of the year in Virginia.").

[179] *See supra* Sections III.A, III.B.

[180] VA. CONST. art. II, § 1.

[181] *Id.* art. V, § 12.

[182] VA. CODE ANN. § 53.1-231.2.

[183] *Id.*

As of 2020, Virginia was one of six states with the highest rates of disenfranchisement.[184] With 366,065 persons disenfranchised, Virginia had approximately 6 percent of her population barred from the ballot.[185] Well over half (190,605 persons) were Black – almost 16 percent of the Commonwealth's total Black population.[186] These figures bear out the findings of a report published by the Sentencing Project to the United Nations that African American adults are 5.9 times as likely to be incarcerated than whites. The same report said that, as of 2001, one in every three Black boys born that year could expect to go to prison in his lifetime, compared to one in every seventeen white boys.[187] These figures became inflated over the years as the statutory definition of what counts as a felony has expanded.[188]

Like the pardoning power, the Governor's power to restore a former felon's voting rights is exercised at the Governor's discretion. Governors can be generous or tight-fisted. In the 1990s, Republican Governors James Gilmore and George Allen, in each of their four years in office, restored the vote respectively to 238 and 460 former felons.[189] In more recent years, however, governors have sought to speed up the process.[190] Governor Mark Warner, a Democrat, streamlined the application process for non-violent offenders in 2005.[191] Warner's successor, Democratic Governor Tim Kaine, quickened the pace, restoring voting rights to 4,402 former felons, thus setting a new record among governors.[192] The next governor, Republican

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[184] *See State-by-State Data*, SENTENCING PROJECT, https://www.sentencingproject.org/the-facts/#map (select Felony Disenfranchisement Rate from the State Data Map dropdown menu) (last visited Mar. 30, 2022). The other states were Kentucky, Tennessee, Alabama, Mississippi, and Florida. *Id.*

[185] *Id.*

[186] *Id.*

[187] THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2018); *see also* U.S. DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2019, 9 tbl. 5 (2018).

[188] SASHA ABRAMSKY, CONNED: HOW MILLIONS WENT TO PRISON, LOST THE VOTE, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE 181-82 (2006).

[189] Anita Kumar, *More Va. Felons Get Rights Restored*, WASH. POST (Sept. 26, 2010).

[190] Helen A. Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 VA. NEWS LETTER 6–7 (2015); *see also* Dori Elizabeth Martin, Comment, *Lifting the Fog: Ending Felony Disenfranchisement in Virginia*, 47 U. RICH. L. REV. 471, 489 (2012) ("Though Virginia's constitutional voting restrictions have not evolved significantly over the years, the restoration process has become more easily navigable, thanks to efforts of Virginia governors throughout the past decade.").

[191] Conservative legislators expanded the number of crimes considered "violent," so more perpetrators could not be eligible to receive the shortened application form issued by Governor Warner. Matthew T. Clarke, *Virginia Governor Warner Restores Felons' Voting Rights, Ignites Controversy*, PRISON LEGAL NEWS, Dec. 2005, at 179.

[192] Kumar, *supra* note 189.

Bob McDonnell, took a bipartisan approach to the process. In 2013, he announced that he would automatically restore the vote to former felons convicted of non-violent crimes if they completed their sentence, probation, or parole; paid all court costs, fines, and restitution; and had no pending felony charges.[193] By the time he left office, Governor McDonnell had restored more than 8,000 individuals' right to vote.[194]

E. Terry McAuliffe Attempts Wholesale Restoration

In April 2016, Governor Terry McAuliffe, a Democrat, sought to attack the problem of disenfranchisement wholesale. Impatient with the process by which individual petitions were considered, McAuliffe announced a policy that would restore voting rights to more than 200,000 former felons at one fell swoop.[195] McAuliffe saw his action as a step toward correcting Virginia's history of excluding African-Americans from the polls. Indeed, in campaigning for office in 2014, McAuliffe had compared felon disenfranchisement to the poll tax.[196] If McAuliffe saw his action through the lens of race, his Republican critics saw "political opportunism" and a "transparent effort to win votes."[197] The Republican Speaker of the House, Bill Howell, declared himself "not surprised by the lengths to which [McAuliffe] is willing to go to deliver Virginia to Hillary Clinton in November."[198]

The Republicans' legislative leaders – Howell and Senate Majority Leader Thomas Norment, Jr. – were quick to challenge McAuliffe's order in court. Seeking writs of mandamus and prohibition in the Supreme Court of Virginia, they insisted that the Governor could not restore rights to a class of persons and instead must proceed one individual case at a time.[199] In a 4-

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[193] Errin Whack, *McDonnell to Expedite Rights Restoration Process for Non-Violent Felons in Virginia*, WASH. POST (May 29, 2013), https://www.washingtonpost.com/local/va-politics/mcdonnell-to-expedite-rights-restoration-process-for-non-violent-felons-in-virginia/2013/05/29/ae34cbe0-c873-11e2-8da7-d274bc611a47_story.html; Dawnthea Price, *Felons Slow to Seek Restoration of Rights*, FREE LANCE-STAR (Sept. 18, 2013), https://fredericksburg.com/news/felons-slow-to-seek-restoration-of-rights/article_a07c07d3-91f6-5a9b-a398-27bea6219f50.html.

[194] Graham Moomaw, *Virginia Democrats Push to End Constitutional Rule Stripping Felons of Voting Rights*, VA. MERCURY (Jan. 11, 2012), https://www.virginiamercury.com/2021/01/11/virginia-democrats-push-to-end-constitutional-rule-stripping-felons-of-voting-rights/.

[195] Sheryl Gay Stolberg & Eric Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), https://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html.

[196] *Id.*

[197] *Id.* (quoting John Whitbeck, Virginia Republicans' party chairman).

[198] Danielle Kurtzleben, *Virginia's Governor Just Gave 206,000 People the Right to Vote*, NPR (Apr. 22, 2016).

[199] Howell v. McAuliffe, 292 Va. 320, 328–29 (Va. 2016).

3 opinion, the Court ruled against McAuliffe. For the justices in the majority, history and precedent were dispositive of the case:

> Never before have any of the prior [seventy-one] Virginia Governors issued a clemency order of any kind – including pardons, reprieves, commutations, and restoration orders – to a class of unnamed felons without regard for the nature of the crimes or any other individual circumstances relevant to the request. To be sure, no Governor of this Commonwealth, until now, has even suggested that such a power exists.[200]

The court was manifestly cautious about executive power. "Deeply embedded in the Virginia legal tradition," the majority said, is a "cautious and incremental approach to any expansions of the executive power."[201]

The court's opinion fails to take into account the clear construction of Article V, Section 12. That section has two paragraphs. The first confers authority upon the Governor. The second imposes a duty of reporting:

> The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.
>
> He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.[202]

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[200] *Id.* at 327; *see also id.* at 338 (citing Governor Tim Kaine's consideration of a similar proposal and conclusion that the voter-disqualification provision did not authorize such an *en masse* use of the restoration power, and doing so would rewrite the law rather than exercise granted executive clemency powers).

[201] *Id.* at 327 (quoting Gallagher v. Commonwealth, 284 Va. 444, 451 (Va. 2012)).

[202] VA. CONST. art. V, § 12.

One who reads these two paragraphs closely will see that there are four grants of authority but only three duties of reporting. As to the first, second, and fourth grant of power in the first paragraph, there is perfect symmetry with the second paragraph. Regarding three grants of power, the Governor is under a constitutional duty to report "his reasons for remitting, granting, or commuting." That language obviously assumes that the Governor must tell the General Assembly why, in individual cases, he has taken action.

The Governor is under no constitutional duty, however, to report his reasons for removing political disabilities. The omission of any such duty obviously implies that the Governor's power to remove disabilities is not limited to individual cases. Was the omission of the third class of cases from the second paragraph a drafting error? Did Homer nod? Given the presence of some of Virginia's finest legal minds on the Commission on Constitutional Revision (a future Supreme Court Justice among them), it is difficult to imagine that the omission was anything but deliberate and that the drafters understood that they were conferring on the Governor a broader license than in the other three classes of cases.

Further, the majority in *Howell v. McAuliffe* seemed to treat Article II, Section 1 as if it were the rule, and Article V, Section 12 to be the exception. In constitutional terms, however, the two sections are of equal dignity. Indeed, in Anglo-American constitutional history, the executive's clemency power has ancient stature.[203] Moreover, the doctrine of desuetude, whatever its application to statutes, has no place in constitutional application.[204] A constitution's grant of authority to a branch of government does not atrophy simply because it has not been exercised. Would one argue that the Virginia Constitution's grant of authority to the General Assembly to impeach and try a governor ceases to have efficacy simply because no governor has ever been impeached?[205]

Governor McAuliffe was obliged, of course, to honor the court's order. Undeterred, however, he simply mailed notices to individual former felons, instructing them on what they needed to do to have their voting rights restored. Within a month of the court's decision, McAuliffe had restored the franchise to 13,000 felons on a case-by-case basis.[206] The Governor was still determined to restore the voting rights of nearly 200,000 people:

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[203] *See, e.g.*, William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977).

[204] For a description of the canon of desuetude in statutory interpretation, *see, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 336 (2012).

[205] *See* VA. CONST. art. IV, § 17.

[206] Laura Vozzella, *McAuliffe Restores Voting Rights to 13,000 Felons*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/local/virginia-politics/mcauliffe-restores-voting-rights-to-13000-felons/2016/08/22/2372bb72-6878-11e6-99bf-f0cf3a6449a6_story.html.

