VOTING RIGHTS AND THE 1971 VIRGINIA CONSTITUTION

Daniel R. Ortiz[♦]

> Mr. Glass: Mr. President, in the midst of differing contentions and suggested perplexities, there stands out the uncontroverted fact that the article of suffrage which the Convention will today adopt does not necessarily deprive a single white man of the ballot, but will inevitably cut from the existing electorate four-fifths of the negro voters. (Applause.) That was the purpose of this Convention; that will be the achievement.
>
> [Delegate]: Will it not be done by fraud and discrimination?
>
> Mr. Glass: By fraud, no; by discrimination, yes. But it will be discrimination within the letter of the law, and not in violation of the law. 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, without materially impairing the numerical strength of the white electorate. As has been said, we have accomplished our purpose strictly within the limitations of the Federal Constitution by legislating against the characteristics of the black race, and not against the "race, color, or previous condition" of the people themselves. It is a fine discrimination, indeed, that we have practiced in the fabrication of this plan; and now, Mr. President, we ask the Convention to confirm our work and emancipate Virginia.[1]

* * *

♦Michael J. and Jane R. Horvitz Distinguished Professor of Law and Director, Supreme Court Litigation Clinic, University of Virginia School of Law. I thank the reference librarians at the law school and Leslie Ashbrook, Kathryn Boudouris, Ben Doherty, Randall Flaherty, and Michael Klepper in particular for their great help in locating relevant materials.

[1] 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION STATE OF VIRGINIA 3076-77 (J.H. Lindsay ed.,1906) [hereinafter PROCEEDINGS].

Thus, Carter Glass, the delegate most responsible for the 1902 Constitution's electoral provisions,[2] called upon his fellow delegates at the Virginia Constitutional Convention of 1901-02 to reject the final obstacle to overhauling Virginia's suffrage requirements. He felt no need to hide his aim: disenfranchising African-Americans. Indeed, he celebrated it. And as the applause he received from the other delegates indicates, he was hardly alone. That was, after all, "exactly . . . what th[e] Convention was elected for."[3]

On its face, the 1971 Virginia Constitution's treatment of voting rights appears remarkably unremarkable. It hardly speaks to them one way or another. Only a few years before, however, the state had been the leader of "Massive Resistance," the movement across large parts of the South to prevent desegregation of the public schools after *Brown v. Board of Education*;[4] all but one of its congressional delegation had voted against the Voting Rights Act of 1965;[5] and the then-Constitution expressly required poll taxes[6] and literacy tests,[7] and it disenfranchised felons according to a standard thought to disproportionately affect African-Americans.[8] Had there been a dramatic change of heart between the mid-1960s and the 1971 Constitutional Convention? Had the state undergone a sea change in its thinking about race in only a few short years?

Alas, no. Such a triumphalist narrative, as comforting as it may be, is mistaken. The 1971 Constitution largely omitted any mention of voting rights (or, more accurately, the suppression of them) not because Virginia had changed heart, but because the federal government, through the

---

[2] RAYMOND H. PULLEY, OLD VIRGINIA RESTORED: AN INTERPRETATION OF THE PROGRESSIVE IMPULSE 1870-1930, at 83 (Univ. Press of Va. 1968). After the convention, the chair of the convention's election law committee, Senator John Warwick Daniel, wrote to Glass that "[t]he success in the Convention of the suffrage plan adopted by that body was . . . more due to you . . . than anyone else." *Id.* at 83.

[3] *Id.* at 84.

[4] 347 U.S. 483 (1954).

[5] *See To Pass S. 1564, the Voting Rights Act of 1965*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s78 (last visited Mar. 18, 2022) (noting nay votes of Senators Byrd and Robertson of Virginia); *To Pass H.R. 6400, the 1965 Voting Rights Act,* GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/h87 (last visited Mar. 18, 2022) (noting single yea vote among Virginia House delegation of Congressman Jennings).

[6] VA. CONST. of 1902, art. II, §§ 18, 20, 21.

[7] *Id.* art. II, § 20.

[8] The 1902 Constitution disenfranchised those "convicted after the adoption of this Constitution . . . of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretences, embezzlement, forgery, or perjury." *Id.* art. II, § 23. "The scholarly consensus is that [the] 1876 amendment to the Virginia Constitution, which added 'petit larceny' to the list of disqualifying offenses . . . was clearly designed to target African American voters." JOHN DINAN, THE VIRGINIA STATE CONSTITUTION 89, n.46 (2d ed., Oxford Univ. Press 2014) (collecting authorities).

Supreme Court and Congress, had taken away its toolbox. To judge the 1971 Constitution's position on voting rights, one must compare it to its predecessor's position. From that perspective, to be sure, it at first looks extremely progressive. But one must also understand it in light of increasingly progressive background federal requirements, like the Supreme Court's striking down poll taxes[9] and Congressional suppression of literacy tests,[10] that gave racial disenfranchisement less room to maneuver—or at least less room to operate as openly as before. Viewed against this quickly changing federal background, the 1971 Constitution's voting rights achievements appear ambivalent.

To begin to understand voting rights under the 1971 Constitution, one must first understand the document it was replacing. This article thus begins by laying out how the 1902 Constitution openly and harshly suppressed voting rights and permitted further suppression through sub-constitutional means. It then describes the durability of those tools of suppression. Some sunsetted after only two years, once they had grandfathered in many whites who otherwise would have been disenfranchised under the strict requirements that fell into place in 1904. Others persisted. Some of the most obviously unfair and humiliating were gradually abolished by court decree. Other provisions lived on until the Voting Rights Act of 1965 suppressed them. One other lives on still—the courts and Congress permit it—and was the recent focus of dispute between Democratic Governor Terry McAuliffe and the Republican leaders of the General Assembly.[11]

Ultimately, one must make one's own judgment about the 1971 Constitution's position on voting rights. On the one hand, it threw out many of the racially disenfranchising devices its predecessor had openly embraced. On the other, it largely had no choice. Federal law required it to do so. The 1971 Constitution also maintained the one disenfranchising tool that federal law allowed it to keep,[12] and it made clear that the legislature could later readopt another that federal law appeared to only temporarily suspend.[13]

---

[9] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (invalidating Virginia poll tax).

[10] *See* 52 U.S.C. § 10303(c) (suspending literacy tests).

[11] Howell v. McAuliffe, 788 S.E.2d 706 (Va. 2016) (invalidating executive order restoring to some felons the right to vote).

[12] VA. CONST. art. II, § 1 ("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.").

[13] *Id.* art. II, § 2 (allowing reimposition of literacy test) ("Nothing in this article shall preclude the General Assembly from requiring as a prerequisite to registration to vote the ability of the applicant to read and complete in his own handwriting the application to register.").

I. VOTER QUALIFICATIONS UNDER THE 1902 VIRGINIA CONSTITUTION

The 1902 Constitution limited the franchise to males over the age of 21[14] and categorically excluded "[i]diots, insane persons, and paupers," those convicted of certain crimes, and those who had participated in "a duel with a deadly weapon" from voting.[15] Those otherwise qualified could register in two separate ways. Before January 1, 1904, any male over 21 could register provided he satisfied any one of three conditions. First, he could register if he had served "in time of war in the army or navy of the United States, of the Confederate States, or of any state of the United States or of the Confederate States"[16] or was "a son of such person."[17] The vast majority of males registering under this head would have qualified by virtue of service during the Civil War[18] and only a small percentage of those who served then were African-American.[19] Second, he could register if "he own[ed] property, upon which … state taxes aggregating at least one dollar ha[d] been paid."[20] This narrowed the electorate in two ways. It imposed an economic burden, which although not large, fell disproportionately on the poor, many of whom were African-American, and it required the ownership of valuable real property. Third, he could register if he was "able to read any section of this Constitution submitted to him by the officers of registration and . . . give a reasonable explanation of the same; or if unable to read, such section, [be] able to understand and give a reasonable explanation thereof when read to him by the officers."[21] This method of qualification, through the so-called "Understanding Clause," was subject to obvious manipulation. The election officers got to pick which part of the Constitution the registrant had to explain.[22] A registrar looking to disqualify an African-American registrant "could always fall back on a demand for explanation of an *ex post*

---

[14] VA. CONST. of 1902, art. II, § 18.