> I personally believe in the power of second chances and in the dignity and worth of every single human being. . . . These individuals are gainfully employed. They send their children and grandchildren to our schools. They shop at our grocery stores and they pay taxes. And I am not content to condemn them for eternity as inferior, second-class citizens.[207]

By the end of his term, McAuliffe had restored voting rights to 173,166 people.[208] It was almost five times more than the total for the 19 governors who had preceded him.[209] In 2017, when the number had topped 150,000, McAuliffe understandably pointed to his record of re-enfranchisement as his "proudest achievement" as governor.[210]

In March 2021, Governor Ralph Northam took another significant step toward restoring the vote to large numbers of former felons. He restored the civil rights of more than 69,000 Virginians using eligibility criteria that automatically restored the vote to felons who had completed their sentence of incarceration, even if they were still on supervision.[211] Northam had made a different, more sensational kind of news when it was reported that he had been photographed in blackface as an undergraduate.[212] Brushing aside calls for his resignation, Northam set out on a course in which racial justice would be his core concern.[213] That commitment surely must have been on Northam's mind when, in announcing his March action, he declared:

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[207] *Id.*

[208] Warren Fiske, *McAuliffe Near the Top in Restoring Ex-Felon Voting Rights*, POLITIFACT (Apr. 19, 2021), https://www.politifact.com/factchecks/2021/apr/19/terry-mcauliffe/mcauliffe-near-top-restoring-ex-felon-voting-right/.

[209] *Id.*

[210] Laura Vozzella, *Va. Gov. McAuliffe Says He Has Broken U.S. Record for Restoring Voting Rights*, WASH. POST (Apr. 27, 2017), https://www.washingtonpost.com/local/virginia-politics/va-gov-mcauliffe-says-he-has-broken-us-record-for-restoring-voting-rights/2017/04/27/55b5591a-2b8b-11e7-be51-b3fc6ff7faee_story.html.

[211] *See, e.g.*, Gregory S. Schneider, *Northam Restores Vvoting Rights for 69,000 with Felony* Convictions, WASH. POST (Mar. 16, 2021), https://www.washingtonpost.com/local/virginia-politics/virginia-voting-felons-northam/2021/03/16/b171271e-868d-11eb-82bc-e58213caa38e_story.html; Victoria Chamberlin, *Virginians Convicted of Felonies Will Now Regain Right to Vote and Other Civil Rights Upon Release*, DCIST (Mar. 16, 2021), https://dcist.com/story/21/03/16/virginians-regain-civil-rights-after-release-from-prison/.

[212] Alan Blinder, *Was That Ralph Northam in Blackface? An Inquiry Ends Without Answers*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/ralph-northam-blackface-photo.html.

[213] Gregory S. Schneider, *Va. Gov. Ralph Northam Says He Wants to Focus Rest of His Term on Racial Equality*, WASH. POST (Feb. 9, 2019), https://www.washingtonpost.com/local/virginia-politics/va-gov-ralph-northam-says-he-wants-to-focus-rest-of-his-term-on-racial-equity/2019/02/09/2a739b20-2c76-11e9-984d-9b8fba003e81_story.html; Gregory S. Schneider, *'A Wounded Healer': Ralph Northam Wraps Up Term in Office, Forged by Scandal into a Governor of*

> Too many of our laws were written during a time of open racism and discrimination, and they still bear the traces of inequity. . . . We are a Commonwealth that believes in moving forward, not being tied down by the mistakes of our past. If we want people to return to our communities and participate in society, we must welcome them back fully – and this policy does just that.[214]

F. Efforts To Amend the Constitution

For the first 50 years after the adoption of Virginia's 1971 Constitution, proponents of restoring felons' voting rights tried, without success, to amend Article II, Section 1. As the court observed in *Howell v. McAuliffe,* at least 69 resolutions had been introduced at each legislative session between 2004 and 2016. Each failed.[215]

The legislative elections of November 2019 brought a sea change. The Democrats gained a majority in both houses of the General Assembly. With Governor Northam still having two years left in his term of office, the Democrats found themselves, for the first time in 26 years, in control of the statehouse and both legislative houses – a trifecta.[216] Now the prospect for amending Article II's provisions on felony disenfranchisement was brighter. Some Democrats wanted to end felony disenfranchisement altogether, while others were more hesitant about going that far. Delegate Marcus Simon, chairman of the House Privileges and Elections Committee, sympathized with that goal. He noted, however, that because the amendment would require not only a second endorsement by the legislature but also the voters' approval in referendum, he was worried that "making the conversation about voting from jail could jeopardize the larger reform effort."[217] Ultimately, in

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Lasting Consequence (Jan. 9, 2022), https://www.washingtonpost.com/dc-md-va/2022/01/09/governor-northam-blackface-scandal-legacy/.

[214] Press Release, Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process (Mar. 16, 2021), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html.

[215] Howell v. McAuliffe, 292 Va. 320, 338–39 (Va. 2016).

[216] Graham Moomaw, *Virginia Democrats Win Control of General Assembly, Sealing Trump-era Power Shift*, VA. MERCURY (Nov. 6, 2019), https://www.virginiamercury.com/2019/11/06/virginia-democrats-win-control-of-general-assembly-sealing-trump-era-power-shift/; *The Latest: Democrats Win Control of Virginia Statehouse*, AP NEWS (Nov. 5, 2019), https://apnews.com/article/gun-politics-donald-trump-us-news-ap-top-news-richmond-fd996ce3e4494a37a4136926cf9425eb.

[217] Graham Moomaw, *Va. House Panel Expands Felon Rights Proposal to Allow Voting After Release*, VA. MERCURY (Jan. 15, 2021), https://www.virginiamercury.com/blog-va/va-house-panel-expands-felon-rights-proposal-to-allow-voting-while-on-probation/.

February 2021, the House and the Senate agreed to an amendment to Article II, Section 1. Striking the language that restoration of voting rights requires action by the Governor, the proposed amendment reads:

> No person who has been convicted of a felony shall be entitled to vote during any period of incarceration for such felony conviction, but every such person, upon release from incarceration for that felony conviction *and without further action required of him*, shall be invested with all political rights, including the right to vote . . . .[218]

No one assumed that, as of the special session, the amendment was a done deal. As Tram Nguyen of New Virginia Majority observed, "I don't think it's lost on any of us that depending on the outcome of November, everything that we've gained could be lost in the blink of an eye."[219]

The gubernatorial and legislative election of November 2021 did indeed change Virginia's political landscape. Republican Glenn Youngkin, a political outsider considered at one time to be a longshot candidate, beat Terry McAuliffe by less than two points to become the next governor.[220] Youngkin helped carry Republicans to gain control of the House of Delegates as well.[221]

When the General Assembly convened in January 2022, the proposed amendment to Virginia's Constitution went before a subcommittee of the Privileges and Elections Committee. Representatives of a politically diverse coalition spoke in favor of the amendment – the American Conservative Union, Americans for Prosperity Virginia, the American Civil Liberties Union, the Legal Aid Justice Center, the Virginia Catholic Conference, the National Association for the Advancement of Colored People, and others.[222] Speaking for the American Conservative Union Foundation,

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[218] *See, e.g.*, *2021 Special Session I: SJ 272*, VA. LEGIS. INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+SJ272 (emphasis added).

[219] Daniel Nichanian, *The Next Virginia Governor Could Wipe Out New Voting Rights Gains*, APPEAL (Mar. 26, 2021), https://theappeal.org/politicalreport/virginia-voting-rights-2021-elections/.

[220] Zach Montellaro & Brittany Gibson, *Youngkin Wins, Flipping Virginia Red*, POLITICO (last updated Nov. 3, 2021), https://www.politico.com/news/2021/11/02/virginia-governor-race-polls-close-518625 ("With 99 percent of the expected vote counted as of Wednesday morning, Youngkin has staked out a 2-point lead — a margin that reflects major gains for Youngkin and his party across Virginia and in other states as well.")

[221] Meagan Flynn, *Virginia Republicans Prepare to Take Control of House of Delegates as Key Races Remain Uncalled*, WASH. POST (Nov. 3, 2021), https://www.washingtonpost.com/dc-md-va/2021/11/03/republicans-control-virginia-house/.

[222] Graham Moomaw, *Virginia House Republicans Kill Proposal on Felon Voting Rights Despite Bipartisan Support*, VA. MERCURY (Feb. 8, 2022), https://www.virginiamercury.com/2022/02/08/va-house-republicans-kill-felon-voting-rights-proposal-despite-bipartisan-support/.

Kaitlin Owens told the panel: "We want to reintegrate people that have served their time, that may have kids in school, may be productive members of society, but can't have a voice."[223] No one spoke in opposition to the amendment.[224] Even so, the amendment was defeated on a 5-4 party line vote.[225] The five Republicans who voted the amendment down gave little explanation for their votes save that it would not require former felons to pay all restitutions and fees before being allowed to vote.[226] When the Senate sent the amendment over for another vote in the House, the same subcommittee, again acting on party lines, voted it down.[227] The Youngkin administration did not weigh in on the proposed amendment.[228]

G. Felon Disenfranchisement as a Partisan Issue

In November 2016, Donald Trump, in his campaign for the presidency, lashed out at Governor McAuliffe for having restored the voting rights of thousands of former felons. To a cheering crowd in Leesburg, Trump was blunt: "He's letting criminals cancel out the votes of law-abiding citizens."[229] While McAuliffe said his executive order was meant to lift "a policy of disenfranchisement that has been used intentionally to suppress the voices of qualified voters, particularly African Americans," Trump called McAuliffe's action "crooked politics."[230] Going further, Trump declared that "Hillary Clinton is banking on her friend Terry McAuliffe on getting

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[223] Andrew Cain, *House Panel Rejects Constitutional Amendments to Restore Voting Rights and to Remove Same-ex Marriage Prohibition*, RICHMOND TIMES-DISPATCH (Feb. 8, 2018), https://richmond.com/news/state-and-regional/govt-and-politics/house-panel-rejects-constitutional-amendments-to-restore-voting-rights-and-to-remove-same-sex-marriage/article_b865ecfe-69b1-50d1-b784-681a359925e2.html.

[224] *Id.*

[225] Moomaw, *supra* note 222.

[226] *Id.* A Republican member of the House, Delegate Mike Cherry, had sponsored a version of the constitutional amendment, but the subcommittee did not take up that bill, presumably because the panel's Republicans were reluctant to vote to kill an amendment sponsored by a member of their own party. *Id.*

[227] Laura Vozzella, *Felon Voting Rights, Same-Sex Marriage Bills Die in Virginia House Panel*, WASH. POST (Mar. 1, 2022), https://www.washingtonpost.com/dc-md-va/2022/03/01/same-sex-marriage-felon-voting-virginia/.

[228] After the subcommittee's final action, Governor Youngkin did not respond to a request for comment. *Id.*

[229] *Trump Attacks Virginia Governor for Restoring Felons' Voting Rights*, WASH. POST (Nov. 7, 2016), https://www.washingtonpost.com/video/politics/trump-attacks-virginia-governor-for-restoring-felons-voting-rights/2016/11/07/add663f4-a4cd-11e6-ba46-53db57f0e351_video.html.

[230] Ashley Killough & Karl de Vries, *Trump Slams Voting Rights for Felons, Wants GOP to Court Black Voters*, CNN (Aug. 22, 2016), https://www.cnn.com/2016/08/20/politics/donald-trump-african-american-voters-virginia-voting-rights/index.html.

thousands of violent felons to the voting booths in effort to cancel out the votes of both law enforcement and crime victims."[231]

Like many policy issues today, the debate over restoring voting rights to former felons has increasingly become a matter of partisan divide. The Democratic party's platform describes voting as a fundamental right and says the party will work "to ensure that returning citizens have their voting rights restored upon release from jail or prison without the additional hurdle of having to pay fines and fees in order to vote."[232] President Biden has been quoted as saying, "My administration will incentivize states to automatically restore voting rights for individuals convicted of felonies once they have served their sentences" – a policy also pursued by the Obama administration.[233]

Republican attitudes toward proposals to re-enfranchise former felons seem to be influenced by their insistence on election purity and being "tough on crime." In their 2016 platform (retained in 2020), the Republican party placed emphasis on "honest elections" and ensuring that only "legitimate voters" had access to the ballot.[234] Thus, a Republican leader in Virginia declared that the only felons who could be legitimate voters are those who "are truly deserving of that second chance," such as those who have committed nonviolent crimes, have completed their sentences, and have paid all restitution, court costs, and fines.[235] Politics enters the picture in explicit terms. Republicans accuse Democrats of looking for votes when they propose making it easier for former felons to be restored the franchise.

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[231] *Id.*; *see also* Stolberg & Eckholm, *supra* note 195 (reporting similar accusations from John Whitbeck, the Virginia Republican Party chairman).

[232] *Restoring and Strengthening our Democracy*, DEMOCRATIC NAT'L COMM. (last visited May 25, 2022), https://democrats.org/where-we-stand/party-platform/restoring-and-strengthening-our-democracy/; Jerry Iannelli, *The Fight for People in Prison to Vote Reaches Congress*, APPEAL (Mar. 2, 2021), https://theappeal.org/politicalreport/congress-voting-from-prison-vote/ (quoting Cori Bush, Congresswoman for Missouri's 1st District).

[233] *Where Democrats Stand*, WASH. POST (last updated Apr. 8, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/criminal-justice/ (hover cursor over the Biden picture in the "Should any individuals be able to vote while incarcerated?" infographic to reveal the quotation); *see Obama Administration Pushes for Full Voting Rights*, BRENNAN CTR. FOR JUST. (Feb. 10, 2010), https://www.brennancenter.org/our-work/analysis-opinion/obama-administration-pushes-full-voting-rights; Anthony Papa, *Obama Administration Calls to Restore Felons Voting Rights*, DRUG POL'Y (Feb. 11, 2014), https://drugpolicy.org/blog/obama-administration-calls-restore-felons-voting-rights. Note also that at the time, Senator Rand Paul was a "leader" on the issue of restoring voting rights to former felons but was concerned about the constitutional validity of blanket restorations. *See* Ashley Lopez, *Rand Paul Has Mixed Feelings About Governor's Ex-Felon Voting Rights Order*, WFPL (Dec. 1, 2015), https://wfpl.org/rand-paul-has-mixed-feelings-about-beshears-felon-voting-rights-order/.

[234] REPUBLICAN NATIONAL COMM., REPUBLICAN PLATFORM 2016, at 16 (2016).

[235] Laura Vozzella, *Republican Leader of Va. Senate Advances Felon Voting Plan of His Own*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/local/virginia-politics/gop-leader-of-va-senate-proposes-felon-voting-plan-of-his-own/2016/09/01/78365fcc-7081-11e6-8533-6b0b0ded0253_story.html.

Attacking U.S. Senate bill S.1 ("For the People Act"), Senator Ted Cruz of Texas called it "The Corrupt Politicians Act" and denounced it as "a massive Democrat power grab."[236] For Cruz, one of the "egregious aspects" of the For the People Act is restoring the voting rights of those convicted of criminal offenses.[237]

Florida presents a case study in how partisan politics can upend even the will of the voters.[238] In November 2018, Floridians were asked to vote on a proposed amendment to the state constitution. An affirmative vote would result in automatically restoring the right to vote to people with prior felony convictions (other than those convicted of murder or a felony sexual offense) after their sentences are completed, including incarceration, parole, and probation.[239] On election day, 64.5 percent voted "yes."[240] Approval of the amendment would have restored the vote to about 1.5 million voters in a state noted for its pivotal importance in American elections.[241]

The amendment required legislative implementation in order to know how the amendment would work in practice. The Republican majority set out to see that it would *not* in fact work in practice. In a vote along party lines (67-42), the Florida legislature passed a bill placing significant obstacles in the way of former felons hoping to have their voting rights restored. For example, those persons must pay back all fines and fees associated with their conviction.[242] Not only does this place a heavy financial obstacle in would-be voters' path, but Florida's record system makes it impossible for many former felons even to find out what they owe.[243] The

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[236] *See* Mary Dimitrov, *Voting Rights Bill is 'A Massive Democrat Power Grab,' Texas Senator Ted Cruz Says*, MCCLATCHY (May 12, 2021), https://www.mcclatchydc.com/news/politics-government/article251332153.html.

[237] *See id.*

[238] *See* Patricia Mazzei, *Floridians Gave Ex-Felons the Right to Vote. Lawmakers Just Put a Big Obstacle in Their Way.*, N.Y. TIMES (May 3, 2019), https://www.nytimes.com/2019/05/03/us/florida-felon-voting-amendment-4.html.

[239] *Florida Amendment 4, Voting Rights Restoration Initiative (2018)*, BALLOTPEDIA, https://ballotpedia.org/Florida_Amendment_4,_Voting_Rights_Restoration_for_Felons_Initiative_(2018).

[240] *Id.*

[241] *See* David A. Graham, *A Voting-Rights Debate Reveals Why Democrats Keep Losing*, ATL. (Apr. 25, 2019), https://www.theatlantic.com/ideas/archive/2019/04/democrats-republicans-felon-voting-florida/588010/. Recall Bush v. Gore, 531 U.S. 98 (2000).

[242] *See* Mazzei, *supra* note 238; *see also* Sam Levine, *How Republicans Gutted the Biggest Voting Rights Victory in Recent History*, GUARDIAN (Aug. 6, 2020), https://www.theguardian.com/us-news/2020/aug/06/republicans-florida-amendment-4-voting-rights.

[243] Betty Riddle, a 63-year-old woman from Sarasota who was last in prison in 2008 and now works at a public defender's office tried to use her connections within the Florida court system to find out how much she owed. However, the charges she could see only went back to the 1980s. She called another county to learn more about her earlier charges, but the county told her that "they were so old they were probably boxed up or put on a disc." Riddle could not figure out how much she owed—the system in Florida is set up that makes it near impossible to figure out how much is exactly owed in conviction-

legislature's gambit was challenged in court. Judge Hinkle of the United States District Court in Tallahassee held the law to be unconstitutional.[244] He reasoned that requiring people to pay court fines and fees in order to register to vote violated the Twenty-Fourth Amendment.[245] Soon thereafter, however, the Eleventh Circuit, in a 6-4 decision, overturned the lower court's ruling.[246] Thus, the Florida law remains in place. How one views this episode in voting law depends in good part on one's partisan perspective. Democrats are more likely to see it as a "cautionary tale," while Republicans consider it to be a "common-sense decision."[247]

IV. THE HEALTH OF AMERICAN DEMOCRACY

Defining an inclusive political community is, of course, not just a job for Virginians. It is a national challenge. That quest obliges us to consider the rising fissures in American democracy – the threats to its values, its functioning, and its place at the core of our constitutional order. Annually, the Economist Intelligence Unit (EIU) publishes a "Democracy Index." The EIU's 2021 Index provides a snapshot of the state of democracy in 165 independent states around the world. The Index is based on five categories: electoral process and pluralism, functioning of government, political participation, political culture, and civil liberties.[248] Based on the scores in each of those categories, each country is classified as one of four types of regime: full democracy, flawed democracy, hybrid regime, or authoritarian regime.[249] Twenty-one countries make the list as being a "full democracy."[250] The United States is not among them. The United States shows up on the list of "flawed democracies."[251] Americans are accustomed to thinking of their country as a beacon to other democracies, as a "city on a hill." What developments account for this fall from grace?

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related payments. There is no centralized place for an ex-felon to look up what they owe and how much has been paid. *See id.*

[244] *See* Jones v. DeSantis, 462 F. Supp. 1196 (N.D. Fla. 2020).

[245] *Id.* at 1231.

[246] Jones v. Governor of Fla., 975 F.3d 1016, 1035 (11th Cir. 2020) ("If a State may decide that those who commit serious crimes are presumptively unfit for the franchise, it may also conclude that those who have completed their sentences are the best candidates for re-enfranchisement.") (citation omitted).

[247] *See* Hans A. von Spakovsky & Courtney Baer, *A Common-Sense Decision on Felon Voting in Florida*, HERITAGE FOUND. (Sept. 18, 2020), https://www.heritage.org/crime-and-justice/commentary/common-sense-decision-felon-voting-florida.

[248] ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2021: THE CHINA CHALLENGE 3 (2022).

[249] *Id.*

[250] *Id.* at 12.