[15] *Id.* art. II, § 23.

[16] *Id.* art. II, § 19.

[17] *Id.*

[18] *See* U.S. DEP'T OF DEF., DIRECTORATE FOR INFORMATION OPERATIONS AND REPORTS, SELECTED MANPOWER STATISTICS FISCAL YEAR 1997, at 48-50 tbl. 2-11 (1997) (listing number of active-duty military personnel for period 1850-1901).

[19] *See Black Soldiers in the U.S. Military During the Civil War*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/blacks-civil-war (last visited Mar. 28, 2022) ("By the end of the Civil War, roughly 179,000 black men (10% of the Union Army) served as soldiers in the U.S. Army and another 19,000 served in the Navy.").

[20] VA. CONST. of 1902, art. II, § 19.

[21] *Id.*

[22] *See, e.g.*, ANDREW BUNI, THE NEGRO IN VIRGINIA POLITICS 1902-1965, at 20-21 (Univ. Press of Va. 1967) (giving examples).

facto law"[23] and few registrars operated race-blind.[24] Indeed, that was exactly the intent of those who proposed the clause. On the floor of the convention, one proponent explained:

> I do not expect an understanding clause to be administered with any degree of friendship by the white man to the suffrage of the black man. I expect the examination with which the black man will be confronted, to be inspired by the same spirit that inspires every man upon this floor and in the convention. I would not expect an impartial administration of the clause. . . . We do not come here prompted by an impartial purpose in reference to negro suffrage. We come here to sweep the field of expedients for the purpose of finding some constitutional method of ridding ourselves of it forever.[25]

The Understanding Clause was "intended to open to the illiterate white men of Virginia an avenue to the ballot-box."[26]

Together, these paths to registration largely limited the vote to white males. Although there were approximately 147,000 African-American males of voting age when the 1902 Constitution was adopted, only 21,000 remained on the registration lists by October that year.[27] In the cities, African-American registrations dropped dramatically. Richmond had 6,427 registered African-American in 1900 but only 760 in 1902.[28] Norfolk's number dropped in that same period from 1,826 to 504.[29] Smaller towns experienced similar declines. Culpeper's African-American registrants dropped from 1,075 to 153.[30] One newspaper estimated that only 15,000 African-Americans in Virginia voted in the 1904 presidential election[31] out of a total of 130,410 votes cast.[32]

---

[23] RALPH CLIPMAN MCDANEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901-1902, at 48 (Johns Hopkins Press 1928).

[24] *Id.* at 47-48 ("The probability is that [registrars] reflected the opinions of the white people of their communities and that the amount of negro registration in each county reflected the conditions that existed there—that is, where there were many negroes few were allowed to register.").

[25] 2 PROCEEDINGS, *supra* note 1, at 2972-73 (statement of Mr. Thom).

[26] *Id.* at 2974 (statement of Mr. Thom).

[27] *See* MCDANEL, *supra* note 23, at 48, 50.

[28] BUNI, *supra* note 22.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 27.

[32] *1904 Presidential General Election Data—National, by state*, DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS,

These particular discriminatory mechanisms were adopted for two reasons. First, they were thought to work. And the voting registration figures show they did. Second, they were thought beyond constitutional reproach. As one proponent explained, the great virtue of the veteran and son-of-a-veteran qualification was that, "[i]t is not thought that this violates any principle of the Constitution of the United States. It has no color in it, and is, therefore, not amenable to any of the amendments of the Constitution of the United States."[33] The United States Supreme Court itself, moreover, had recently upheld the use of understanding clauses in *Williams v. Mississippi*,[34] as one proponent explained at length on the floor of the convention.[35]

After January 1, 1904, a different set of discriminatory restrictions applied. In order to successfully register after that date, a registrant would have to satisfy three independent requirements. First, unless he was a Civil War veteran, he would have to pay poll taxes for the prior three years or for one year if he had just turned 21.[36] As the Supreme Court has noted, this "Virginia poll tax was born of a desire to disenfranchise the Negro."[37] The committee report accompanying a plan to impose the poll tax at the 1901-02 Convention itself argued:

> The capitation tax as a prerequisite for voting will . . . have a tendency to purge and purify the electorate. It will not do away with the negro as a voter altogether, but it will have the effect of keeping the numbers of the most unworthy and trifling of that race from the polls. I do not know of anything better in view of the fifteenth amendment.[38]

And it worked. One commentator has noted that the poll tax "[w]as probably . . . the most efficient discourager of voting."[39] In 1923, for example, 63 percent of whites paid the tax as compared to only 38 percent of African-

---

https://uselectionatlas.org/RESULTS/data.php?year=1904&datatype=national&def=1&f=0&off=0&elect=0 (last visited Mar. 11, 2022).

[33] 2 PROCEEDINGS, *supra* note 1, at 2944 (statement of Mr. R.L. Gordon).

[34] 170 U.S. 213 (1898). The Court upheld the use of the Mississippi understanding clause against an equal protection challenge because "[it] do[es] not on [its] face discriminate between the races, and it has not been shown that [its] actual administration [i]s evil; only that evil [i]s possible under [it]." *Id.* at 225.

[35] 2 PROCEEDINGS, *supra* note 1, at 2945-49 (statements of Mr. Daniel).

[36] VA. CONST. of 1902, art. II, § 20.

[37] Harmon v. Forssenius, 380 U.S. 528, 543 (1965).

[38] 2 PROCEEDINGS, *supra* note 1, at 604.

[39] MCDANEL, *supra* note 23, at 53.

Americans.[40] And since the Supreme Court had upheld it in *Williams v. Mississippi*,[41] it was thought safe from any constitutional attack.

Second, he would have "to register in his own handwriting, without aid, suggestion, or memorandum . . . stating . . . his name, age, date and place of birth, residence and occupation . . . and whether he has previously voted, and, if so, the state, county, and precinct in which he voted last."[42] This requirement, if applied even-handedly, meant that every registrant would have to fill out a blank sheet of paper with all the required information, in the correct order, without aid of any person or form. Those who could not write, of course, simply could not register. And even many of those who could, if truly unaided, would omit or mistake required information or include it in the wrong order. This version of a literacy test operated much like examination under the Understanding Clause, which applied until 1904, to weed out the lesser educated, who included a larger proportion of African-Americans than whites due to educational discrimination.[43] According to the 1920 census, for example, 29.3 percent of African-Americans 21 years old or older were illiterate, whereas only 6.9 percent of similar whites were.[44] Many registrars, moreover, applied this requirement in a discriminatory way.[45] In some cases, "registrars handed whites a piece of paper and told them step-by-step what to write down; blacks, on the other hand, had to memorize all pertinent information in advance."[46]

One might wonder why the Virginia Framers wanted this literacy test to replace the Understanding Clause in 1904. They both, after all, tested similar qualifications in ways susceptible to similar discrimination. The answer lies in a surprising fear. The literacy test, as one delegate explained it,

---

[40] *Id.* at 55.

[41] *See* Williams v. Mississippi, 170 U.S. 213, 222 (1898) (upholding poll tax and criminal disenfranchisement provision because "[t]hey reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime").

[42] VA. CONST. of 1902, art. II, § 20.

[43] In 1900, for example, the national school enrollment rate of white males was almost twice that of African-American males—58.4 versus 29.4 percent. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., BICENTENNIAL EDITION: HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, at 370 ser.H433-441 (1975), https://www2.census.gov/library/publications/1975/compendia/hist_stats_colonial-1970/hist_stats_colonial-1970p1-chH.pdf.

[44] MCDANEL, *supra* note 23, at 55.