[251] *Id.*

A. A Loss of Faith in Elections

Almost a year after rioters breached the United States Capitol as Congress worked to certify the 2020 presidential election results, researchers at the University of Massachusetts-Amherst (UMass) released a poll on how Americans regarded the legitimacy of that election. More than a third of those polled believed that President Joe Biden's victory was illegitimate. Of Republicans polled, an overwhelming majority – 71 percent – thought the election was not legitimate. Only 21 percent accepted Biden as the legitimate winner.[252] The figures have stayed remarkably stable over time. Another poll published just before the insurrection had found that 58 percent of those surveyed believed Biden to be the legitimate victor; on the first anniversary of the attack on the Capitol, the same polling group found that 55 percent believed Biden's victory to be legitimate.[253]

For respondents in the UMass poll who questioned the election result, the top reason for that belief was voter fraud, specifically that election officials in key battleground states counted fraudulent ballots.[254] Those groundless beliefs continue to grip the minds of disappointed voters even though candidate Trump's attorneys were unable to convince any American courts that the election was tainted by fraud.[255] Indeed, Trump's own Attorney General, William Barr – who was unwaveringly loyal at so many key moments during the Trump presidency – said while still in office that the Department of Justice had "not seen fraud on a scale that could have effected a different outcome in the election."[256] United States attorneys and FBI

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[252] Lisa Hagen, *Poll: A Third of Americans Question Legitimacy of Biden Victory Nearly a Year Since Jan. 6*, U.S. NEWS & WORLD REP. (Dec. 28, 2021), https://www.usnews.com/news/politics/articles/2021-12-28/poll-a-third-of-americans-question-legitimacy-of-biden-victory-nearly-a-year-since-jan-6.

[253] Maya Yang, *More than 40% in US Do Not Believe Biden Legitimately Won Election – Poll*, GUARDIAN (Jan. 5, 2022), https://www.theguardian.com/us-news/2022/jan/05/america-biden-election-2020-poll-victory.

[254] Hagen, *supra* note 252.

[255] *E.g.*, Russell Wheeler, *Trump's Judicial Campaign to Upend the 2020 Election: A Failure, but Not a Wipe-out*, BROOKINGS INST. (Nov. 30, 2021), https://www.brookings.edu/blog/fixgov/2021/11/30/trumps-judicial-campaign-to-upend-the-2020-election-a-failure-but-not-a-wipe-out/; Jim Rutenberg, Nick Corasaniti, & Alan Feuer, *Trump's Fraud Claims Died in Court, but the Myth of Stolen Elections Lives On*, N.Y. TIMES (last updated Oct. 11, 2021), https://www.nytimes.com/2020/12/26/us/politics/republicans-voter-fraud.html.

[256] Michael Balsamo, *Disputing Trump, Barr Says No Widespread Election Fraud*, AP NEWS (Dec. 1, 2020), https://apnews.com/article/barr-no-widespread-election-fraud-b1f1488796c9a98c4b1a9061a6c7f49d.

agents had been tasked with following up on specific complaints, but the evidence was not there.[257]

What explains the persistence, in the minds of millions of Americans, of the belief that the election was stolen, when the facts point so plainly in the opposite direction? Sports fans will recognize one phenomenon: tribalism. Fans simply do not like their team to lose. If your team wins, you rarely complain about the umpire. If they lose, you search for a reason.[258] For Trump voters, that reason is electoral fraud.

A close companion to tribalism is susceptibility to conspiracy theories. At least one poll has found that this weakness is bipartisan. In October 2020 – before many votes had even been cast and before all had been counted – 45 percent of Republicans and an almost identical percentage of Democrats (44%) said that if their candidate did not win the election, it would be somewhat or very likely that "election fraud will have been involved."[259] Many voters, whatever their party, are prepared to seize upon conspiracy theories. Thus, the same 2020 poll found that seven of 10 Republicans believed that allowing ballots to be sent by mail would increase instances of voter fraud. In the other party's ranks, four in 10 Democrats said there was a conspiracy to stop the U.S. Post Office from processing mail-in ballots.[260]

Anyone who has been involved in promoting democracy around the world knows that an absolute baseline for achieving authentic democracy is that competing political factions accept the rules of the game. Those implicit rules require that players accept their rivals as legitimate. If an election is free and is fairly administered, then the losers lick their wounds, step aside, let the winners get on with governing, and gird their loins to fight the next election.[261] Those norms assume something like common ground – respect and tolerance for the other side.[262] Alas, in the United States, as Larry Diamond, a respected scholar of democracy, has said, "Common political ground has largely vanished."[263]As tribal loyalties harden, respect and

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[257] *Id.*

[258] *E.g.*, Dae Hee Kwak & Sean Pradhan, *"If You Ain't First, You're Last!" Understanding Identity Threat, Team Identification, and Advertisement Messages When Your Favorite Team Loses.*, 35 J. SPORT MGMT. 158 (2021); Isabel C. Duarte et al., *Tribal love: The Neural Correlates of Passionate Engagement in Football Fans*, 12 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 718 (2017).

[259] David Byler, *Opinion: Why Do Some Still Deny Biden's 2020 Victory? Here's What The Data Says*, WASH. POST (Nov. 10, 2021), https://www.washingtonpost.com/opinions/2021/11/10/why-do-some-still-deny-bidens-2020-victory-heres-what-data-says/.

[260] *Id.*

[261] *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE 97–117 (2018).

[262] SEYMOUR MARTIN LIPSET, POLITICAL MAN: THE SOCIAL BASES OF POLITICS 77–78 (1981).

[263] Larry Diamond, *Democracy's Arc: From Resurgent to Imperiled*, 33 J. OF DEMOC. 163, 170 (2022).

tolerance give way to partisan distrust and stereotypes of opponents.[264] A 2020 Pew poll found that about eight in 10 voters on both sides believed that their differences with the other side were about core American values. Even more – about nine in 10 – thought that, if the other side won, it would lead to "lasting harm" to the country.[265] In a 2021 poll, 29 percent of Americans, including 39 percent of Republicans, thought that "violent actions" by the people were justified "to protect America" if their elected leaders failed to do so.[266]

Tribalism and conspiracy theories are surely important. But one inescapable factor makes election denial overwhelmingly important in the aftermath of the 2020 presidential election – the "big lie" pronounced, day in and day out, by the former President. Well before election day, Trump told supporters at election rallies that the election was "rigged" and that, if he was not the winner, it would be because of fraud.[267]

There was a time when one might have thought that the charge of rampant election fraud was a conspiracy theory held by activists on the fringes of American politics. Sadly, that is no longer the case. Many candidates for office, including Congress, are pushing the "big lie."[268] It has become a staple of political discourse. Moreover, legislators in some states have sought partisan "audits" of election results.[269] A sad irony of this picture is

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[264] *See* Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How it Harms Democracies: Comparative Evidence & Possible Remedies*, 681 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 234, 234–35 (2019).

[265] Michael Dimock & Richard Wike, *America is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/.

[266] Daniel A. Cox, *After the Ballots Are Counted: Conspiracies, Political Violence, and American Exceptionalism*, SURVEY CTR. ON AM. LIFE (Feb. 11, 2021), https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/.

[267] *E.g.*, Morgan Chalfant, *Defiant Trump Insists Election was 'Rigged' at Rally for Georgia Senate Republicans*, HILL (Dec. 5, 2020), https://thehill.com/homenews/administration/528921-defiant-trump-insists-election-was-rigged-at-rally-for-georgia-senate; Terrance Smith, *Trump Has Longstanding History of Calling Elections 'Rigged' If he Doesn't Like the Results*, ABC NEWS (Nov. 11, 2020), https://abcnews.go.com/Politics/trump-longstanding-history-calling-elections-rigged-doesnt-results/story?id=74126926.

[268] *E.g.*, Jacqueline Alemany & Theodoric Meyer, *On the Jan. 6 Anniversary, Republican Candidates Embrace the 'Big Lie'*, WASH. POST (Jan. 6, 2022), https://www.washingtonpost.com/politics/2022/01/06/jan-6-anniversary-republican-candidates-embrace-big-lie/?request-id=7915167d-d101-4560-b2ad-6ae0266007b1&pml=1; Michael Waldman, *The Big Lie and the Push to Restrict Voting*, BRENNAN CTR. FOR JUST. (Feb. 2, 2021), https://www.brennancenter.org/our-work/analysis-opinion/big-lie-and-push-restrict-voting; Libby Cathey, *A Year After Jan. 6, How Trump Keeps Pushing the 'Big Lie': Analysis* ABC NEWS (Jan. 5, 2022), https://abcnews.go.com/Politics/year-jan-trump-pushing-big-lie-analysis/story?id=81749379.

[269] *See, e.g.*, Matt Vasilogambros, *Republican Lawmakers Seek New Powers Over Elections*, PEW CHARITABLE TRS. (Jan. 26, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/01/26/republican-lawmakers-seek-new-powers-over-elections.

that many who press baseless claims about election fraud have persuaded themselves that they are, in fact, the true defenders of democracy.

In an essay lamenting the crisis of the global liberal world order, *New York Times* opinion columnist David Brooks turns to the need to restore the seedbeds of democracy here in the United States. He urges nurturing the insights that fortify democracy:

> . . . how to weigh evidence and commit to truth; how to correct for your own partisan blinders and learn to doubt your own opinions; how to respect people you disagree with; how to avoid catastrophism, conspiracy and apocalyptic thinking; how to avoid supporting demagogues; how to craft complex compromises.[270]

B. State Legislatures Make Voting More Difficult

In the wake of the 2020 presidential contest, legislatures in many states stepped up their efforts to make voting more difficult in the name of election integrity. In the first half of 2021, at least 19 states enacted 34 laws that are challenged as restricting access to the ballot.[271] Among the many measures being imposed are those that make mail voting and early voting more difficult, impose stricter voter ID requirements, and trigger more extensive purges of the voting rolls.[272] Proponents of the new laws insist that they are necessary to shore up public confidence in the integrity of elections after the 2020 election.[273] The Republican governor of Texas, Greg Abbott, struck a defiant note: "Voter fraud is real and Texas will prosecute it whenever and wherever it happens. We will continue to make it easy to vote but hard to cheat."[274]

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[270] David Brooks, Opinion, *The Dark Century*, N.Y. TIMES (Feb. 17, 2022), https://www.nytimes.com/2022/02/17/opinion/liberalism-democracy-russia-ukraine.html.