[45] *See id.* ("Practically none of the illiterate negroes can vote, while it is very probable that many of the [illiterate] whites are on the permanent registration lists.").

[46] J. DOUGLAS SMITH, MANAGING WHITE SUPREMACY: RACE, POLITICS, AND CITIZENSHIP IN JIM CROW VIRGINIA 230 (Univ. of N.C. Press 2002); *see also id.* at 58 ("[B]lack women . . . were handed a blank application and told to write down all necessary information. White applicants, on the other hand, received a form listing exactly what was required.").

> serves to strengthen th[e] plan at a point where we have always believed it to be weak, and, that is, if the administration of the understanding clause should get into the hands of a party, who would undertake to admit negroes to the suffrage by wholesale and contrary to the term of the requirements, then there should be something substantial and efficient still left between the negro and the ballot-box.[47]

Third, a registrant would have to answer "any and all questions affecting his qualifications as an elector . . . ."[48] This requirement appears more innocent than the others, but it was not. After the Understanding Clause expired on January 1, 1904, registrars lost an effective discriminatory tool and repurposed this provision to discriminatorily test registrants' civic understanding. Registrars denied registration to African-Americans because they did not know such things as how many people signed the Declaration of Independence, when payment of the poll tax was not required, and what all the prerequisites to enable one to register were,[49] even when the registrars themselves did not know the answers to some of these questions.[50]

In addition, the 1902 Constitution allowed much discrimination in everyday election administration and party activities. In Hampton, for example, the registrar allowed whites to register in two or three minutes, while making African-Americans wait for hours.[51] He did so by making all registrants take a number. The white numbers began at one while those for African-Americans began at 40. As a result, whites who arrived after African-Americans got lower numbers and experienced little wait time. Some African-Americans had to wait until the office closed and were told to come back another day.[52]

In 1912, moreover, Virginia allowed political parties to hold primary elections limited to white voters.[53] The Democratic Party quickly excluded African-Americans. Since the Democratic Party ruled Virginia politics

---

[47] 2 PROCEEDINGS, *supra* note 1, at 2978.
[48] VA. CONST. of 1902, art. II, § 20.
[49] BUNI, *supra* note 22, at 125; SMITH, *supra* note 46, at 230-32.
[50] SMITH, *supra* note 46, at 232.
[51] *Id.* at 58.
[52] *Id.*
[53] *See* BUNI, *supra* note 22, at 61-68 (discussing Democratic white primary and its repercussions on other parties).

during the period of the white primary,[54] this effectively disenfranchised African-American voters from the usually decisive stage of the electoral process.

II. THE DURABILITY OF DISCRIMINATION IN VOTING

Those who qualified for voting under the pre-1904 standards "bec[a]me permanent electors."[55] They did not have to re-register under the 1904 standards, "the permanent scheme of suffrage,"[56] after the earlier standards expired. Going forward, then, four separate mechanisms operated to exclude African-Americans: (1) the requirement that one answer "any and all questions affecting [one's] qualifications as an elector," which registrars had repurposed to work as a new understanding clause; (2) the poll tax; (3) the literacy test; and (4) the criminal disenfranchisement provision. The first three have been struck down or effectively neutered by the courts or Congress; the last survives still.

A. The New Understanding Clause

The repurposed requirement that one answer all questions affecting one's qualifications as an elector was the first discriminatory mechanism to go. After the local registrar refused to register the Commandant of Cadets and several professors at the Hampton Institute, a historically black research university, as well as local African-American professionals and business people, a test case involving someone who would not "know offhand the answers to the questions put to him by the registrar" was taken to the Virginia Supreme Court.[57] The applicant wrote out and submitted a registration application that "was so polished in its accuracy that it was reminiscent of a night school, . . . [a] suspicion . . . amply confirmed by his

---

[54] The Democratic Party's gubernatorial nominees, for example, won every election during this period. *See Gubernatorial Election Results from 1901 to 1932*, VA. DEP'T OF ELECTIONS, HIST. ELECTIONS DATABASE, https://historical.elections.virginia.gov/elections/search/year_from:1901/year_to:2017/office_id:3/stage:General (under elections tab in search box enter "1901" and "1932" in years field, "governor" in office field, "all general elections" in stage field, and click on candidates link in every elections row). The Fourth Circuit struck down the Virginia white primary in 1930. *See* Bliley v. West, 42 F.2d 101, 103 (4th Cir. 1930) (invalidating the white primary because "[i]f all the political parties in the state of Virginia incorporated the same qualifications in their rules and regulations as did the Democratic party, nobody could participate in the primary, except white persons, and other races would thereby be deprived of a material right guaranteed to them under the Constitution . . . .").

[55] 2 PROCEEDINGS, *supra* note 1, at 2950 (statement of Mr. Daniel).

[56] *Id.*

[57] *Registrars' Subterfuge Held Illegal*, NORFOLK J. & GUIDE, Oct. 10, 1931, at 15.

subsequent ["qualifications"] examination, the questions and answers [to] which were written by the applicant."[58] His hand-written questions and answers were as follows:

> *Question.* What is *ment* By Legal *Residenct* in Va
> Answer. All persons Who have lived in the Stat—for one year are a Legal *Residenter*
> Question. When is the Payment of Poll Tax Not *Requared*
> Answer. After a *Pearson* have *obtaine* the age of sixty years
> Question. What are the *Requisites* to enable one to Register in Va
> Answer he will have to Be 21 years of age and a citizen—of the State for one year in the City Town or county for *6 month* Precinct in which he *ofers* to vote 30 Days and Pay all State Tax for 3 years Back say for 1926, 27 & 28 . . . ."[59]

The court held Davis's initial application adequate, if flawed:

> The application filed by Davis is not in good form, and shows that he has comparatively little education. But was made and signed by him in his own handwriting, in the presence of the registrar, without aid, suggestion or memorandum; is addressed to the proper officer; gives substantially the information which section 20 of the Constitution requires that it shall give; and discloses nothing for which the Constitution provides that a person shall be excluded from registering and voting. Such an application for registration is sufficient in law.[60]

The only question was whether Davis's answers to the registrar's oral questions disqualified him. The court noted that the questions a registrar may ask an applicant "are limited to 'questions affecting his qualifications as an elector.'"[61] Although the temporary pre-1904 regime imposed an

---

[58] Davis v. Allen, 160 S.E. 85, 88 (Va. 1931) (Holt, J., dissenting).
[59] *Id.* at 86 (italics and misspellings in original).
[60] *Id.* at 87.
[61] *Id.* (quoting VA. CONST. of 1902, art. II, § 20).

understanding requirement, the permanent regime did not.[62] Even if the first question concerned Davis's qualifications, the court held that his "answer . . . [,] while showing his lack of education, [wa]s substantially . . . correct."[63] The court found the other two questions impermissible. They "elicit[ed] no information from him with reference to any qualification" for voting.[64] They instead

> seem[ed] designed to test his knowledge or understanding of the law relating to the general subject, who may register and vote. The Constitution has not made the perfect knowledge or understanding of these things a prerequisite to his own registration; and the registrar was not authorized to refuse him registration because of his failure to correctly answer these questions. Neither his knowledge or lack of knowledge of these subjects, nor his proficiency or deficiency in education as disclosed by his answers to these questions, has any bearing on whether he is, or is not, entitled to register and vote.[65]

Although some registrars continued for a while to disqualify African-American voters by requiring them to answer difficult questions unrelated to their own voting qualifications, the state chapter of the National Association for the Advancement of Colored People (NAACP) successfully intervened.[66] One state NAACP official noted that "[t]he case had a 'far-reaching' effect on local registrars, who thereafter became more selective in their questions, making certain they related only to the [applicant's own] 'qualifications as an elector.'"[67]

B. The Poll Tax

In 1937, the United States Supreme Court upheld the use of poll taxes in *Breedlove v. Suttles*.[68] A 28-year-old voting applicant challenged the Georgia poll tax because it applied to all men between 21 and 60-years old

---

[62] *Id.* ("The Constitution has prescribed . . . no test of knowledge or understanding or educational requirement . . . .").
[63] *Id.*
[64] *Id.*
[65] *Id*. at 88.
[66] BUNI, *supra* note 22, at 126-27.
[67] *Id.* at 126 (quoting W. Lester Banks, Executive Secretary of the Virginia NAACP).
[68] 302 U.S. 277 (1937).

and only to women who registered to vote.[69] He argued that its limited coverage made it "repugnant to the equal protection clause and the privileges and immunities clause of the Fourteenth Amendment and to the Nineteenth Amendment,"[70] but he did not challenge it as a form of racial discrimination. The Court rejected all three arguments in reasoning that strongly suggested that poll taxes were secure against general constitutional attack.

First, the Court suggested that the poll tax was innocuous because it "ha[d] long been a familiar form of taxation."[71] Collecting it from minors, it added, would burden their fathers, and the exemption for those over 60 was no different from their traditional exemption from "road work, jury duty and service in the militia."[72] The state, moreover, may exempt women without violating equal protection because of the "burdens necessarily borne by them for the preservation of the race."[73]

Second, the Court held the poll tax did not have the purpose of abridging the privilege of voting, and, even if it did, voting was a state, not national, privilege and thus not protected by the Privileges or Immunities Clause of the Fourteenth Amendment.[74] This holding undercut even more general attacks. And third, the Court thought it "fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. T[hus, t]he challenged enactment is not repugnant to the Nineteenth Amendment."[75]

After *Breedlove*, many people, including scholars, lawyers, civil rights groups, and politicians, thought poll taxes secure against constitutional challenge.[76] Any change would have to come through state or federal constitutional amendment[77]—a difficult process. In the 1940s, Virginia poll tax opponents took up the challenge. They persuaded the Virginia General Assembly to submit a constitutional amendment to repeal the tax to the

---

[69] *Id.* at 280.
[70] *Id.*
[71] *Id.* at 281.
[72] *Id.* at 281-82.
[73] *Id.* at 282.
[74] *See id.* at 282-83 (discussing privileges and immunities argument).
[75] *Id.* at 284.
[76] *See, e.g.*, Note, *Disenfranchisement by Means of the Poll Tax*, 53 HARV. L. REV. 645, 649 (1940) (noting after *Breedlove* that "[t]he poll tax may prove especially invulnerable [to federal constitutional challenge] since not only does it in form apply equally to both white and colored voters, but it considerably reduces the opportunities for discriminatory administration"); *see also id.* at 650 ("It seems clear . . . that a state may condition the voting privilege through such a tax if it believes that only citizens with sufficient interest to pay the tax should vote.").
[77] *See id.* at 651-52 (rejecting argument that a federal statute could bar poll tax because "[t]he Constitutional grounds of [such a] measure are ingenious, but not convincing" and finding that "the most practicable attack upon the poll tax would seem to be embodied in movements local in origin").

voters in 1949.[78] Unfortunately, it was presented as part of "a package of amendments which would have . . . [also] substituted annual for permanent registration, authorized literacy tests and a non-suffrage poll tax at a higher annual rate than the tax then in effect,"[79] the price of political compromise.[80] In the end, "[m]any persons who had been pressing hardest for poll tax repeal led the fight in opposition . . . . [They] opposed repeal [because] it was presented with provisions for annual voter registration and literacy tests . . . [and] would not make voting easier but would increase voting restrictions . . . ."[81] In short, those most interested in repealing the poll tax "urged Virginians to wait until they could get poll tax repeal with no strings attached."[82] And they got their wish. Virginia voted 206,542 to 56,687 against the proposed amendments.[83]

Virginia made no more attempts to repeal the poll tax, but in the early 1960s, the effort moved to Congress for a federal constitutional amendment banning them in the five states where they still applied.[84] Ultimately, the Senate and House adopted and sent to the states what became the 24th Amendment.[85] It declared simply that

> [t]he right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.[86]

It purposefully did not extend to elected state and local officials.[87]

---

[78] *See* FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 201-15 (Univ. of Ala. Press 1958) (describing Virginia constitutional repeal movement). Ogden's is fullest account of the campaign available.

[79] *Id.* at 201.

[80] *See id.* at 204-15 (describing compromise process and amendment campaign).

[81] *Id.* at 208.

[82] *Id.*

[83] *Id.* at 213.

[84] In 1962, Alabama, Arkansas, Mississippi, Texas, and Virginia were the only states imposing a poll tax as a condition of voting. H.R. REP. NO. 87-1821, at 3 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 4033, 4034.

[85] The Senate approved the proposed amendment by a vote of 77 to 16 on March 27, 1962, 108 CONG. REC. 5105 (1962), and the House followed by a vote of 294 to 86 on August 27, 1962. 108 CONG. REC. 17,670 (1962).

[86] U.S. CONST. amend. XXIV, § 1.

[87] H.R. REP. NO. 87-1821, at 5 (1962), *as reprinted in* 1962 U.S.C.C.A.N. 4033, 4037 ("[T]his section would not prevent a State from imposing a poll tax in purely State or local elections.").

Virginia vehemently opposed the amendment. One of two hearings before the House subcommittee considering the amendment was devoted to objections from Virginia.[88] A former Governor, the Lieutenant Governor, the Attorney General, a circuit judge, an assistant attorney general, and the executive director of the Virginia Commission on Constitutional Government all testified against it.[89] One of them argued that "[t]he abolition of the poll tax . . . is proposed by forces outside of the South as a racial matter involved in the present mania in the field of civil rights. It has not the slightest application in the racial or civil rights field. It applies with equal force to all citizens whether while [sic] or colored."[90] Rather, he maintained, its purpose was to exclude poor citizens and irresponsible voters who were "susceptible to pressure from pressure groups and to demagogic appeal and [who] would encourage the development of organized corruption."[91] The other Virginia witnesses argued that the proposed amendment "would," among other things, "become a wedge in the door for further amendments . . . to enable the Federal Government to control completely all elections";[92] would make no difference in voting;[93] and would impair an important source of state revenues.[94] One testified that Virginians are "happy and satisfied with what we have in Virginia."[95]

Congress adopted the proposed amendment over Virginia's objections. Only four of Virginia's congressional delegation voted in favor of it; the remaining seven voted against it.[96] Virginia also found itself on the losing side in the state ratification process. South Dakota became the 38th state to

---

[88] *See Abolition of Poll Tax in Federal Elections: Hearings on H.J. Res. 404, 425, 434, 594, 601, 632, 655, 663, 670, S.J. Res. 29 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 87th Cong. 73-105 (1962) (recording second day of hearing on May 14, 1962).

[89] *See id.* at 74 (statement of former Governor Tuck introducing Virginia witnesses); *id.* at 74-102 (recording testimony of Virginia witnesses).

[90] *Id.* at 82 (statement of William Old).

[91] *Id.*

[92] *Id.* at 75 (statement of Miles E. Godwin).

[93] *Id.* at 76 ("I suspect, if we were to go to the homes of any of the people who failed to pay their poll tax, we would find evidences of luxuries all around, and we would come away with the feeling that $1.50 per year is a small charge to pay for the privilege of voting. I do not believe that there are now any poor people who are kept from voting by reason of a poll tax.") (statement of Miles E. Godwin).

[94] *Id.* at 97, 101 (statement of Robert Y. Button).

[95] *Id.* at 94 (statement of Francis C. Lee).