[271] *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (last updated Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021?ms=gad_voting%20laws_572836936998_8626214133_130570618446&gclid=Cj0KCQiAr5iQBhCsARIsAPcwROM-4uvZpMR8pMv-Kv6y-A1j86mb9ZNr5a0dqIuoI8T9dCj3cR2nU-kaAgFfEALw_wcB.

[272] *Id.*

[273] Amy Gardner, Kate Rabinowitz, & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states/.

[274] Horus Alas, *Report: Republican-Led State Legislatures Pass Dozens of Restrictive Voting Laws in 2021*, U.S. NEWS (July 2, 2021), https://www.usnews.com/news/best-states/articles/2021-07-02/17-states-have-passed-restrictive-voting-laws-this-year-report-says.

There is little escaping the fact, however, that these laws are likely to have a disproportionate effect on those who live in cities and on Black voters, who vote overwhelmingly Democratic.[275] Limits to early or absentee voting, perhaps the most common measure, heightens the risk of long lines and long waits, especially in large cities.[276] The Brennan Center labels the current wave of restrictions on voting as "the most aggressive we have seen in more than a decade of tracking state voting laws."[277] Partisan efforts to gain advantage on election day is clearly driving the campaign to skew the flow of ballots.[278] The same party controls both houses of the legislature and the statehouse in 38 states, 23 Republican, 15 Democratic.[279] In contrast to the retrogressive steps being taken in some states, however, other states have moved to expand access to the ballot.[280] Like so much in American life, "the promise of the right to vote depends increasingly on where Americans happen to live."[281]

Virginia has been among those states making the ballot more accessible. In 2020, the General Assembly repealed photo ID requirements, eliminated the requirement that voters seeking to vote by absentee ballot offer an excuse, and provided for automatic voter registration when interacting with the DMV, such as when applying for a driver's license.[282] In an especially symbolic yet substantive action, the General Assembly struck Lee-Jackson Day from Virginia's list of legal holidays and, in its place, added Election Day as a legal holiday.[283]

The next year, Virginia took an even more remarkable step, enacting the Voting Rights Act of Virginia.[284] For half a century, Virginia had to submit election changes for approval under the preclearance requirement of the

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[275] Gardner, Rabinowitz, & Stevens, *supra* note 273.

[276] *Id.*

[277] BRENNAN CTR. FOR JUST., *supra* note 271.

[278] Nearly two dozen Republicans who have publicly questioned or disputed the results of the 2020 presidential election are running to become secretary of state across the country. Watchdog groups are alarmed that this will weaponize offices which, by tradition, have usually been quietly administering election rules. Jennifer Medina, Nick Corasaniti & Reid J. Epstein, *Election Deniers Seek State Posts to Certify Votes*, N.Y. TIMES, Jan. 31, 2022, at A1, https://static01.nyt.com/images/2022/01/31/nytfrontpage/scan.pdf.

[279] Gardner, Rabinowitz, & Stevens, *supra* note 273.

[280] *Id.*

[281] *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (last updated Jan. 12, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021?ms=gad_voting%20laws_572836936998_8626214133_130570618446&gclid=Cj0KCQiAr5iQBhCsARIsAPcwROM-4uvZpMR8pMv-Kv6y-A1j86mb9ZNr5a0dqIuoI8T9dCj3cR2nU-kaAgFfEALw_wcB.

[282] H.B. 235, 2020 Leg., Reg. Sess. (Va. 2020); S.B. 219, 2020 Leg., Reg. Sess. (Va. 2020).

[283] H.B. 108, 2020 Leg., Reg. Sess. (Va. 2020); S.B. 601, 2020 Leg., Reg. Sess. (Va. 2020).

[284] *E.g.*, Ben Paviour, *Virginia Is Poised To Approve Its Own Voting Rights Act*, NPR (Feb. 26, 2021), https://www.npr.org/2021/02/26/971366621/virginia-is-poised-to-approve-its-own-voting-rights-act.

federal Voting Rights Act.[285] In 2021, it effectively imposed the same covenants on itself. This omnibus legislation, among other key provisions, prohibits racial discrimination or intimidation related to voting, empowers the Attorney General to sue in cases of voter suppression, requires local officials to collect public feedback or receive advance approval from the Attorney General before making local election changes (such as moving a precinct) – a preclearance requirement, and makes special provision for disabled voters.[286] Thus, the *New York Times* was able to report that Virginia, the onetime seat of the Confederacy's capital, had become "a voting rights bastion."[287] Another commentator, playing off the well-known ad "Virginia is for lovers," observed, "Apparently, Virginia is for voters."[288] At the General Assembly's 2022 session, Republican members sought, without success, to repeal these laws.[289]

C. The Supreme Court Eviscerates the Voting Rights Act

For decades, the Voting Rights Act of 1965 had stood as the centerpiece of federal protection for voting rights.[290] In 2013, however, the Supreme Court in *Shelby County v. Holder* dealt the statute a severe blow when a 5-4 majority declared a core portion of the law unconstitutional.[291] Section 5 of the Act requires that states covered by the statute must receive clearance from the Justice Department or from a federal district court in the District of Columbia before they make changes to voting procedures, such as redrawing electoral districts.[292] Even minor changes, such as moving a polling station, are subject to preclearance.

Section 4 sets out the Act's coverage formula. The section specifies which states, or portions thereof, are subject to preclearance.[293] Congress has repeatedly extended the preclearance requirement – for five years in 1970,

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[285] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (1965); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (holding that jurisdictions identified by Section 4(b) of the federal Voting Rights Act no longer need to follow such preclearance for new voting changes, unless covered by a different court order, submitted under the federal Voting Rights Act's Section 3(c)).

[286] Voting Rights Act of Virginia, ch. 528, 2021 Va. Acts 1651 (codified in scattered sections of Va. Code tit. 24.2).

[287] Reid J. Epstein and Nick Corasaniti, *Virginia*, *The Old Confederacy's Heart, Becomes A Voting Rights Bastion*, N.Y. TIMES, Apr. 2, 2021, at A16.

[288] James Hohmann, *Apparently*, *Virginia is for voters*, WASH. POST, July 19, 2021, at A19.

[289] Dean Mirshahi, *Virginia Democrats Reject Republican Bills to Change Voting Rules*, WRIC (Feb. 23, 2022), https://www.wric.com/news/politics/capitol-connection/virginia-democrats-reject-republican-bills-to-change-voting-rules/.

[290] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

[291] *See* Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

[292] Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965).

[293] *Id.* § 4, 79 Stat. at 438.

for seven years in 1975, for 25 years in 1982, and most recently, for another 25 years in 2006.[294] In its most recent action, however, Congress did not revise the coverage formula. Instead, it relied on data from its 1975 reauthorization.[295]

For Chief Justice John Roberts, Congress's failure to use current data was fatal to the Act's coverage formula. "Our country has changed," he said. "[W]hile any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions."[296] Relying on facts from 40 years in the past, Roberts said, has "no logical relation to the present day."[297] Roberts did not doubt that racial discrimination in voting remains today, but he thought it undeniable that Americans have made "great strides."[298] To illustrate that progress, Roberts observed that in 1965, when white registration was nearly 70 percent, "only 19.4 percent of African-Americans of voting age were registered to vote in Alabama, only 31.8 percent in Louisiana, and only 6.4 percent in Mississippi."[299] In the 2012 election, by contrast, turnout among African-American voters "exceed[ed] white voter turnout in five of the six States originally covered by § 5."[300]

The Court's decision in *Shelby County* is hardly a model of judicial restraint. After all, it is to Congress that the 15th Amendment looks to enforce its command that no state shall deny or abridge, on account of race, the right to vote.[301] When Congress extended the Voting Rights Act in 2006 and renewed section 4's coverage formula, the Senate's vote was unanimous; the bill passed the House by a vote of 390 to 33.[302] Dissenting in *Shelby County*, Justice Ruth Bader Ginsburg was so outraged that she read her dissent from the bench, an unusual moment on opinion day at the Court.[303] Ginsburg was distressed that the Court would substitute its judgment for that of Congress: "When confronting the most constitutionally invidious form of discrimination, and the most fundamental right in our

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[294] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 3–4, 84 Stat. 315 (1970); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 101, 202, 89 Stat. 400, 401 (1975); Voting Rights Act Amendments, Pub. L. No. 97-205, 96 Stat. 131 (1982); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act, Pub. L. No. 109-246, 120 Stat. 577 (2006).

[295] Adam Liptak, *Supreme Court Invalidates Key Part of Voting Rights Act*, N.Y. TIMES (June 25, 2013), https://www.nytimes.com/2013/06/26/us/supreme-court-ruling.html.

[296] Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

[297] *Id.* at 554.

[298] *Id.* at 549.

[299] *Id.* at 545-46.

[300] *Id.* at 535.

[301] U.S. CONST. amend. XV.

[302] Liptak, *supra* note 295.

[303] 570 U.S. at 559–94 (Ginsburg, J., dissenting); Liptak, *supra* note 295.

democratic system, Congress' power to act is at its height."[304] Citing the words of Dr. Martin Luther King, Jr. in her dissent from the bench, Ginsburg charged that his legacy and the nation's commitment to racial justice had been "disserved by today's decision."[305] One of King's most faithful disciples, John Lewis, lamented that the Court had "gutted the most powerful tool this nation has ever had to stop discriminatory voting practices from becoming law."[306]

Legislators and officials in states that had lived under the shadow of the Voting Rights Act were quick to take advantage of *Shelby County.* Hours after the Court's decision, then-Texas Attorney General Greg Abbott announced that Texas would immediately implement a voter ID law that had been blocked by the Act.[307] In 2016, reflecting on the impact of *Shelby County* on the first presidential election conducted without a fully operative Voting Rights Act in 50 years, the *New York Times*' Editorial Board observed that officials had closed polling places, having a particularly negative impact on minority voters. Texas had closed more than 400 voting locations. In Arizona, nearly every county had closed at least one voting location, as had 60 percent of counties in Louisiana.[308]

D. The Supreme Court Enables Barriers to Voting

Chief Justice Roberts' opinion in *Shelby County,* aimed at section 4, left section 2 standing. The latter provision, enabling challenges brought against voting practices after they have been put in place, forbids any measure "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[309] The statute instructs courts to consider "the totality of circumstances" in deciding whether a challenged practice has the forbidden effect.[310]

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[304] 570 U.S. at 566 (Ginsburg, J., dissenting).

[305] Liptak, *supra* note 295.

[306] John Lewis, Opinion, *John Lewis and Others React to the Supreme Court's Voting Rights Act Ruling*, WASH. POST (June 25, 2013), https://www.washingtonpost.com/opinions/john-lewis-and-others-react-to-the-supreme-courts-voting-rights-act-ruling/2013/06/25/acb96650-ddda-11e2-b797-cbd4cb13f9c6_story.html.

[307] Gary Martin & David Saleh Rauf, *Abbott Declares Voter ID in Effect Immediately in Wake of Supreme Court Ruling*, HOUSTON CHRON. (last updated June 26, 2013), https://www.houstonchronicle.com/news/houston-texas/houston/article/Abbott-declares-Voter-ID-in-effect-immediately-in-4622292.php.

[308] The Editorial Board, *The Voters Abandoned by the Court*, N.Y. TIMES (Nov. 8, 2016), https://www.nytimes.com/2016/11/09/opinion/the-voters-abandoned-by-the-court.html.

[309] 52 U.S.C. § 10301(a); Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965).

[310] 52 U.S.C. § 10301(b)

In the days before *Shelby County*, section 2 had been used almost entirely in redistricting cases, sometimes referred to as "vote dilution" cases.[311] The preclearance provision, section 5, had been used in "vote denial" cases challenging laws or practices making access to the polls more difficult.[312] In 2021, the Supreme Court decided *Brnovich v. Democratic National Committee*, a section 2 case challenging two restrictions to voting in Arizona.[313] One measure required election officials to discard ballots cast at the wrong precinct.[314] The other made it a crime for campaign workers, community activists, and other people to collect ballots for delivery to places, a practice critics called "ballot harvesting."[315]

Brnovich was the Court's first section 2 case addressing election procedures outside of redistricting. Thus, the justices were writing, in effect, on a blank slate. The conservative justices carried the day. By a 6-3 vote, the Court rejected the challenges to the Arizona practices. The majority and dissenting opinions offer a case study in how differently nine justices can read the same statutory language but, more importantly, the contrasting assumptions they can bring to voting rights cases. Justice Samuel Alito, who wrote for the majority, emphasized a state's legitimate interest in rooting out fraud. The casting of fraudulent ballots, he said, can dilute the weight of legitimate votes and can affect the outcome of a close election. Moreover, he declared, "Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome."[316] In laying out the guidelines by which courts should weigh section 2 challenges, Alito declared that "[m]ere inconvenience" cannot be enough to demonstrate a section 2 violation.[317]

Justice Elena Kagan complained that the majority had given "a cramped reading to broad language," using that reading to uphold practices that discriminate against minority voters.[318] "What is tragic," she said, "is that the court has (yet again) rewritten – in order to weaken" – the Voting Rights Act.[319] Justice Kagan was concerned, as well, with an implication in Alito's

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[311] Linda Greenhouse, Opinion, *On Voting Rights, Justice Alito is Stuck in the 1980s*, N.Y. TIMES (July 15, 2021), https://www.nytimes.com/2021/07/15/opinion/Voting-rights-supreme-court.html.

[312] *Id.*

[313] Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021).

[314] ARIZ. REV. STAT. ANN. § 16-122 (2021).

[315] ARIZ. REV. STAT. ANN. § 16-1005(E)–(F) (2016); *see, e.g.*, Amber Phillips, *What is Ballot 'Harvesting,' and Why is Trump So Against It*, WASH. POST (May 26, 2020), https://www.washingtonpost.com/politics/2020/05/26/what-is-ballot-harvesting-why-is-trump-so-against-it/.

[316] 141 S. Ct. at 2340.

[317] *Id.* at 2338.

[318] *Id.* at 2351 (Kagan, J., dissenting).

[319] *Id.* (Kagan, J., dissenting).

opinion that somehow practices should be measured by what was in play in 1982. That was the year that Congress amended section 2 to make it clear that that provision did not require a showing of intentional discrimination, but rather, disparate impact was sufficient.[320] For example, Alito said that "it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day."[321] Does this mean that measures cutting back on mail-in ballots are less suspect because they were not as widely used in 1982? This obviously worried Kagan: "The 1982 state of the world is no part of the Section 2 test . . . . Section 2 was meant to disrupt the status quo, not to preserve it . . . ."[322]

Conservatives were elated at the Court's decision in *Brnovich.* The *Wall Street Journal*'s editorial page declared that the Court had "saved federal courts from becoming super election commissions."[323] Others were not so thrilled. Professor Richard Hasen said that the Court has "put a huge thumb on the scale in favor of restrictive state voting rules."[324] Indeed, it is as if the justices had amended section 2's application to any "denial or abridgment" of the right to vote to insert "substantial" before "abridgment."[325] Overall, challengers invoking section 2 have a much steeper hill to climb after *Brnovich*, and state legislators wanting to throw additional obstacles in the path of voters can move ahead with more confidence.

E. Congress Fails to Enact Voting Rights Legislation

In his opinion in *Shelby County*, Chief Justice Roberts said that Congress was free, of course, to enact a new statute so long as it drew upon current data.[326] That supposition collided, as we know, with the realities of partisan politics. The bipartisanship that produced consensus as late as the Voting Rights Act's renewal in 2006 has evaporated. Democrats recently put forth two voting rights measures. One, the John Lewis Voting Rights Advancement Act, would restore the preclearance requirement of the Voting

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[320] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); *see also* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

[321] 141 S. Ct. at 2339.

[322] *Id.* at 2363 (Kagan, J., dissenting).

[323] Editorial Board, Opinion, *The Supreme Court Bolsters Voting Rights*, WALL ST. J. (last updated July 1, 2021), https://www.wsj.com/articles/the-court-bolsters-voting-rights-11625178708.

[324] Richard L. Hasen, Opinion, *The Supreme Court is Putting Democracy at Risk*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html.

[325] Nicholas Stephanopoulos, Opinion, *The Supreme Court Showcased its 'Textualist' Double Standard on Voting Rights*, WASH. POST (July 1, 2021), https://www.washingtonpost.com/opinions/2021/07/01/supreme-court-alito-voting-rights-act/.

[326] Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

Rights Act.[327] The other, a much more ambitious proposal called the Freedom To Vote Act, would make Election Day a national holiday, require states to allow voters to register on the day of an election, mandate at least 15 days of early voting, restore voting rights to felons who have completed their prison sentences, and require states to allow mail-in voting.[328] In states that require an ID to vote, the proposal would require more than a dozen different kinds of IDs to be accepted (thus preventing states from refusing to accept students IDs or utility bills).[329] The bill would create a formula providing a minimum number of drop boxes for each region.[330]

Both bills were repeatedly blocked in the Senate by Republican filibusters.[331] Renewing their efforts, Democrats combined the two bills into a single package.[332] Again, they failed. In order to get the omnibus bill through the Senate, the Democrats sought to change the chamber's filibuster rules and allow the voting rights measure to pass on a simple majority vote. To do that, however, the Democrats had to be united, in light of the Senate's being evenly divided 50-50 between the two parties. The Democrats did succeed in forcing the Senate, for the first time, to have a floor debate on the bill, stoking hours of raw and emotional exchanges on civil rights, racism, and elections.[333] In the end, two Democrats, Joe Manchin of West Virginia and Kyrsten Sinema of Arizona, were unwilling to go along with the rules change.[334] In the unlikely event that the Democrats pick up Senate seats in the November 2022 elections, the voting rights legislation could come to life again.[335] All in all, prospects for any serious action in the near future seem bleak.

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[327] H.R. 4, 117th Cong. (1st Sess. 2021-2022).

[328] S. 2747, 117th Cong. §§ 1011, 310, 1705, 312, (1st Sess. 2021-2022).

[329] *Id.* § 1801.

[330] *Id.* § 1305.

[331] *E.g.*, Nicholas Fandos, *Republicans Use Filibuster to Block Voting Rights Bill*, N.Y. TIMES (last updated Oct. 22, 2021), https://www.nytimes.com/live/2021/06/22/us/joe-biden-news.

[332] Freedom to Vote: John R. Lewis Act, H.R. 5746, 117th Cong. (1st Sess. 2021-2022).

[333] *See* Carl Hulse, *After a Day of Debate, the Voting Rights Bill is Blocked in the Senate.*, N.Y. TIMES (Jan. 19, 2022), https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html. The exchange between two black senators, Republican Tim Scott of South Carolina and Democrat Cory Booker of New Jersey was especially heated. Scott found it offensive that Democrats likened Republican opposition to the bill as a throwback to the days of Jim Crow. Booker, outraged, defended the comparison. *Id.*

[334] Siobhan Hughes & Eliza Collins, *Democrats Fail in Push to Change Senate Filibuster, Sinking Elections Bill*, Wall St. J. (last updated Jan. 19, 2022), https://www.wsj.com/articles/senate-democrats-brace-for-defeat-on-elections-bill-filibuster-changes-11642617597.

[335] *See, e.g.*, Larry J. Sabato, Kyle Kondik, & J. Miles Coleman, *2022 Senate: Crystal Ball 2022 Senate Ratings*, UVA CTR. FOR POL.(last updated Mar. 1, 2022), https://centerforpolitics.org/crystalball/2022-senate/.