[96] *See* 108 CONG. REC. 5105 (1962) (listing Virginia Senators Byrd and Robertson as voting "nay"); *id.* at 17670 (listing Congressmen Broyhill, Hardy, Jennings, and Poff as voting "yea" and Congressmen Downing, Gary, Harrison, Smith, and Tuck as voting "nay").

ratify it on January 23, 1964,[97] and it officially became part of the Constitution on February 4, 1964.[98] Virginia did not ratify it until 1977.[99]

As of January 23, 1964, when the amendment became part of the Constitution,[100] Virginia could no longer require one to pay the poll tax to vote in federal elections. Despite Virginia's protestations before the House, the 24th Amendment did make a difference—a very large one, in fact. In 1962, before the poll tax was abolished in federal elections, 940,000 whites were registered to vote, but only 110,000 African-Americans were.[101] In 1964, by contrast, 1,050,000 whites were registered and 200,000 African-Americans were.[102] Thus, although registration increased in both groups, it rose only 18 percent among whites and a dramatic 82 percent among African-Americans—relatively speaking, over four times as much.

Those figures reflect only registration for federal elections. Virginia still required the payment of the poll tax to vote in state and local elections, which the 24th Amendment did not reach. In 1964, after adoption of the 24th Amendment, a class sued Virginia officials in district court seeking a declaration that requiring payment of the poll tax to vote in state and local elections violated the 14th Amendment.[103] The three-judge district court held the challenge foreclosed by Supreme Court precedent: plaintiffs' "denunciation of the State constitutional and statutory poll tax requirements has been squarely refuted by the Supreme Court in *Breedlove v. Suttles* . . . . We are not at liberty to deviate from that precept. . . . Moreover, no racial

---

[97] *Statement by the President Announcing the Adoption of the 24th Amendment to the Constitution*, THE AMERICAN PRESIDENCY PROJECT (Jan. 23, 1964), https://www.presidency.ucsb.edu/documents/statement-the-president-announcing-the-adoption-the-24th-amendment-the-constitution.

[98] Amendment to the Constitution 1964, 78 Stat. 1117, 1118 (1964), https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg1117.pdf.

[99] *See* VA. H. OF DELS., JOURNAL OF THE HOUSE OF DELEGATES, S.J. Res. 140, 1977 Sess. 835-36 (1977); *id*. at 1275; S. OF VA., JOURNAL OF THE SENATE, S.J. Res. 140, 1977 Sess. 508-16 (1997).

[100] *Historical Highlights: The Twenty-fourth Amendment*, HIST., ART & ARCHIVES, U. S. HOUSE OF REPRESENTATIVES, https://history.house.gov/HistoricalHighlight/Detail/37045#:~:text=On%20January%2023%2C%20196 4%2C%20the,when%20South%20Dakota%20ratified%20it (last visited Mar. 16, 2022).

[101] *See* U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 1972, at 374 tbl.600 (93rd ed. 1972) (listing white and African-American voter registration in 11 southern states 1960 to 1970).

[102] *Id.*

[103] Harper v. Va. State Bd. of Elections, 240 F. Supp. 270 (E.D. Va. 1964) (3-judge court) (per curiam).

discrimination is exhibited in its application as a condition to voting."[104] On appeal, however, the Supreme Court overruled *Breedlove*.[105] It held that

> [w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination that runs afoul of the Equal Protection Clause.[106]

With that, the Virginia poll tax was history.[107]

C. The Literacy Test

Virginia's permanent, post-1903 registration regime required every applicant "to register in his own handwriting, without aid, suggestion, or memorandum . . . stating . . . his name, age, date and place of birth, residence and occupation . . . and whether he ha[d] previously voted, and, if so, the state, county, and precinct in which he voted last."[108] Registrars had used this provision to effectively screen out African-Americans otherwise qualified to vote.[109] Early on in this period, they often required African-American registrants to submit all the information in their own handwriting without any prompt.[110] By the 1960s, however, the application was reduced to a standard form with individual prompts for each item of required

---

[104] *Id.* at 271.

[105] Harper v. Va. State Bd. of Elections, 383 U.S. 663, 669 (1966) ("Breedlove v. Suttles sanctioned [the poll tax's] use as a 'prerequisite of voting.' To that extent the *Breedlove* case is overruled." (quoting Breedlove v. Suttles, 302 U.S. 277, 283 (1937))).

[106] *Id.* at 668 (citations omitted).

[107] It is hard to judge the difference *Harper* made to registration rates because it occurred during the same election cycle in which Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.). This act transformed voting in many states, including Virginia.

[108] VA. CONST. of 1902, art. II, § 20.

[109] *See supra* notes 57-65 and accompanying text (discussing how this provision was used to disenfranchise African-Americans).

[110] *See* Davis v. Allen, 160 S.E. 85, 86-87 (Va. 1931) (describing one application).

information, which the applicant still had to answer "in his own handwriting, without aid, suggestion, or memorandum." The form looked like this:

COMMONWEALTH OF VIRGINIA
Form for Application to Register to Vote

I hereby make application to be registered to vote.
Name:_____
Age: _____
Date of Birth: _____
Place of Birth: _____
Place of Residence: _____
Place of Residence for
the one year next preceding: _____
Occupation: _____
Occupation for the
one year next preceding: _____
Have you ever voted? _____
If you have ever voted, give State, county (or city),
and precinct where you last voted: _____
Dated:_____
Signature: _____
Applicant[111]

Although it did guide the applicant step-by-step through the information required for registration, it still barred any applicant unable to read or write.[112]

The Supreme Court had initially upheld the use of literacy tests in 1915. In *Guinn v. United States*,[113] the Court disposed of the question in a few words, "[n]o time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen, its establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and, indeed, its validity is admitted."[114]

By the late 1950s, however, the legal landscape had changed enough to warrant a second constitutional challenge. In *Lassiter v. Northampton*

[111] H.R. REP. NO. 89-439, at 73 (1965) (statement of William M. Tuck); *see also* VA. CODE ANN. § 24-68 (1950) (specifying contents of registration form).

[112] *See* H.R. REP. NO. 89-439, at 73 (1965) ("It is difficult to understand how any fairminded person can consider this a literacy test, although it does appear that there are those who advocate the right to vote, irrespective of a person's ability to write his name or to read one word of English.")

[113] 238 U.S. 347 (1915).

[114] *Id.* at 366.

County Board of Elections,[115] an African-American woman challenged, in federal district court, North Carolina's literacy test requirement on its face. That court stayed the action so that plaintiff could seek clarification from the North Carolina state courts on how the requirement's various parts operated.[116] Plaintiff then applied for registration, refused to submit to North Carolina's literacy test, and was denied.[117] She then challenged her denial in state court, represented by members of the North Carolina Lawyers Association, an organization of African-American lawyers who aimed to "secure . . . due justice."[118] The North Carolina courts upheld her denial, which the United States Supreme Court reviewed.

The North Carolina test required that "[e]very person presenting himself for registration . . . be able to read and write any section of the Constitution in the English language."[119] The suit, however, was in one sense awkward. In state court, Ms. Lassiter had challenged the requirement only on its face, not as applied.[120] The Court, therefore, did not consider any "discrimination in the actual operation of the ballot laws."[121]

This made the case easy. The Court upheld the test as having "some relation to standards designed to promote intelligent use of the ballot."[122] "Literacy and intelligence," it explained, "are obviously not synonymous. Illiterate people may be intelligent voters. Yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise."[123]

But the Court invited the plaintiff to make exactly such a challenge when back in federal court. "[W]e do not reach [the issue, we] mention[ed] in passing[, an as-applied challenge to the requirement's discriminatory application,] so that it may be clear that nothing we say or do here will prejudice appellant in tendering that issue in the federal proceedings which await the termination of this state court litigation."[124] The Court then went

---

[115] 360 U.S. 45 (1959).

[116] *Id.* at 45-46; *see* Lassiter v. Taylor, 152 F. Supp. 295 (E.D.N.C. 1957) (3-judge court) (per curiam) (explaining procedural posture).

[117] *Lassiter*, 360 U.S. at 46.

[118] *See History*, NORTH CAROLINA ASSOCIATION OF BLACK LAWYERS, https://nc-abl.org/history/ (last visited Mar. 29, 2022) (describing history and aims of organization and listing identifying Herman Taylor and Samuel Mitchell, Lassiter's attorneys, as prominent members).