F. The Supreme Court Closes the Federal Judiciary's Door to Challenges to Partisan Gerrymandering

For years, the Supreme Court's justices have been fragmented in cases in which parties have gone into federal courts to challenge partisan gerrymandering.[336] In none of these cases have five justices been willing or able to find a judicial remedy for that iniquitous practice. Finally, in 2019, in *Rucho v. Common Cause*, the Supreme Court shut that door.[337] Writing for the majority, Chief Justice Roberts declared:

> We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions.[338]

It is difficult to savor the reasoning in *Rucho* without recalling Justice Felix Frankfurter's flat assertion, as he put it in *Colegrove v. Green* (1946), that challenges to malapportionment of state legislatures presented a "political thicket."[339] He maintained that petitioners in *Colegrove* were asking relief of the Court "beyond its competence to grant."[340] In l962, the Warren Court entered that thicket after all. In *Baker v. Carr* (1962), Justice William Brennan, for the majority, rejected the argument that claims of legislative malapportionment presented a nonjusticiable "political question."[341] Justice Frankfurter dissented:

> Once the electoral apportionment process is recognized for what it is – the product of legislative give-and-take and of compromise among policies that often conflict – the relevant constitutional principles at once put these appellants out of the federal courts.[342]

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[336] Gaffney v. Cummings, 412 U.S. 735 (1973); Davis v. Bandemer, 478 U.S. 109 (1986); Vieth v. Jubelirer, 541 U.S. 267 (2004); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

[337] *See* Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[338] *Id.* at 2506–07.

[339] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[340] *Id.* at 552.

[341] Baker v. Carr, 369 U.S. 186, 209–37 (1962).

[342] *Id.* at 349 (Frankfurter, J., dissenting).

Baker paved the way for the Court's 1964 "one-person, one-vote" decision in *Reynolds v. Sims*.[343] There, too, Chief Justice Earl Warren noted that the Court was "cautioned about the dangers of entering into political thickets and mathematical quagmires."[344] Warren's response was unequivocal: equal protection requires that both houses of a legislature must be apportioned on the basis of population.[345]

What if Frankfurter's view had prevailed? Would constitutional government be better served if one-person, one-vote was not the law of the land? If the electoral process were distorted by arrangements in which one person's vote was worth less than another?

It is fair to ask whether we are better off when state legislatures need not worry that federal courts may intervene to curb partisan gerrymandering.[346] Whatever answer one might give to that question, a solid conservative majority has now settled in on the Supreme Court.[347] Only a dreamer could suppose that today's Court might change its mind about *Rucho* as its predecessor did about *Colegrove*. That being so, we should note Chief Justice Roberts' reminder in *Rucho* that states, through their constitutions, can address the problem of partisan gerrymandering.[348] Virginia voters voted to amend their constitution to create a bipartisan redistricting commission.[349] The commission deadlocked on the drawing of new district maps, throwing the process into the Supreme Court of Virginia.[350] The court set about its

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[343] *See* Reynolds v. Sims, 377 U.S. 533 (1964).

[344] *Id.* at 566.

[345] *Id.* at 568.

[346] A recent study by the *New York Times* concludes that, because of partisan gerrymanders, fewer than 40 seats (out of 435) in the House of Representatives will be competitive in the next election. Reid J. Epstein & Nick Corasaniti, *New Voting Maps Erase Competitive House Seats*, N.Y. TIMES, Feb. 7, 2022, at A1, https://static01.nyt.com/images/2022/02/07/nytfrontpage/scan.pdf.

[347] See Erwin Chemerinsky & Jeffrey Abramson, Op-Ed*, What Do We Teach Law Students When We Have No Faith in the Supreme Court?*, L.A. TIMES, Jan, 16, 2022, at 21; Leah Litman & Melissa Murray, Op-Ed*, Shifting from a 5-4 to a 6-3 Court Majority Could be Seismic*, WASH. POST, Sept. 25, 2020, at B4; Geoffrey R. Stone, *Seeing a Threat to Democracy in a Conservative Court*, WASH. POST, Apr. 16, 2021, at B7 (review OF IAN MILLHISER, THE AGENDA: HOW A REPUBLICAN SUPREME COURT IS RESHAPING AMERICA (2021)).

[348] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019). State courts in several states that feature prominently in national politics – North Carolina, Ohio, and Pennsylvania – have recently relied on their state constitution to order congressional or legislative district lines be redrawn. Michael Wines, *North Carolina Court Imposes New District Map, Eliminating G.O.P. Edge*, N.Y. TIMES (Feb. 23, 2022), https://www.nytimes.com/2022/02/23/us/politics/north-carolina-maps-democrats.html.

[349] VA. CONST. art. II, § 6.

[350] Mel Leonor, *Redistricting Panel Seems to be Deadlocked*, RICHMOND TIMES-DISPATCH, Oct. 9, 2021, at 1A; Andrew Cain, *"This Isn't Working": Virginia's Redistricting Commission Near Failure on Congressional Map*, RICHMOND TIMES-DISPATCH, Oct. 20, 2021, at 1A; Jeff E. Schapiro, *Va. High Will Do What Panel Wouldn't, Lawmakers Couldn't*, RICHMOND TIMES-DISPATCH, Oct. 22, 2021, at 1D.

task with care and with results that, whatever critics might have expected, were a vast improvement on the old ways of doing redistricting.[351]

V. BACK TO THE FUTURE: STATE CONSTITUTIONS

James Bryce, a perceptive observer of American institutions, said of state constitutions that their development "enables the annals of legislation and political sentiment to be read in these documents more easily and succinctly than in any similar series of laws in any other country. They are a mine of instruction for the natural history of democratic communities."[352] Yet too often, state constitutions are written off as being rather like a statute book – "too much debris of old tempests in local teapots . . . no grand vision, no overarching theory."[353]

The fact is that in the American scheme of things state constitutions are an essential component of the constitutional order. Consider the text of the Federal Constitution. States are mentioned at least 50 times. But state institutions are not described, save in Article IV's declaration that the United States "shall guarantee to every State in this Union a Republican Form of Government . . . ."[354] It is inescapable that the Federal Constitution assumes the existence of states and their constitutions. Moreover, in its basic structure – a framework for the new United States – the United States Constitution leaves the state constitutions to define a way of life for their citizens, to sketch out the common ground, and to define the political community.[355]

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[351] Frank Green & Mel Leonor, *Virginia Supreme Court Picks Two Experts to Assist in Redistricting; Wants Proposed Maps in 30 Days*, RICHMOND TIMES-DISPATCH. Nov. 19, 2021, at 1A; Mel Leonor, *Va. Supreme Court Approves Congressional Map that Moves Western Chesterfield, Western Henrico into Wittman's 1st*, RICHMOND TIMES-DISPATCH, Dec. 28, 2021, at 1A; Deb Wake & Liz White*, Virginia's Redistricting Process Was Messy, Frustrating and Complicated. It Still Worked*, RICHMOND TIMES-DISPATCH (Jan. 12, 2022), . https://richmond.com/opinion/columnists/deb-wake-and-liz-white-column-virginia-s-redistricting-process-was-messy-frustrating-and-complicated/article_cc2e4704-5a5b-5d01-b7e9-cf938d5a06b8.html A discussion of the amendment to Article II, § 6 of Virginia's Constitution, however instructive it might be, is beyond the scope of this article.

[352] James Bryce, I THE AMERICAN COMMONWEALTH 434 (2d ed. 1891). James Bryce, First Lord Bryce, was British ambassador to the United States from 1907 to 1913. His book, The *American Commonwealth*, first published in 1888, was widely read in America. See Christopher Harvie, *Bryce, James, Viscount Bryce (1838-1922)*, OXFORD UNIV. PRESS'S DICTIONARY OF NAT'L BIO. (2004).

[353] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 196 (1984). Linde, a justice of the Oregon Supreme Court, was a leading advocate for the independent use of state constitutions.

[354] U.S. CONST., art. IV, § 4. The Supreme Court has held that attempts to have the Court define a "republican form of government" is a political question. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[355] In its original design, the United States left the states free to decide who would have the vote. Even the qualifications to vote for the members of the United States House of Representatives turned on state law; electors for the House were those qualified to vote for members "of the most numerous Branch of the State Legislature." U.S. CONST., art. I, § 2.

How do state constitutions differ from the United States Constitution? They are distinctive in at least the following ways:

(1) They derive from popular consent in a more direct fashion than the Philadelphia convention and the ratifying conventions that brought about the Federal Constitution. Virginia's Declaration of Rights, for example, avers that "all power is vested in, and consequently derived from, the people . . . ."[356]

(2) State constitutions are documents of limitation, not grants of power. For its legislative power, Congress must look ultimately to Article I, Section 8 of the United States Constitution.[357] By contrast, Virginia's General Assembly enjoys plenary legislative powers, subject to limitations imposed by federal law and by the Constitution of Virginia.[358]

(3) During the 19th century, state constitutions increasingly became instruments of government rather than simply a framework for government. As American society and the economy became more complex, especially with the rise of powerful corporations, state constitutional conventions acted in the place of state legislatures to restrain corporations and to limit government debt.[359]

(4) State constitutions are far more readily amended, revised, or replaced than the Federal Constitution. Professor John Dinan, in a 2006 study, reported that the 50 states had held 233 constitutional conventions, adopted 146 constitutions, and ratified over 6,000 constitutional amendments.[360]

(5) One who looks at a state constitution will inevitably be struck by how much longer and more detailed it is than the federal document. State constitutions devote whole articles to subjects which are not even mentioned in the United States Constitution, for example, education, local government, and the environment.[361]

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[356] VA. CONST. art. I, § 2.

[357] U.S. CONST., art. I, § 8. Those powers, even though enumerated, are quite broadly interpreted, thanks to the necessary and proper clause of Article I, section 8. See McCulloch v. Maryland, 17 US (4 Wheat.) 316 (1819).

[358] *See, e.g.*, Harrison v. Day, 200 Va. 764, 770 (Va. 1959) ("The General Assembly functions under no grant of power. Unless forbidden by some State or Federal constitutional provision, its powers are plenary."); Old Dominion Comm. for Fair Util. Rates v. State Corp. Comm'n, 294 Va. 168, 177–78 (Va. 2017); Elizabeth River Crossings OpCo, LLC v. Meeks, 286 Va. 286, 311 (Va. 2013) (discussing this in the context of delegating legislative powers to administrative agencies).

[359] See *Nineteenth-Century State Constitutionalism*, *in* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 94-136 (1998).