[119] *Lassiter*, 360 U.S. at 47 (quoting N.C. CONST. of 1868, art VI, § 4).

[120] *See id.* at 50 ("[No] issue of discrimination in the actual operation of the ballot laws of North Carolina has . . . been framed in the issues presented for the state court litigation.").

[121] *Id.*

[122] *Id.* at 51.

[123] *Id.* at 51-52.

[124] *Id.* at 50.

even further to suggest that a different type of facial challenge might even well succeed. "[A] literacy test," it noted,

> may be unconstitutional on its face. In *Davis v. Schnell*, the test was the citizen's ability to 'understand and explain' an article of the Federal Constitution. The legislative setting of that provision and the great discretion it vested in the registrar made clear that a literacy requirement was merely a device to make racial discrimination easy. We cannot make the same inference here. The present requirement, applicable to members of all races, is that the prospective voter 'be able to read and write any section of the Constitution of North Carolina in the English language.' That seems to us to be one fair way of determining whether a person is literate, not a calculated scheme to lay springes for the citizen. Certainly we cannot condemn it on its face as a device unrelated to the desire of North Carolina to raise the standards for people of all races who cast the ballot.[125]

Although there was a fatal problem in this particular phase of the case, the Court helpfully suggested how that problem might be overcome when the plaintiff landed back in federal court.

Unfortunately, the plaintiff and her legal team appear not to have taken up the Court's invitation and dropped the federal suit.[126] The Department of Justice, however, did act. It sued Louisiana for using its literacy test to deny African-Americans the right to vote.[127] The Louisiana test, an "interpretation test," required every applicant "to understand and give a reasonable interpretation of any section of either [the federal or state] Constitution when read to him by the registar."[128] The district court recognized it as exactly the second type of suit the Supreme Court had recommended in *Lassiter*: a facial challenge focusing on the "great discretion . . . vested in the registrar."[129] And it struck it down. "Each registrar in Louisiana," it noted,

---

[125] *Id.* at 53-54 (citation omitted).

[126] Electronic databases at least show no subsequent history in the stayed federal case.

[127] United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963) (3-judge court).

[128] H.R.J. RES. 355, 1960 Leg., Reg. Sess., at 1166-1169 (La. 1960).

[129] *See* United States v. Louisiana, 225 F. Supp. at 388 (quoting Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 53 (1959) and discussing Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd mem*., 336 U.S. 933 (1949)).

> is the sole judge of whether to apply the interpretation test or not to apply it and whether an applicant qualifies. The judgment is made without guidance, without standards, without limitations imposed by law; the judgment is necessarily subjective. Thus the right to vote depends more upon the caprice of the registrar than upon the possession of measurable qualifications.[130]

And since the state "provide[d] no effective method whereby arbitrary and capricious action by registrars of voters may be prevented or redressed[, u]nreviewable discretion was built into the test."[131] That proved fatal.

The Supreme Court agreed. "The applicant facing a registrar in Louisiana," it argued,

> has been compelled to leave his voting fate to that official's uncontrolled power to determine whether the applicant's understanding of the Federal or State Constitution is satisfactory. . . . This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out the invalidity of laws so completely devoid of standards and restraints.[132]

Unreviewable discretion thus turned *Lassiter*'s "one fair way of determining whether a person is literate"[133] into "a trap."[134]

How did this apply to Virginia's literacy test? Virginia's questions were fixed and rather simple. Unlike the earlier Understanding Clause, Virginia's literacy test—whether an applicant could furnish in her own handwriting and without aid the answers to questions relevant to registration[135]—gave the registrar no discretion to choose the questions and little to reject correct answers. It operated more like *Lassiter*'s "one fair way of determining

---

[130] *Id.* at 390.
[131] *Id.* at 384.
[132] Louisiana v. United States, 380 U.S. 145, 152-53 (1965).
[133] 360 U.S. at 54.
[134] 380 U.S. at 153.
[135] *See supra* note 108-11 and accompanying text (discussing 1960s version of Virginia's standard registration form).

whether a person is literate, [rather than] a calculated scheme to lay springes for the citizen."[136]

Congress intervened, however, and made further judicial consideration of how Virginia's scheme worked unnecessary. Shortly after the Court decided *Louisiana v. United States*, Congress enacted the Voting Rights Act of 1965.[137] Section 4 prohibited the use in certain jurisdictions with low voter registration rates, including Virginia,[138] of any "test or device,"[139] which included "any requirement that a person as a prerequisite for voting or registration for voting . . . demonstrate the ability to read, write, understand, or interpret any matter . . . ."[140] This suspension, which originally lasted for five years, clearly barred Virginia's literacy test,[141] and the change had its anticipated effect. Both African-American and white registration rates increased. From 1964 to 1968, both of which were presidential election years, registrations among African-Americans jumped 27.5 percent and among whites, 19.6 percent.[142]

D. Felon Disenfranchisement

The 1902 Virginia Constitution's registration ban against any "person[] convicted . . . of treason, or of any felony, bribery, petit larceny, obtaining money or property under false pretences, embezzlement, forgery or perjury"[143] was the only device from the 1902 Constitution that still remained in effect. No one had brought a judicial challenge to the Virginia provision, and the Voting Rights Act of 1965 did not reach such provisions generally. Those few courts that had considered equal protection attacks on felon disenfranchisement provisions before 1970 had, moreover, rejected them.[144] As the Second Circuit noted in 1967, "[e]ven though the precise

---

[136] 360 U.S. at 54.

[137] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

[138] *See* Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (determining that Virginia maintained a test or device).

[139] 52 U.S.C. § 10303(a)(1).

[140] 52 U.S.C. § 10303(c).

[141] South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the Act's suspension of literacy tests).

[142] *See* U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 374 tbl.600 (1972) (listing white and African-American voter registration in 11 southern states).

[143] VA. CONST. of 1902, art. II, § 23.

[144] *See* Perry v. Beamer, 933 F. Supp. 556, 558-59 (E.D. Va. 1996) (canvassing cases of this period). The California Supreme Court, however, had by this time used the doctrine of federal constitutional avoidance to narrow California's exclusion for those convicted of "infamous crimes." Otsuka v. Hite, 414 P.2d 412, 419-25 (Cal. 1966).

issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized— indeed put forward by the Justices to illustrate what the states may properly do— that such expressions cannot be dismissed as unconsidered dicta."[145] The Supreme Court, after all, was just beginning to develop fundamental rights equal protection and the lower courts, for the most part, still applied reduced scrutiny to voting classifications.[146]

III. THE 1971 CONSTITUTION

When the Virginia General Assembly authorized the creation of a Commission on Constitutional Revision in 1968,[147] the legal landscape had changed significantly since 1902. The Virginia Supreme Court had barred registrars from using their authority to require applicants to "answer on oath any and all questions affecting [their] qualifications as [electors]" as a new Understanding Clause;[148] the United States Supreme Court had declared poll taxes unconstitutional;[149] and Congress had suspended literacy tests until 1970.[150] Thus, three of the four major mechanisms the 1902 Constitution created to disenfranchise African-Americans in the permanent registration system starting in 1904 had fallen away—one perhaps only temporarily. Only the felon disenfranchisement mechanism remained.

In considering how to revise the constitution's voting provisions, the Commission took note of these developments, particularly ones concerning the poll tax and literacy test.[151] Its proposed constitution limited the information the state could require at registration,[152] required only that the

---

[145] Green v. Board of Elections, 380 F.2d 445, 451 (2d. Cir. 1967) (citations omitted).

[146] *Id.* at 451-52.

[147] H.J. Res. 3, 1968 Sess., at 1568 (Va. 1968).

[148] *See supra* note 57-65 and accompanying text.

[149] *See supra* note 105-06 and accompanying text.

[150] *See supra* note 137-41 and accompanying text.

[151] *See* 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 109 (1969) [hereinafter REPORT OF CCR] (referencing Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) as reason for eliminating poll tax); *id.* at 111 (referencing Voting Rights Act of 1965 in discussion of literacy test); *id.* at 16 (noting that any literacy test "would, of course, have to be compatible with applicable federal laws on voting); *see also* 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 333 (1974) ("The Constitution of 1971 was adopted against a backdrop of mounting federal activity regarding the franchise and apportionment.").

[152] *See* REPORT OF CCR, *supra* note 151, at 108-09 ("Applications to register shall require the applicant to provide under oath the following information and no other: name; age; date and place of birth; whether the applicant is presently a United States citizen; residence during the six months immediately preceding the effective date of registration; place and time of any previous registrations to

application "be completed in person before the registrar and by or at the direction of the applicant and signed by the applicant," rather than the applicant having to answer any questions "in his own handwriting, without aid, suggestion, or memorandum,"[153] and abolished the poll tax.[154] It did, however, expressly allow the General Assembly to adopt a "fair, reasonable, and nondiscriminatory [literacy] test," if it wanted and federal law allowed.[155] It also retained the automatic disenfranchisement of serious criminals, although it changed the crimes covered from the 1902 Constitution's gerrymandered list to just "felon[ies]."[156]

What are we to make of these changes? Do they represent the repudiation of Virginia's racist constitutional history or the grudging acknowledgment that federal law had taken away most of Virginia's toolbox? The literacy test and felon disenfranchisement provisions are the most important in making this judgment. The Commission's official commentary, however, is not very helpful. After noting the traditional arguments in favor of and against literacy tests, canvassing their history in Virginia, and explaining Congress's hostility and possible grounds for a future judicial challenge, the commentary simply states: "[w]hether or not a literacy test might be desirable or permissible at present, the Commission is of the view that the imposition of such a test should not be foreclosed by the Constitution."[157] Its discussion of the felony disenfranchisement provision is even more elliptical. In three sentences, it notes merely that the exclusion "remains automatic," that "the generic term 'felony'" replaces the prior list of particular crimes, and that the Governor can restore felons' civil rights.[158]

The unofficial, if authoritative, commentary by the Commission's Executive Director, Professor A.E. Dick Howard of the University of Virginia School of Law, offers little more guidance. After discussing how the Voting Rights Act of 1965 suspended Virginia's literacy test and possible future vulnerabilities to judicial challenge, he notes simply that "[t]he Commission on Constitutional Revision thought that, regardless of whether a literacy test might be desirable and whether it might be permissible under federal law, the Virginia Constitution should not foreclose

---

vote; and whether the applicant has ever been adjudicated to be of unsound mind or convicted of a felony, and if so, under what circumstances the applicant's right to vote has been restored.").

[153] *Compare id.* at 109, *with* VA. CONST. of 1902, art. II, § 21.

[154] *See* REPORT OF CCR, *supra* note 151, at 109 ("Those sections or parts of sections relating to the poll tax . . . have been eliminated.").

[155] *Id.*

[156] *Id.* at 106.

[157] *Id.* at 111.

[158] *Id.* at 106.

the possibility of such a test's being imposed."[159] And although Professor Howard discusses the 1971 felon disenfranchisement provision at greater length, he offers no more insight into the motivations behind it.[160]

The legislative debates offer little more aid. Although the literacy test was, as Professor Howard notes, "much debated at the 1969 special session" that considered the Commission's proposal,[161] those debates do not illuminate the extent, if any, that a wish to discriminate supported it.[162] Overt racist language like that of the 1901 Constitutional Convention was absent in 1969 and 1970, but, to paraphrase the aphorism, absence of racial evidence is not evidence of racial absence.

In the end, the General Assembly made one change to both the literacy test and felon disenfranchisement provisions before submitting the proposed constitution to the voters. It narrowed the Commission's proposal to allow the General Assembly to require that the applicant have "the ability . . . to read and write [as] determined by a fair, reasonable, and nondiscriminatory test" to one allowing it to require that the applicant have "the ability . . . to read and complete in his own handwriting the application to register."[163] And it allowed for not only the "Governor" but "other appropriate authorit[ies]" to restore felons' voting rights when appropriate.[164] The voters ratified the constitution as proposed by the legislature.[165]

IV. THE 1971 CONSTITUTION'S LEGACY

The 1971 Constitution's literacy test and felon disenfranchisement provisions have had very different effects. Although the Voting Rights Act of 1965 originally suspended literacy tests in only certain jurisdictions and only for five years, Congress amended it in 1970 to expand the suspension

---

[159] 1 HOWARD, *supra* note 151, at 371.

[160] *See id.* at 344-47 (discussing provision).

[161] *Id.* at 371.

[162] *See* PROCEEDINGS AND DEBATES OF THE HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 177-78, 194-99, 219-20 (Charles K. Woltz ed.,1969 & 1970) [hereinafter HOUSE PROCEEDINGS]; PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 83-85, 409-12 (Charles K. Woltz ed., 1969 & 1970) [hereinafter SENATE PROCEEDINGS].

[163] *Compare* first column of SENATE PROCEEDINGS, *supra* note 162, at 690, *with* fourth column.

[164] *Compare* first column of *id.* at 688 *with* fourth column.

[165] *See* VA. DEP'T OF PURCHASES & SUPPLY, 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 15, 20 (1970), https://historical.elections.virginia.gov/data/serve_file_pages_for_item/3526/BallotQuestion/ (listing total votes cast for and against proposed constitution).

to all jurisdictions in the country and extended it for five more years.[166] In 1975, it made the suspension permanent.[167] At no time, then, has Virginia had the opportunity to revive its literacy test.

Virginia's felon disenfranchisement provision, by contrast, continues to operate. In 1974, the Supreme Court upheld state felon disenfranchisement provisions generally in *Richardson v. Ramirez*.[168] It held that the Fourteenth Amendment, which reduces a state's representation in Congress in proportion to the degree the state denies right to vote "to any of the male inhabitants of [the] State, being twenty-one years of age, and citizens of the United States . . . *except for participation in rebellion, or other crime*,"[169] indicated that states could exclude convicted criminals from the franchise.[170] Eleven years later, however, in *Hunter v. Underwood*,[171] it conformed this broad holding to its subsequent development of an intent requirement in equal protection[172] by making clear that one could successfully challenge felon exclusions motivated by a state's desire to racially discriminate.[173]

Judicial challenges to Virginia's current felon exclusion have so far failed. In the first challenge, a felon challenged the bar because "like all Americans—felons and nonfelons—are required to do, he pays his taxes. In effect, [he] claims that, as a felon, he suffers 'taxation without representation.'"[174] Construing this claim as a straight-forward equal protection challenge, the court rejected it under "[t]he Supreme Court's authoritative decision in *Richardson v. Ramirez*."[175] The next challenge failed under *Hunter v. Underwood*. In *Howard v. Gilmore*,[176] the Fourth Circuit, in an unpublished opinion, held that Virginia's "decision to

---

[166] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

[167] *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 84 Stat. 400 (1975) (codified at 52 U.S.C. § 10303).

[168] 418 U.S. 24 (1974).

[169] U.S. CONST. amend. XIV, § 2 (emphasis added).

[170] 418 U.S. at 54-55.

[171] 471 U.S. 222 (1985).

[172] *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Washington v. Davis, 426 U.S. 229, 238-48 (1976) (holding that discriminatory intent in addition to discriminatory effect is necessary to establish an equal protection violation).

[173] 471 U.S. at 233 ("[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [Alabama's felony disenfranchisement provision] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* suggests the contrary.").

[174] Perry v. Beamer, 933 F. Supp. 556, 557 (E.D. Va. 1996).

[175] *Id.* at 558.