[360] JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 1 (2006).

[361] *See* VA. CONST. art. VII (local government); *id.* art VIII (education); *id.* art. XI (conservation). Alabama's Constitution has 402,852 words. THE COUNCIL OF STATE GOVERNMENTS, 53 THE BOOK OF THE STATES 5 & 7 tbl. 1.3 (2021). By contrast, the main body of the original United States Constitution has, by our count, 4,501 words. U.S. CONST.

(6) The periodic revisions and frequent amendments to state constitutions are a road map to the major eras of American history. At the federal level, there have been important amendments, especially those following the Civil War, but to map the evolution of federal constitutional law, one looks, above all, to decisions of the Supreme Court. But by following the trail of state constitutions and their evolution, one sees the footprints of the age of Jackson, the Civil War and Reconstruction, the Progressive movement, and the move toward notions of management and delivery of governmental services.[362]

(7) State constitutions, especially those grounded in the thought of the founding era, often set out to foster civic virtue and the character of citizenship in a republic. Virginia's Declaration of Rights proclaims: "That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[363]

(8) The voice of the people is directly manifest in much that one finds in state constitutions. Popular constitutionalism is partly the result of the ease with which state constitutions are revised or amended. In some states, the people can act even more directly though the initiative, referendum, and recall.[364]

(9) State courts can rely on state constitutions to create rights beyond those recognized by the United States Supreme Court.[365] A striking example is state courts in a number of states requiring more equal funding of rich and poor school districts notwithstanding the Supreme Court's rejecting the argument that the 14th Amendment's equal protection clause should impose such a mandate.[366]

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[362] *See* ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 29 (2009).

[363] VA. CONST. art. I, § 15.

[364] *See* G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO STATE L.J. 237 (2016).

[365] *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). The United States Supreme Court has expressly approved the ability of state courts to use state constitutions to create rights that are more expansive than federal rights. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980).

[366] *Compare, e.g.,* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (N.J. 1973), *with* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 US 1 (1973). *See* Paul L. Tractenberg*, Reforming School Finance Through State Constitutions:* Robinson v. Cahill *Points the Way*, 27 RUTGERS L. REV. 365, 373–81 (1974); David G. Sciarra & Danielle Farrie, *From* Rodriguez *to* Abbott*: New Jersey's Standards-Linked School Funding Reform*, *in* THE ENDURING LEGACY OF *RODRIGUEZ*: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITIES 119–42 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015); Carmel Martin et al., *Lessons from State School Finance Inform a New Federal Right to Equal Access to a High-Quality Education*, *in* A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 283–302 (Kimberly J. Robinson, ed. 2019); *Equality and Adequacy of School Funding*, *in* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 22–32 (2018).

Justice William J. Brennan, Jr., in a much-cited law review article, celebrated the place of state constitutions in the fabric of American constitutionalism:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.[367]

It was in this spirit that the Commission on Constitutional Revision laid out the principles that guided the commissioners in their work in drafting a new Virginia constitution.[368] In this work, the commissioners often had the health of the political community in mind. Thus, the commission drew upon language from Thomas Jefferson's Bill for the More General Diffusion of Knowledge in adding education as a fundamental right alongside other rights in the Bill of Rights.[369] Further, in addition to the original 1776 Declaration of Rights' admonitions to those who would preserve free government and liberty, the commissioners added a contemporary note: "and by the recognition by all citizens that they have duties as well as rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed."[370] And the commissioners proposed the Constitution's first anti-discrimination clause.[371]

VI. EPILOGUE

Thomas Jefferson famously proclaimed that "the earth belongs always to the living generation."[372] Writing to Samuel Kerchival in 1816, Jefferson

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[367] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[368] CCR, *supra* note 19, at 8–11.

[369] VA. CONST. art. I, § 15; CCR, *supra* note 19, at 99. For Jefferson's Bill, *see* Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge* (1779), *in* THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION 526–34 (James P. McClure & J. Jefferson Looney ed., 2009-2022). In 1786, Jefferson, in Paris, wrote George Wythe: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom and happiness." PAPERS OF THOMAS JEFFERSON X, 245 (Julian P. Boyd ed. 1950). *See also* CCR, *supra* note 19, at 253–73 (delivering the Commission's proposals for Article VIII).

[370] VA. CONST. art. I, § 11.

[371] *Id.* § 15.

[372] Letter from Thomas Jefferson to James Madison (September 6, 1789), in 15 THE PAPERS OF

invited each generation to ponder the existing constitution and to debate in what respects it might not suit the needs of the present time.[373] But change should come only with deliberation and with regard to the charge laid upon us by George Mason and his contemporaries: "That no free government, nor the blessings of liberty, can be preserved to any people . . . but . . . by frequent recurrence to fundamental principles . . . ."[374] This is especially true in deciding who belongs to the political community.

Virginia's Declaration of Rights of 1776 has to be counted as being among the western world's most influential constitutional documents. The example provided by George Mason and his colleagues quickly spread to the other colonies. Working from Mason's initial draft of the Declaration, as published in the *Virginia Gazette* on June 1, 1776, Pennsylvania's convention produced a bill of rights which John Adams declared to have been taken "almost verbatim from that of Virginia."[375] Papers in other colonies published Mason's draft, thus spreading it "up and down the seaboard."[376] The Virginia Declaration of Rights was also at Thomas Jefferson's elbow when he drafted the Declaration of Independence.[377]

The Virginia Declaration of Rights quickly became part of the transatlantic debate over the nature of rights. In France, Jacques-Pierre Brissot celebrated "l'immortelle declaration de l'Etat de Virginie sur la liberté des cultes."[378] Both Benjamin Franklin and Thomas Jefferson, as American ministers to France, spread word of the early American state constitutions far and wide.[379] French translations of those constitutions were available to members of the country's National Convention.[380] Virginia's Declaration of Rights proved especially influential when, in 1789, the Marquis de Lafayette drafted France's Declaration of the Rights of Man and the Citizen.[381] Indeed, the first sentence of Article I of France's Declaration

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THOMAS JEFFERSON 292–98 (Julian P. Boyd ed., 1958).

[373] Letter from Thomas Jefferson to Samuel Kerchival (July 12, 1816), in 10 THE PAPERS OF THOMAS JEFFERSON 222–28 (J. Jefferson Looney ed., 2013).

[374] VA. CONST. art. I, § 15.

[375] John Adams Diary 29, 12 March - 31 July 1779 50 (Jun. 23, 1779) (On file with the Massachusetts Historical Society).

[376] *Editorial note of first draft of the Virginia Declaration of Rights (May 1776)*, *in* 1 PAPERS OF GEORGE MASON, 1725-1792, at 276 (Robert A. Rutland ed.,2011).

[377] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 104 (1997).

[378] PAPERS OF GEORGE MASON, *supra* note 376, at 286.

[379] WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 460-63 (2004); DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 224 (1951).

[380] GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN: A CONTRIBUTION TO MODERN HISTORY 18 (MAX FARRAND TRANSL. 1901)

[381] MAIER, *supra* note 377, at 168. On Jefferson's close contacts with Lafayette during the latter's drafting of France's Declaration, *see* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 223–25 (1948).

is lifted virtually verbatim from Mason's draft.[382] Where one might expect to find in the French Declaration the influence of figures of the enlightenment in France, such as Jean-Jacques Rousseau, scholars have found that the document, especially its first several articles, closely resemble the Virginia Declaration.[383] All in all, Professor Steven Calabresi is able to declare, "The modern world's attachment to liberty and to Bills of Rights in general dates back to the adoption of The Virginia Declaration of Rights . . . "[384]

Soon after the fall of the Berlin Wall and the collapse of the communist empire in Central and Eastern Europe, I was on my way to Bucharest to compare notes with members of a team of drafters at work on a post-communist constitution for Romania. I stopped off in Paris and paid a visit to my friend, Robert Badinter, the president of France's Conseil Constitutionnel. When I told Badinter where I was headed and why, he smiled a wry gallic smile and said light-heartedly, "You will enjoy seeing Bucharest, but there really won't be that much for you to do…We French have already been there." He went on to add, however, "It's quite appropriate that a Virginian should be going, coming, as you do, from the state that produced the Virginia Declaration of Rights." Besides being an eminent jurist, Badinter is a respected scholar. He and his wife have written a well-received biography of the French philosopher, the Marquis de Condorcet.[385] It was Condorcet who said, "The first declaration of rights really worthy of the name is the Virginia declaration, signed on l June 1776, and the author of that declaration deserves the eternal gratitude of the human race."[386]

Declaring rights and defining the political community were intertwined in the adoption of the Virginia Declaration of Rights. They remain intertwined in our time. In the two and a half centuries since 1776, Virginia has sometimes done itself proud – think of the handiwork of James Madison or John Marshall, or, more recently, of Lewis Powell or Oliver Hill. There have been other times, when Virginia was on the wrong side of history – think of slavery, and Jim Crow, and Massive Resistance. We are endlessly

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[382] Article I of the French Declaration states that "Men are born and remain free and equal in rights." FRENCH DECL. OF THE RIGHTS OF MAN art. I.

[383] *See* Donald S. Lutz, *The States and the U.S. Bill of Rights*, 16 S. ILL. U. L.J. 251 (1992).

[384] Steven G. Calabresi, *On Liberty, Equality, and the Constitution: A Review of Richard A. Epstein's* The Classical Liberal Constitution, 8 N.Y.U. J. L. & LIBERTY 839, 857 (2014).

[385] ELISABETH BADINTER & ROBERT BADINTER, CONDORCET: UN INTELLECTUEL EN POLITIQUE (1988).

[386] Steven Lukes and Nadia Urbinati, eds., CONDORCET: POLITICAL WRITINGS 176–77 (2012).

grappling with how to follow "the better angels of our nature" in nurturing a political community that is democratic and just.[387]

[387] Abraham Lincoln, *First Inaugural Address of Abraham Lincoln*, YALE L. SCH. AVALON PROJECT (Mar. 4, 1861), https://avalon.law.yale.edu/19th_century/lincoln1.asp; JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990).