[176] 205 F.3d 1333 (4th Cir. 2000) (per curiam) (appearing in table of decisions); No. 99-2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000) (full opinion).

disenfranchise felons [could not be] motivated by race [because its] decision . . . pre-dates the adoption of [the Fourteenth and Fifteenth Amendments] as well as the extension of the franchise to African-Americans."[177] While true, this analysis fails to acknowledge that the 1902 Virginia Constitution gerrymandered its definition of which crimes one could be disenfranchised for committing in a way that intentionally targeted race.[178] Finally, in *El-Amin v. McDonnell*,[179] a felon argued that the way Virginia established disqualifying crimes in earlier constitutions invalidated its current one, which extended to all felons.[180] The district court refused to dismiss this claim, leaving it to later adjudication on the merits.[181] Before it could do so, however, the Governor restored the plaintiff's civil rights and the case became moot.[182] No one has since challenged the exclusion on this basis.

Virginia's felon exclusion continued to have great effects. In 2016, it disqualified from voting 7.81 percent of Virginia's overall voting-age population[183] and nearly three times as many African-Americans: 21.9 percent.[184] Only Kentucky disqualified a higher percentage of otherwise eligible African-Americans.[185]

Noting this signficant racial disparity and the large absolute number of disenfranchised felons of all races, in April 2016, Terry McAuliffe, the then-Governor of Virginia, issued an order restoring the right to vote to all felons who had served their time and any required period of supervised release.[186] The state's demographic analysis indicated that of the 206,000 Virginians qualified under the order approximately 94,559 African-Americans (45.9

---

[177] *Id.* at *1.

[178] *See, e.g.,* DINAN, *supra* note 8 at n.46 ("The scholarly consensus is that an 1876 amendment to the Virginia Constitution, which added 'petit larceny' to the list of disqualifying offenses that at the time included 'bribery in any election, embezzlement of public funds, treason, or felony,' was clearly designed to target African American voters.") (collecting authorities).

[179] No. 3:12-cv-00538-JAG, 2013 WL 1193357 (E.D. Va. Mar. 22, 2013).

[180] *See id.* at *3 (describing plaintiff as arguing that prior versions of Virginia's felon disenfranchisement provision were "tinged by racial animus").

[181] *Id.* at *4.

[182] Helen A. Gibson, *Felons and the Right to Vote in Virginia: a Historical Overview*, 91 VA. NEWSL., Jan. 2015, at 1, 6.

[183] CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 15 tbl.3 (2016).

[184] *Id.* at 16 tbl.4.

[185] *Id.*

[186] Press Release, Alenaa Yarmosky, Office of the Governor, Governor McAuliffe Restores Voting and Civil Rights to Over 200,000 Virginians (Apr. 22, 2016) [hereinafter McAuliffe Order], https://www.governor.virginia.gov/newsroom/all-releases/2017/mcauliffe-administration/headline-826610-en.html.

percent) and 106,050 whites (51.5 percent) would regain the right to vote.[187] Very quickly, however, the Republican Speaker of the House and four registered Virginia voters challenged the order in the Virginia Supreme Court, arguing that the governor could not restore voting rights "on a categorical, as opposed to an individual, basis."[188]

The Virginia Supreme Court agreed. In a 4-3 opinion, the Court held that historical practice,[189] the particular wording of Virginia's pardon power,[190] and the Virginia Constitution's provision restricting executive suspension of laws[191] barred the governor from restoring felons' voting rights on a wholesale, as opposed to retail, basis. The majority opinion did not acknowledge, let alone discuss, however, that courts had upheld similar executive orders in other states under similar provisions.[192] Undeterred by the ruling, Governor McAuliffe began to sign individual orders restoring voting rights through autopen and enfranchised approximately 67,000 felons by that November's election.[193] The Republicans asked the Virginia Supreme Court to hold him in contempt, but the court unanimously refused to do so.[194]

Virginia has more recently moved to amend its constitution to automatically restore voting rights to felons when they leave prison.[195] To become effective, the General Assembly must pass the proposed amendment again in its current session, and the public must approve it at the next general

---

[187] *See* Travis Fain, *Restored felon stats: Half white, 79 percent non-violent*, DAILY PRESS (May 11, 2016; 4:52 p.m.), https://www.dailypress.com/government/dp-nws-felon-voting-profile-20160511-story.html.

[188] Howell v. McAuliffe, 788 S.E.2d 706, 711 (Va. 2016). For a full analysis of the case, please see Lindsey Turok, *Howell v. McAuliffe: Felon Disenfranchisement in Virginia and the "Cautious and Incremental Approach" to Voting Equality*, 28 GEO. MASON U. CIV. RTS. L.J. 341 (2018).

[189] *See* 788 S.E.2d at 718 ("All prior Governors exercised their clemency powers—including pardons, reprieves, commutations, and restorations—on an individualized case-by-case basis taking into account the specific circumstances of each.").

[190] *See id.* at 719 (reasoning that "the power to grant blanket, group pardons is irreconcilable with the specific requirement in Article V, Section 12 that the Governor communicate to the General Assembly the 'particulars of every case' and state his 'reasons' for each pardon").

[191] *See id.* at 720 (arguing that Governor McAuliffe's order "runs afoul of the separation-of-powers principle protected by Article I, Section 7 of the Constitution of Virginia. That provision declares: 'That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.'").

[192] *See* Fletcher v. Graham, 192 S.W.3d 350 (Ky. 2006) (upholding similar Kentucky order); Ruling on Motions for Summary Judgment, Allison v. Vilsack, No. EQCV016165 (Iowa Dist. Ct. Oct. 27, 2005), https://www.brennancenter.org/sites/default/files/legal-work/IowaVilsack_Ruling%20on%20Motions%20for%20Summary%20Judgment%20-%20Allison%20v.%20Vilsack.pdf (upholding similar Iowa order).

[193] Turok, *supra* note 188, at 343.

[194] *See id.* (describing proceedings).

[195] S.J. Res. 161-272, 1st Spec. Sess., Ch. 519 (Va. 2021), https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0519.

election.[196] In the meantime, Virginia's last governor, Ralph Northam, announced that he had already restored the voting rights of the 69,000 Virginians who would qualify under the new constitutional criteria.[197] The amendment may, however, now be in trouble. The current Virginia Assembly is divided between a Democratic Senate and Republican House of Delegates.[198] Although the current Senate has approved the proposed amendment, a committee in the House of Delegates has voted against it.[199]

V. CONCLUSION

Did the 1971 Constitution repudiate the racist project of its earlier one? Or is Virginia doing so only now? Fifty years matter—not only to its African-American citizens but to all. It would be comforting to believe that Virginia overcame its Redeemer past many years ago, but its civil rights history—not only in 1971 but since—has been complex and sometimes troubling. Perhaps it is better not to spend time debating how much progress the 1971 Constitution truly represented but to instead focus on furthering the reforms it initiated for whatever reasons. Adoption of the newly proposed amendment to the constitution enfranchising felons who had served their terms would take one step. But, of course, more—both in voting rights and elsewhere—would remain to be done. Taking comfort too soon may blind us to the necessity of further action.

---

[196] VA. CONST. art. XII, § 1.

[197] Press Release, Alenaa Yarmosky, Office of the Governor, Governor Northam Restores Civil Rights to Over 69,000 Virginians, Reforms Restoration of Rights Process: New eligibility criteria mirror proposed Constitutional amendment (Mar. 16, 2021), https://www.governor.virginia.gov/newsroom/all-releases/2021/march/headline-893864-en.html.

[198] Gregory S. Schneider & Laura Vozzella, *A divided Virginia General Assembly meets, with outgoing governor cautioning against 'hyper-partisanship'*, Wash. Post (Jan. 12, 2022, 9:01 p.m.), https://www.washingtonpost.com/dc-md-va/2022/01/12/virginia-session-start-commonwealth-address/.

[199] Graham Moomaw, *Va. House Republicans kill proposal on felon voting rights despite bipartisan support*, Va. Mercury (Feb. 6, 2022, 7:46 a.m.).